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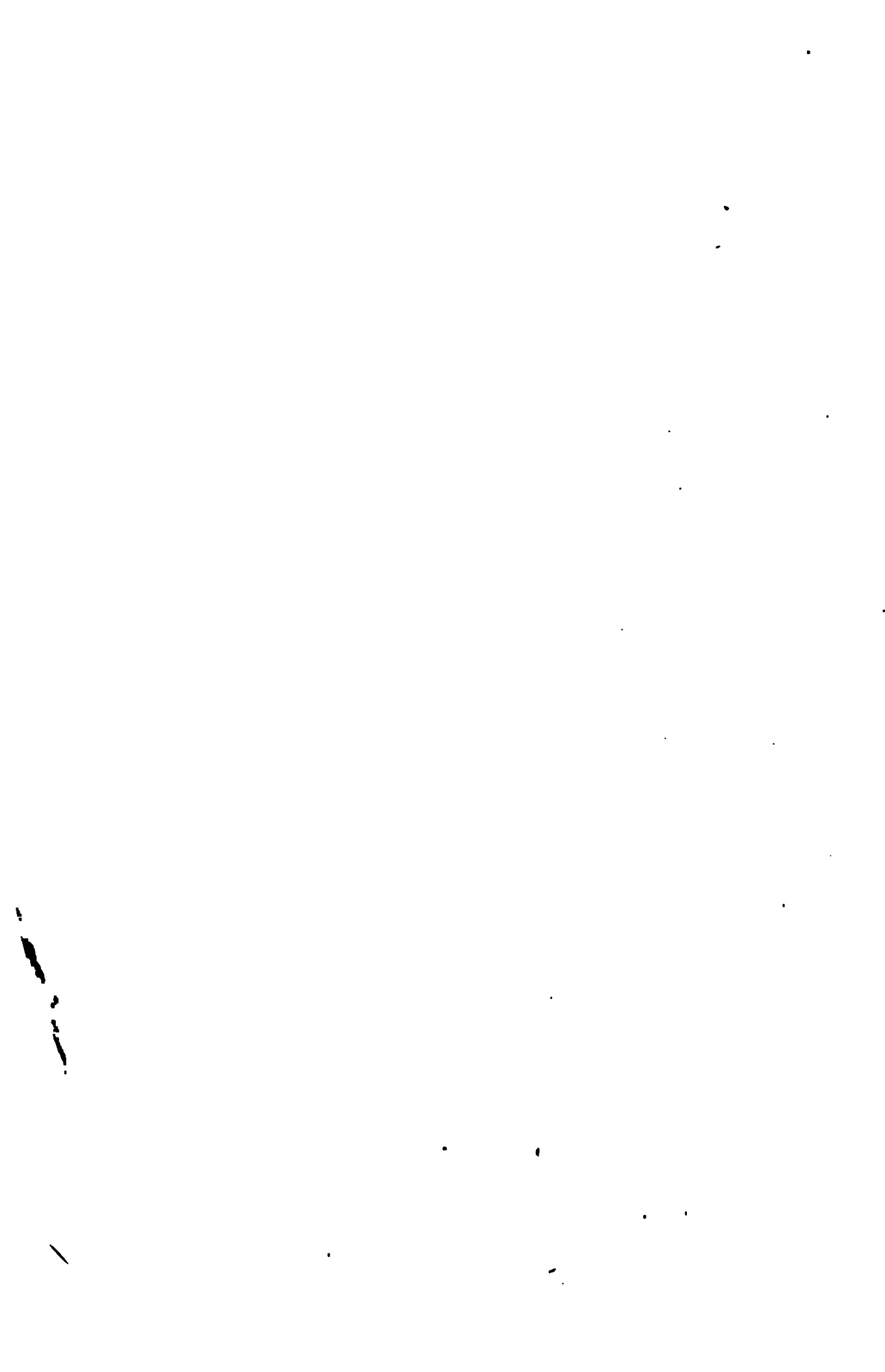
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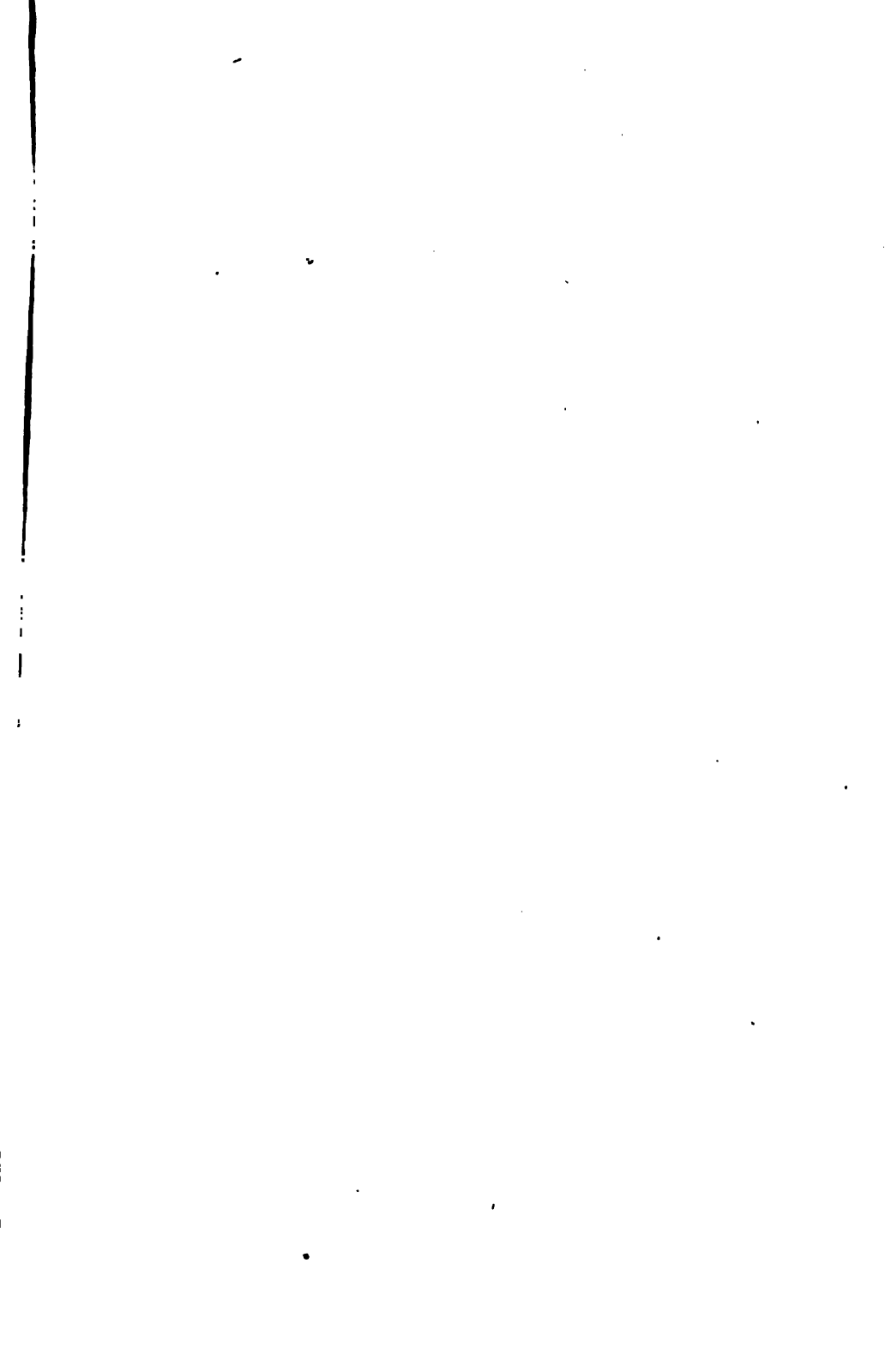
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THE CANADIAN LAW TIMES.

JANUARY, 1902.

FOREIGN LAW AFFECTING LIFE INSURANCE CONTRACTS.

THE very large amount of business done by foreign insurance companies in Canada has prompted legislative dealing with their contracts. Many millions of dollars every year are paid away in life insurance premiums to United States companies, and policies are issued to Canadians, who accept them without regard to the fact that they may be forced to collect them abroad; or, what is perhaps more vital, that the rights of their beneficiaries may have to be determined by foreign law. When a policy matures, there are three things to be determined: first, where the contract was actually made; second, by what law are the rights of the beneficiary by designation, indorsement or will, to be determined; and third, where are the insurance moneys payable. It may happen that the policy was made or delivered in Canada, but is payable in a foreign country; or that it is both made and payable out of Canada, but that it has been dealt with or affected by some contract or will in Canada. In any of these cases, and they are generally met with in practice, difficult questions arise as to what law governs.

There are some statutory provisions affecting this question in Canadian legislation, and it is necessary to examine their scope.

The R. S. C. c. 124, ss. 13 and 16, provide for the service of process on the agent holding a power of attorney

"in respect of any liabilities incurred in any Province of Canada," which leaves open for discussion whether the liability on a foreign company's policy was or was not incurred here. The same wording occurs in the Ontario Act R. S. O. 1897 c. 203, ss. 66, 68.

By s. 39, s.-s. 9, of the Dominion statute, it is enacted (regarding assessment companies only) that: "In every policy issued by a company licensed in accordance with this section of this Act in favour of a resident of Canada, a clause shall be either embodied therein, or indorsed thereon, to the effect that an action to enforce the obligation of such policy may be validly taken in any court of competent jurisdiction in the Province wherein the policy-holder resides or last resided before his decease, and such policy shall not contain any provision inconsistent with such clause."

This gives a right of action to enforce the obligation of such policy, but if that be to pay at the head office in New York, the place of payment is not altered by the right of suit here; and, as in the case of *Wintemute v. Railway Trainmen*, 19 P. R. 6, the effect of the action may depend on the good faith and willingness of the organization to pay its debts, and not on its solvency. Even in cases where a deposit with the Government is required, it is not the right to share in that fund that satisfies the policy-holder, but his belief that the company is solvent and can be made to pay here in full.

In Ontario there is a special provision intended to secure to Ontario Courts the right to deal with and enforce contracts with foreign companies. It is found in R. S. O. 1897 c. 203, s. 143, and is as follows:

"Where the subject matter of any insurance contract is property, or an insurable interest within the jurisdiction of Ontario, or is a person domiciled or resident therein, any policy, certificate, interim receipt or renewal receipt, or writing evidencing the contract, shall, if signed, countersigned, issued or delivered over in Ontario, or committed to the post office or to any carrier, messenger or agent, to be delivered or handed over to the assured, his assign or agent in Ontario,

be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation, in lawful money of Canada, and this section shall have effect notwithstanding any agreement, condition or stipulation to the contrary."

By this section, if a person within or resident in Ontario insures his life, the policy, etc., if signed, countersigned, issued, or delivered over in Ontario, or if posted (apparently anywhere) to be delivered to the assured or his assign or agent in Ontario, then it evidences a contract *made in Ontario*, to be *construed according to Ontario law*, and *exigible at the chief office in Ontario*. No stipulation in the policy is allowed to oust this statutory provision.

The intention of the legislation is evident enough, but it does not enact all that can be effectively done. It makes delivery in Ontario the test as to whether it is an Ontario contract and to be construed according to Ontario law, that is, as between all parties to it; but it is not stated that "it is subject to Ontario law," nor that those who take as beneficiaries, unless originally named, can invoke this provision, nor, while construed according to Ontario law, does it enact that the rights or status of the parties thereto or subsequent beneficiaries are to be governed by or are to arise according to that law. The provision that "all moneys payable under the contract shall be paid . . . in Ontario," naturally means "payable to the person with whom the company have contracted to pay it by the terms of that contract." Hence the most difficult of all questions, namely, how far the rights or status of the insured, or the original or substituted beneficiaries, are governed by foreign law, is open for discussion.

It is necessary, therefore, to see how far the authorities help us in approaching a decision on the effect of the legislation of Ontario, where the contract is made with a foreign company, and what the rights of a beneficiary under such a contract are.

The case most generally met with is where there is a contract with a foreign company made here, but to be performed abroad, *i.e.*, the premiums are to be paid, as is usually

the case, at its foreign head office, where the death losses are also payable. All the authorities* agree that its construction would *prima facie* be governed by Ontario law, and this is affirmed by the Ontario statutory provision. Denman, J., in *Jacobs v. Credit Lyonnais* (1884), 12 Q. B. D. at p. 596, adds that "all its incidents" are so governed. Manisty, J., and Bowen, L.J. (*S. C.*, pp. 597, 600), say that "the nature, the obligation, and the interpretation of it" are subject to the law of the country where it is made. Day, J., in *Lee v. Abdy* (17 Q. B. D. at p. 312), expresses it thus: "The validity and incidents of a contract must be determined by the law of the place where it is entered into." But this broad statement must now be taken with a very distinct qualification which is most clearly set forth by Lord Herschell, L.C., in the case cited of *Hamlyn v. Talisker*, [1894] A. C. at p. 207, in these words:

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern

* *Robinson v. Bland*, 2 Burr. 1077; *Lloyd v. Gumbert*, L. R. 1 Q. B. 115; *P. & O. Steam Navigation Co. v. Shand*, 3 Moo. P. C. (N. S.) 272; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; *Re Missouri Steamship Co.*, 42 Ch. D. 321; *Hamlyn v. Talisker*, [1894] A. C. 202; *South African Breweries Co. v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273; *Lee v. Abdy*, 17 Q. B. D. 309; *Phinney v. Mutual Life Ins. Co.*, 67 Fed. Rep. 493.

particular parts of the contract between the parties. In this case, as in all such cases, *the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract.* It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it.†

Lord Watson (at p. 212) thus expresses himself: "When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractus*, and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another." He goes on (p. 213) to explain more minutely the exact kind of law as to which no doubt arises, no matter where the contract is made. He says: "It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any Court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don v. Lippman*, 2 Sh. & McL. 682, which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But

† Lord Halsbury's expression in *Re Missouri S. S. Co.*, 42 Ch. D. at p. 336, in this connection may be noted:—"The validity of this contract may be affected by the intention of the parties, or, more strictly speaking, the intention of the parties as seen through the contract."

all the rules noticed by Lord Brougham in his elaborate judgment as belonging to that class refer to the action of the Court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the Court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*."

The same rule obtains in Washington, D.C., where it has been decided that in expressly providing that the contract was to be performed in New York, the parties had shewn an intention that the laws of New York should apply so far as affects the obligation of the party in respect to performance: *Phinney v. Mutual Life Ins. Co.*, 67 Fed. Rep. 493.

These cases give us a general guiding principle, namely, that the question of what law governs such a contract is influenced most largely, if not absolutely, by the intention of the parties. Many considerations have had weight in the cases already cited, such as the form of the contract, its subject matter, and what are called the surrounding circumstances, the fact that a stipulation was void in one country and valid in another, common sense, business convenience, the comity of nations, and the country with which the transaction has the most real connection: *Westlake on Private International Law*, 3rd ed., p. 258. Intention is, of course, expressed when the parties themselves agree what law shall govern. This was the basis of the decision in *Hamlyn v. Talisker* (*ante*), and is recognized by Lord Halsbury, L.C., in the *Missouri S. S. Co.* case, 42 Ch. D. at p. 336, in these words:

"It seems to me that it is impossible to approach this question without recognising the fact that there may be stipulations which one country may enforce and which another country may not enforce, and that in order to determine whether they are enforceable or not you must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract."

Bowen, L.J., in *Jacobs v. Credit Lyonnais*, 12 Q. B. D. at p. 599, says: "The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject matter and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, upon the comity of nations; but these are only presumptions or *prima facie* rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The particular rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties. . . . But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom."

The Ontario statute quoted is a legislative negative to any stipulation in the contract that foreign law shall apply so far as the construction of the contract is concerned. But of the rights and status of the beneficiaries no mention is made, and it is to be observed that the foregoing cases deal entirely with the rights of the contracting parties and not with those of strangers, who become, by the law of the country, interested in the subject matter of the contract. Further consideration, aided by the application of the principles derived from these cases, is necessary before the wider question can be properly dealt with.

In Ontario many insurance contracts are practically made trusts, or are, within certain limits, irrevocable. Thus strangers to the contract may become beneficiaries in a fund which may be contingently payable in another country.

Interests, too, which do not amount to beneficial interests in a trust fund, may be created either by a declaration or by will in such a fund. And the three fundamental questions are these: (1) can interests created by the contract in such a fund have the rights given to them by domestic legislation; (2) are interests subsequently created by the insurer to be given effect to according to Ontario law as trusts or revocable interests; and (3) can such interests, either arising by the contract or by subsequent action, affect the insurer?

In proceeding to consider these questions the following considerations are of considerable weight and must be borne in mind:

A foreign company coming over into Canada would naturally expect to be governed by our laws; it submits to them to the extent that it pays a license, becomes registered here, and issues policies which as contracts, both as to form and as to contents, conform to our law. It may reasonably expect that the assignment or devolution of the policy and the insurance money will be made or take place here, and therefore presumably with the formalities and the incidents attached in this Province to such transfers. A policy of insurance and certainly many of its modern forms are really investments of present value which may be pledged or sold or left at death to the insured's family.

The insurer, too, is really the trustee, banker, or clearing house for the collective number of the insured. The latter provides the money which is to be returned to their beneficiaries when they die, or when the policies mature. The insurer is less really interested than the insured in the law applicable to the contract.

Most of these incidents point to the fact that the very natural intention of the parties, who live and who do business here, legalized and protected by our laws, is that the insurance law of this country will govern the contract and the rights which arise under it.

The Courts in some of the United States have decided that a foreign corporation cannot by stipulations in its contract withdraw itself from the limitations of a statute of the place where it does business, while obtaining all the

advantages of its license. (*Fletcher v. N. Y. Life Insurance Co.*, 4 McCrary 440, 13 Fed. Rep. 528; *White v. Connecticut Life Insurance Co.*, 4 Dill. 177; *Lowell v. Alliance Life Insurance Co.*, 3 Cent. L. J. 699).

As to the first question, it is entirely probable that where a contract is deemed to be made here (as it is by force of our Ontario statute, wherever it is actually entered into), our Courts would enforce the rights given by that contract to the insured, or to a beneficiary who is interested by force of the original terms of the contract itself. When exigible, the debt would be considered a Canadian debt, that is, its situation, if actually payable abroad, is transferred from the foreign country to Ontario by our statute. (See and compare remarks of Street, J., in *Re Benfield and Stevens* (1897), 17 P. R. 344, and of Osler, J.A., in *Re Confederation Life Association* (1900), 19 P. R. 92. Apart from the statute, other and varied considerations which are common to the other two questions would arise as to whether foreign or Ontario law applied. (See *Clarke v. Union Fire Insurance Co., Export Lumber Co.'s case* (1883), 10 P. R. 313; (1884), 6 O. R. 223).

But it may safely be concluded that, as *Boyd, C.*, in *Mason v. Massachusetts Benefit Life Association* (1899), 30 O. R. at p. 723, says, "As they" (the insurance company) "were actually doing business" (in Ontario) "they became subject to the operation of the" (Ontario Insurance) "Act."

Upon the second question there is more to be said.

In *Lee v. Abdy* (1886), 17 Q. B. D. 309, *Wills, J.*, made a very important statement which throws much light on the subject. The question to be there decided was as to the validity of an assignment made in South Africa of an English policy of insurance, which assignment was invalid in South Africa. *Wills, J.*, proceeds to consider two cases of foreign indorsements on bills of exchange, and says (p. 314):

"It seems to me that the principle which may be deduced from those decisions with regard to the law which governs the indorsement of negotiable instruments is this. The contract and its surrounding circumstances must be looked at in order to ascertain where and with reference to the law

of what place the parties contemplated the indorsement would be made. If the natural inference is that they must have contemplated it as being to take place in England, then the English law would apply to it; but if the natural inference is that they must have contemplated it as being to take place in some other country, then the law of that other country would apply to it. That principle would hardly apply to the case before us; it is not like the case of a bill of exchange, for *prima facie* there is no reason to presume in such a case as this that any assignment will take place, still less is there any reason to presume that, if it takes place, it will be in England. On the contrary, the insurance being made by a person described in the policy as residing in South Africa, the probability is rather in favour of an assignment, if any, being made abroad. Under those circumstances, I should, apart from authority, be disposed to think that the reasonable view would be that the person who contracts, knowing that an assignment of such contract may be made elsewhere than in England, must be taken to contract subject to the incident that such an assignment may be made anywhere, and that it will be governed by the law of the place where it is made. If that is the correct view, the company in entering into the assurance take on themselves the risk of having to ascertain what may be the law of any place where an assignment may be made. It follows that, as the assignment in the present case is void according to the law where it was made, and where the parties to it were domiciled, the defendants are not bound by it. I am not much impressed by the suggestion that inconvenience may be occasioned to insurance companies by having to ascertain the validity or invalidity of assignments according to foreign law. Taking into consideration the difficulties that may arise with regard to the validity of assignments according to English law, it does not seem to me that the difference caused by this additional difficulty is appreciable. In any case of assignment the office may have to settle for itself doubtful and complicated questions of fact, and there is nothing more in having to ascertain the law of a foreign country than in having to ascertain whether the assignment was in fact *bona fide* or for good consideration."

Day, J., who joined in the judgment, had no such embarrassment in reference to the bills of exchange cases, and says (p. 312):

"The subject matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment. Now the contract in fact entered into by the parties to the assignment was entered into in Cape Colony, and the parties were domiciled there, and, as I have said, it had relation to a chose in action which has no locality. It is argued that the validity of this contract must be determined by the law of England. Why should that be so? The reason given is that the parties were contracting with reference to a contract which is affected by the law of England. That consideration seems to me to be immaterial. They are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract must be determined. It was argued that this conclusion would occasion great inconvenience to insurance companies. But I can not see that much greater difficulty would arise in ascertaining whether an assignment was good according to foreign law than in the ordinary case of an assignment under English law. No doubt people are theoretically bound to know the law of their country, but in point of fact in many cases they do not, and there might often be difficulties in ascertaining whether an alleged assignment according to English law had been validly effected."

In this Province the question has been debated. In *Toronto General Trusts Co. v. Sewell* (1889), 17 O. R. 442, the moneys were payable in Montreal, the indorsements in favour of the wife were made in Ontario, and it was argued that the Ontario statutes had no application to the policies, because they were foreign contracts. Ferguson, J., follows *Lee v. Abdy*, and says: "I cannot but think that it would

be a surprise to most people to be told that they could not properly make indorsements upon policies under the provisions of our statutes, merely because the policies were issued in Montreal by companies having their Canadian head office there." But, as the money had been paid into Court in Ontario, this expression of opinion, while valuable, might be supported on a ground different from the exact question debated here.

In *Re Lynn* (1891), 20 O. R. 475, Boyd, C., held that a beneficiary certificate of a foreign company (presumably payable in Illinois) was payable pursuant to the Ontario Act to or for the benefit of his wife and children, beneficiaries designated in his will, made while domiciled in Ontario. But in this case the executors were also in Ontario, and apparently had the money in hand.

A decision under somewhat similar conditions is *Hallendal v. Hillman* (1891), 28 O. R. 342n, where, as the company had paid the money into Court, no questions were decided other than those arising between the insured and his assignee. In *Bunnell v. Shilling* (1897), 28 O. R. 336, the effect of an attempted change of beneficiary, where the parties to a foreign contract had agreed that the contract was "to be governed by, subject to, and construed only according to the constitution, by-laws, and regulations of the said (foreign) association and the laws of the State of New York," was considered. MacMahon, J., held that that stipulation was binding on the parties and on the beneficiary, and that the attempted change of beneficiary was invalid according to New York law. He says (at p. 341):

"The policy of the 20th August, 1885, by which the plaintiff was the beneficiary, was subject to this condition contained in the body of the policy:—'The entire contract contained in this certificate and said application taken together shall be governed by, subject to, and construed only according to the constitution, by-laws, and regulations of said association, and the laws of the State of New York, the place of the contract being expressly agreed to, in the home office of the said association in the city of New York.' Although the application for insurance was made and

the policy delivered in Canada, the insured and the insurers having agreed that the place of contract should be in New York, that the contract should be subject to and construed according to the laws of that State, if the change in the beneficiary was validly made according to the law of that State, the plaintiff could not succeed, notwithstanding the life association has not intervened, and is raising no question as to whether the law of Ontario or that of the State of New York should govern. For, if by the law of the State of New York, the life association had validly contracted to pay Mrs. Bunnell's estate on her death \$3,000, it must go to her estate. It mattered not whether the amount of the insurance was retained in New York, or was sent to an agent in Ontario of the life association, the contract must be construed according to the laws of New York. The judgment of the Common Pleas Division in *Hallendal v. Hillman* in no manner conflicts with this view. In that case the insurance company declined raising any question as to its liability, and having paid the money into Court, an order was made striking the name of the company from the proceedings, and freeing it from further liability to be proceeded against by either of the parties. Had all that been done in the present case by the life association, the question would still have to be decided: was the contract between the insured and the insurer changing the beneficiary, a valid contract in the place in which it was entered into, namely, in the State of New York? Mr. Riley, the American consul at Ottawa, and for many years a practising attorney of Plattsburg, New York, was called to give evidence as to the law of that State. He produced a copy of an enactment, c. 175, s. 18, of the laws of the State of New York, passed in 1883, which provides:— 'Section 18. Members in any corporation, association, or society transacting the business of life or casualty insurance, or both, upon the assessment or co-operative plan, shall give to any member thereof the right at any time, with the consent of such corporation, association, or society, to make a change in his payee or payees, beneficiary or beneficiaries, without requiring the consent of such payee or beneficiary.' Mr. Riley was unable to state the effect of the Act, as he was not aware of any interpretation having been given to

the statute. The New York Court of Appeals considered the effect of the statute in *Smith v. National Benefit Society* (decided in 1890), 123 N. Y. 85, the head-note to which is:— 'The provision of the Act of 1883 (s. 18, c. 175, Laws of 1883), providing for the incorporation of co-operative life insurance societies, which declares that membership in such a society gives the member the right to make a change in his payee or beneficiary without the consent of such payee or beneficiary, applies simply when the original designation is in the matter of an inchoate or an unexecuted gift; it does not prevent a contract between the member and the payee by which a vested right passes to the latter, and in such case, without his consent, the payee may not be changed.' The Court in that case said (p. 88): 'The statute does not prevent a contract between the parties by force of which a vested interest does pass.' By virtue of the contract between Mrs. Bunnell and her husband, by which, in consideration of his agreeing not to apportion any part of the insurance moneys amongst his children on the policy issued on his life, and of which the wife was the named beneficiary, she agreed that the original policy issued on her life should be payable to the husband as beneficiary, a vested interest in the policy passed to the husband, and the beneficiary could not be changed without his consent."

The case, however, does not help in the decision of the question of whether, had the foreign contract not contained the stipulation making New York law applicable, the provisions of our statute would have governed: in which case, however, the result would have been the same. But it is useful as clearly giving effect to the law of intention.

The only case, therefore, which purports to deal with the question is the one already referred to of *Mason v. Massachusetts Benefit Life Association* (1899), 30 O. R. 716. The facts in that case were these:—

On the 20th July, 1892, the Canadian Mutual Life Association transferred all its business and assets to the Massachusetts company, and certificates were issued, dated 1st August, 1892, to the two persons, Curry and O'Dea, thereafter insured for life or disability with the Canadian company.

These certificates were contracts with the parties insured by the Massachusetts company to make good the amount insured and to be attached to and made a part of the original contract with the Canadian company.

These certificates were not to be operative until countersigned by the resident agent in Ontario of the Massachusetts company. These certificates were accepted by the parties insured, and thereafter all premiums were duly paid thereunder to the Massachusetts company.

Boyd, C., says (at p. 723):—

“The effect of this transfer of business and issuing of certificates to the assured was to make a new contract of insurance with the Massachusetts company on the same terms as existed with the old company. This new contract, however, came into effect and existence after the Ontario statute of 1892, and is subject to its terms. The Massachusetts company was then validly carrying on business in Ontario, being licensed under sec. 39 of the Dominion Insurance Act, R. S. C. c. 124, and as such was within the meaning of the Ontario Act of 1892, secs. 2, 6, 12, 27, 33, and 34. These last sections, therefore, modify the old terms expressed in the certificate issued by the original company, so that the new contract with the Massachusetts company must be read in conjunction with the Ontario Act of 1892. This appears to me to be altogether irrespective of the time when the Massachusetts company actually registered; as they were actually doing business they became subject to the operation of the Act so far as ss. 33 and 34 are concerned. The fact of the certificate not being valid till countersigned in Ontario, renders the whole contract one subject to Canadian or Ontario law, which, however, does not seem important, because the company coming into the Province to do business must be subject to the statutory conditions imposed for the benefit of the public.”

And in discussing another claimant's case he (on p. 730) deals with the objection that foreign law governed the contract, thus:—

“It was, however, contended that the law of the State of Massachusetts, and not the law of Ontario, applies, and

Clarke v. Union Fire Insurance Company, Re Export Lumber Co. (1884), 6 O. R. 223, was referred to. The point in that case was decided or assumed to be decided in accordance with the law as laid down in Wharton on Conflict of Law, 2nd ed., par. 465. In the following paragraph (466) the same learned author says:—‘An insurer, however, doing business in a particular state by an agency with power to act, puts itself by so doing, under the control of such state law. The agency then becomes the seat of the obligation. And where the insurance is made dependent on the action of an agent in a particular state, by whom the policy must be countersigned, then the policy is subject to the laws of such state.’ In *Joyce on Insurance*, s. 229, it is said: ‘Where the policy is not to be valid till countersigned by the agent, it will be construed according to the place where such act is performed and the policy delivered, although the policy is dated in another State and signed by the president and secretary there.’ In the present case the policy or contract, as before stated, was sealed and was signed by the president and secretary in Massachusetts, but was not to be valid or binding unless countersigned by the principal agent here. He did countersign it and deliver it, and it is according to the statement of the law given above, and, as I think, a contract to be construed and governed according to the laws of this country.”

Wakeman v. Metropolitan Life Ins. Co. (1899), 30 O. R. 705, avoids deciding the point.

It must be admitted that there has been nothing in the Ontario decisions which really settles the point. The *Mason* case was one between insurer and insured, and was held to be subject to a local law relieving against forfeiture on account of an innocent misrepresentation as to age and being a statutory condition which local law can impose on the parties to the contract. In *Bunnell v. Shilling*, *ante*, the law by agreement was to be foreign law.

We must, therefore, fall back on the general principles enunciated in the English and American cases (see *Phinney v. Mutual Life Ins. Co.*, 67 Fed. Rep. 493) to determine whether interests subsequently created by the insured have the rights given them by Ontario legislation, and whether the insurer is affected by them.

A simple problem illustrates both questions. If a man domiciled in Ontario takes out a 20 year endowment policy in favour of his wife in a foreign company, can he, at the end of the period obtain its surrender value himself without his wife's consent, provided the foreign law permits this? It is clear that if the policy is governed by Ontario law he cannot. Such a policy is now issued in Canada by one of the largest New York insurance companies. Applying the principle of intention, we find much similarity in the facts as they existed in *South African Breweries, Limited v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273, where the test applied was (p. 177):—

“Looking at the subject matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract?”

The residence of the contracting parties was considered as an element, though not given a large measure of weight. The residence of the company, though an English one, with directors and secretary there, but carrying on business in South Africa, was held to be (for the purpose of ascertaining intention) in South Africa. The place of execution and the place of performance were treated as important. The form of the contract was an English form, worded just as if an English firm was employing a person in England. A substantial stipulation in it was valid by English law, but invalid or of doubtful validity in South Africa.

The decision proceeded on the principle that preference must be given to the country with which the transaction had the most real connection.

Applying these facts to the problem suggested, it is interesting to ascertain how far they are decisive on the question of intention. As to the residence of the foreign company, it may be held, for this purpose, to be where it carries on business, namely, Ontario, and where it pays a license fee and registers in order to do so, and where it has agents and assets. The place of execution is, by Ontario law, in this Province. There remain three things: (1) The provision

allowing surrender by the insured without the consent of the beneficiary, valid by foreign law, but invalid here, which existed in the South African case and did not govern, on the ground that the parties were thought to have intended to make and accept the stipulation for what it was worth. (2) The form of the contract, which may be foreign in the sense that it purports to be drawn in a foreign country, and is based on the rights and expressions known to foreign law. This, the South African Breweries case says, should not outweigh the other considerations. (3) The place of performance, which may, both as to the insured and insurer, be foreign or domestic as expressed in the contract. This last consideration was given very great weight in the South African Breweries case, and it was fortified by the fact that the defendant resided in South Africa, and that the invalid stipulation had reference to that country.

It would be natural to decide that the transaction had most real connection with Ontario, and no doubt it would be so held if the payment of the premiums, on the one hand, was to be made here, and if the insurance moneys were, on the other hand, payable in Ontario. If the Ontario statute governs, then it seems clear that most of the considerations which are held to have weight point to Ontario as the country with which the transaction has most real connection. But if the contrary be the case, and the premiums and death claims are payable in a foreign country, where also the proofs of loss are to be made, there is the opinion of an American Judge that the foreign law governs (see *Phinney v. Mutual Life Ins. Co.*, 67 Fed. Rep. 493).

But it is obvious that, when the question comes to be decided, the determination cannot be predicated on any assumed basis of facts, but that in each case the whole of the circumstances must form the true basis of the solution of the problem.

The third question really depends on the answer to the second. If the Ontario statute governs the rights and interests which arise, because the parties intended it should, then the insurer will be bound by them.

The above leads to a conclusion which both to the insurance lawyer and to the Canadian public is unsatisfactory.

If the insurer in Canada or the beneficiaries enter into a contract with a foreign company, and the contract does not, in terms, provide that Ontario law shall govern both the construction of the contract and the status of those who become interested in it as beneficiaries, then the parties must in every case of dispute become involved in an expensive contest to determine their true intention. That question may be settled either way, and if in favour of foreign law evidence of it must be given and the rights of the insurer and beneficiaries may arise or fall as has seemed best to United States legislators. Their views may be enlightened, and may deal with insurance contracts in the most exemplary and reasonable way. But where the savings of such a vast proportion of the population of Canada are invested in life insurance, it is hardly to be expected that they will prefer to have them dealt with by laws in the making of which they have had no voice. Nor will the lawyer nor the Judge find it easy to solve the complicated question so as to satisfy himself. Legislation can do much to minimize difficulties, but as long as people here insure in foreign companies, the latter are the only ones who can, by a clear provision in favour of Canadian law, entirely remove them.

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RECENT CASES FROM THE TIMES' REPORTS.*

Adulteration of Food.]—The popular impression that marmalade is a compound of turnips and sugar is not borne out by the case of *Smith v. Wisden*, 18 T. L. R. 92, the sample of that commodity in question there being found to consist of oranges and glucose. It was held that as there was no legal standard for marmalade, and as glucose was not injurious to health and had the beneficial tendency of preventing the marmalade from mildewing and fermenting, a conviction for selling a pot of marmalade which was not of the nature, substance, and quality demanded, to the prejudice of the purchaser, could not be upheld. See the Adulteration Act, R. S. C. 109, and the amendments thereto.

Aliens.]—*Netherlands South African Railway Company (Limited) v. Fisher*, 18 T. L. R. 116, is a case very interesting in itself, but, fortunately, not at all likely to be of practical use. The plaintiffs brought in England an action for libel, and the jury having, upon evidence set out in the report, found that they were at the date of the issue of the writ, "adhering to the King's enemies," it was held that the action was not maintainable.

Ancient Lights.]—*Warren v. Brown*, 18 T. L. R. 55, is not likely to have, in this Province, in view of the provisions of R. S. O. 1897 c. 133, s. 36, much practical bearing, but it is an interesting case and well worth noting. The Court of Appeal held that where business of a special kind, requiring much light, is carried on in a house, and the prescriptive right to light is interfered with, it is no answer to an action to restrain the interference to say that enough light remains for all ordinary purposes.

Appeal.]—An order of a Divisional Court, refusing a *rule nisi* to a magistrate to compel him to state a case in

* Including the cases in No. 6, Vol. 19, week ending 4th December, 1901.

a proceeding before him under the London Building Act, 1894, in which he ordered the demolition of the building complained of, was held by the Court of Appeal in *Rex v. D'Eyncourt*, 18 T. L. R. 53, to have been made in a "criminal cause or matter," and therefore not to be appealable. See *Regina v. Cushing*, 26 A. R. 248; and Ontario Judicature Act, R. S. O. 1897 c. 51, ss. 76, 191.

Assignment of Debt.—*Jones v. Humphreys*, 18 T. L. R. 54, is a useful case, dealing as it does with a question of every day occurrence. A debtor assigned to his creditor as security for an advance "so much and such part of my income, salary, and other emoluments. . . . to which I am now or may at any time hereafter become entitled, as shall be necessary and requisite for payment to you of the" amount of the advance. A Divisional Court held that this was not an absolute assignment of an ascertained sum under the Judicature Act, 1873, s. 25 (6), and therefore was not enforceable by the creditor by action against the employer. See the Ontario Judicature Act, R. S. O. 1897 c. 51, s. 58 (5). To bring the case within the Act, the Lord Chief Justice points out, "it must be possible to find from the document an assurance of a definite debt to the extent that the debtor might know what he was paying to the assignée, on receiving notice of the assignment."

Bicycle.—The legal status of the bicycle is once more considered in *Simpson v. Teignmouth and Shaldon Bridge Company*, 18 T. L. R. 104, the decision being that a bicycle was not within the section of an Act allowing the defendants to charge tolls "for every coach, chariot, hearse, chaise, Berlin landau, and phaeton, gig, whiskey car, chair, or coburg, and for every other carriage hung on springs, the sum of sixpence for each wheel, and for each horse or other beast of draught drawing the same the sum of twopence."

Company.—The judgment of the Judicial Committee in *Burland v. Earl*, 18 T. L. R. 41, reverses, but does not, to say the least, satisfactorily dispose of the carefully reasoned judgment of the Court of Appeal for Ontario (*Earle v. Burland*, 27 A. R. 540), upon the main question involved, viz.,

the right of a minority of shareholders in a trading company to complain of the action of the directors elected by the majority in heaping up an absurdly large reserve fund and in investing it in hazardous securities. The Court of Appeal interfered and directed the fund, over and above "a fair and reasonable sum," to be distributed among the shareholders. But the Judicial Committee held that the "elementary principle" of non-interference with the internal management of the affairs of a company, except in cases of fraud or invalidity, governed the case, and that neither fraud nor invalidity had been made out. It is submitted that, even applying this elementary principle in all its vigour, enough appears in the case to justify the interference of the Court, the unnecessary tying up of and reckless dealing with the profits of the company amounting to fraud. But why in this age of development of the company system should the Court be restricted to the exercise of the narrow jurisdiction of earlier days? New wrongs demand new remedies, and are shareholders helpless to resist a carefully devised starving out process? Upon the less important question of the profit made by the president of the company upon the sale by him to the company of a property purchased by him with the intention of so reselling, the judgment of the Court of Appeal was also reversed, the Judicial Committee taking the view that the president was not at the time of the purchase by him acting in any sense as trustee or agent for the company; that he therefore acquired the property as his own, and was at liberty to make as good a bargain as he could upon the sale by him to the company. Upon the questions as to salaries, depending upon the construction of special by-laws and resolutions, success was divided.

Conditional Sale.—In *Mellor's Trustee v. Maas and Co.*, 18 T. L. R. 40, there was an unsuccessful attempt to escape from the provisions of the Bills of Sale Act, the case being an illustration of the principle that in contests of this kind the real substance and not the form of the transaction must be looked at. A person who had agreed to purchase an hotel and its furniture was unable to pay the purchase money in full and objected to giving to the vendors a bill

of sale of the furniture to secure the balance. The vendors, therefore, purported to sell the furniture to the defendants, who in turn purported to sell it to the original purchaser under a conditional sale agreement. Mr. Justice Wright held that there had not been a *bona fide* sale to the defendants, and that the conditional sale agreement was really a bill of sale by way of mortgage to secure the portion of the purchase money paid by them, and was void for want of registration. Purchases of the assets of insolvent estates are not infrequently arranged in very much this way in this Province, but as the consequent conditional sale agreement has to be registered, there would not be much force in a technical objection to the form of the transaction.

Constitutional Law.]—The judgment of the Judicial Committee in the Manitoba prohibition appeal is reported, *sub. nom.* Attorney-General for the Province of Manitoba v. Manitoba License Holders' Association, in 18 T. L. R. 94.

Contract.]—In London Electric Supply Corporation (Limited) v. Priddis, 18 T. L. R. 64, a special contract for the installation of electric wires and fixtures and the supply of electricity was held by a Divisional Court to bind the consumer to pay a certain amount per quarter for each lamp, and, although he had used no electricity during the summer quarter, he was ordered to pay the minimum rate. The contract in question is in much the same terms as the contract (not set out in the report) considered in Ottawa Electric Company v. St. Jacques, 1 O. L. R. 73, where, in the Supreme Court, the customer found himself in an unpleasantly "tied-up" condition.—In Attorney-General v. Stewards and Co. (Limited), 18 T. L. R. 131, the House of Lords reversed the judgment of the Court of Appeal (*sub nom.* Stewards and Co., Limited v. The Queen), 17 T. L. R. 111—noted 21 C. L. T. 52—the question being, as the Lord Chancellor put it, the meaning of three "irregular and inappropriate documents; . . . the difficulties in the construction of these three documents being so great that either side of the question might be plausibly argued." The House of Lords had "to spell out the intention to be" that the acceptance of a tender to supply about 2,000,000 tons of stone,

or such quantity as may be required, did not bind the acceptors to take approximately that quantity.

Counterclaim.]—Where upon a counterclaim against two joint plaintiffs evidence is received which tends to establish it as against one it should not be dismissed, but should be determined as against that one, and if held to be established, judgment should be given against that one, in the nature of judgment in a cross-action: *Hall v. Fairweather*, 18 T. L. R. 58.

Criminal Law.]—In *Pearks, Gunston, and Tee (Limited) v. Richardson*, 18 T. L. R. 78, the mode of service of a summons against a company for an offence against the Sale of Food and Drugs Act, 1875, was considered, and it was held that service must be effected at the registry office of the company, and not at the branch establishment where the offence was committed. It was also held that the objection had not been waived by the attendance before the magistrate of a solicitor who insisted on the objection and withdrew from the case when it was overruled.—In *McDonald v. Hughes*, 18 T. L. R. 79, the executrix of a licensee of a tavern carrying on the business before the next available sessions for the transfer of the license was held to be a "licensed person" under the Licensing Act, 1872, s. 17, and liable to conviction for an offence against the Act. See the Liquor License Act, R. S. O. 1897 c. 245, s. 37.—In *Wise v. Dunning*, 18 T. L. R. 85, Mr. Justice Darling, in the Divisional Court, lapses into poetry, prose being too cold in his view to express his view of the perversity of the appellant, who complained of a magistrate's order binding him over to keep the peace, he not having himself committed a breach of the peace, but his violent and offensive public attacks upon members of another religious persuasion having led to conflicts between his followers and those who resented his language. The Court held that the fact that the language used might lead to a breach of the peace was quite sufficient to give jurisdiction. See the Criminal Code, s. 959, as amended by 56 V. c. 32 (D.)—a by-law, passed under the Municipal Corporations Act, 1882, s. 23, which authorizes the passing of by-laws for the "good

rule and government of the borough," providing that no person shall wilfully annoy passengers in the public streets," was, in *Nash v. Finlay*, 18 T. L. R. 92, held to be void for uncertainty, and a conviction under it was quashed. Several by-laws enacted at the same time dealt with particular kinds of annoyances, and the Divisional Court thought it would be difficult to say what was included in the by-law in question that was not included in the other by-laws. On the other hand, in *Gentel v. Rapps*, 18 T. L. R. 72, a by-law of a tramway company, that no person should swear or use obscene or offensive language whilst in or upon any carriage, was held to be good, as against the contention that it was repugnant to a general Act which forbade the use of obscene or profane language to the annoyance of passengers. *Brabham v. Wookey*, 18 T. L. R. 99, is a case dealing with the same class of offence, the municipal by-law there in question providing a penalty for using profane, indecent, or obscene language to the annoyance of the inhabitants or passengers. A conviction was upheld where the defendant used the objectionable language in his house, and, the door being open, it was heard by a policeman in the street, there being no evidence that an inhabitant or passenger had been annoyed. Compare *Regina v. Bell*, 25 O. R. 272.

Discovery.]—In *Graves v. Heinemann and Armstrong*, 18 T. L. R. 115, an action for infringement of copyright, an application was made under Order 31, Rule 19 A (3), for the production of certain documents, and the contest was whether as to a number of them the description was within the meaning of the Rule, "specific." There is no corresponding Rule in Ontario, but the decision may be of some help in describing documents in an ordinary affidavit on production.—In *Carr v. Anderson*, 18 T. L. R. 128, a discharged convict brought an action for an account against the officer who had administered his property during his imprisonment. He was ordered to give particulars of the "property consisting of moneys, stocks, funds, shares, securities, jewellery, chattels, and effects," which had been, he alleged, taken possession of at the time of his conviction. It was pointed out that the case could not be treated as one of

ordinary *cestui que trust* against trustee.—An order was made in *In re London and Northern Bank (Limited)*, 18 T. L. R. 130, directing a former officer of the bank to tell on his examination on the liquidator's behalf in winding-up proceedings whether he had had certain letters in his possession, and if so what had become of them. The letters in question related to a libel action commenced by the bank before the winding-up order and continued by the liquidator, and it was contended that the liquidator was indirectly endeavouring to obtain evidence as to letters in respect of which the defendants in the libel action had claimed privilege.

Domicil.]—The decision of a Divisional Court in *Attorney-General v. Winans*, 17 T. L. R. 94, noted 21 C. L. T. 94, was affirmed by the Court of Appeal, and it was held that the deceased, a subject of the United States, who had lived in England for many years before his death and had taken leases of houses there, was domiciled there at the time of his death, and his estate liable to legacy duty. Domicil of choice, the Master of the Rolls said, is a thing which it is difficult to define. It does not embrace the idea of a man's putting off his nationality and putting on another nationality, but there must be something more than residence; as put in *Udny v. Udny*, L. R. 1 H. L. Sc. 441, there must be "a residence freely chosen and not prescribed or dictated by an external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation." See *Bonbright v. Bonbright*, 2 O. L. R. 249.

Exemptions.]—That a sewing machine hired by an iron moulder under a hire purchase agreement and used by his wife to do sewing to aid in the support of the family comes within the exemption given by s. 147 of the County Courts Act, 1888, to "tools and implements of (a tenant's) trade," and so is protected from distress for rent due by the iron moulder, is the somewhat curious result arrived at by a Divisional Court in *Master v. Fraser*, 18 T. L. R. 31. The Court held that the words applied to tools and implements which the tenant had hired, borrowed, or in any way become

possessed of, and were not applicable only to those of which he was the owner; and also (apparently) that as the wife was not carrying on a separate business or using the sewing machine independently of her husband, the sewing trade was his and the sewing machine one of the tools or implements thereof. The words of the Ontario Execution Act, R. S. O. 1897 c. 77, s. 2 (6), are wider than those above quoted, and the decision would apply in this Province in the case of proceedings under writs of execution. As far as distress for rent is concerned, the tenant's case would of course be very much stronger here: see the Landlord and Tenant Act, R. S. O. 1897 c. 170, ss. 30, 31.

Factories Act].—Consolidated Properties Company v. Chilvers, 18 T. L. R. 59, in effect decides that owners of a building, directed under the Factories Act to make certain alterations therein, cannot be convicted of an offence under the Act, if, because of part of the building being in the possession of their tenants, they are unable to make the alterations as directed; and it is not too late to take the objection after arbitrating, as permitted by the Imperial Act, as to the nature of the alterations. The same defence would seem to be applicable under the Ontario Act, R. S. O. 1897 c. 256, as amended by 1 Edw. VII. c. 35.—The Factory and Workshop Act, 1895, provides that “a person employed in a factory shall not be allowed to be in the space between the fixed and the traversing portions of a self-acting machine unless the machine is stopped with the traversing portion on the outward run.” It was held in *Crabtree v. Fern Spinning Company (Limited)*, 18 T. L. R. 91, that there could not be a conviction under this provision where a workman, ordered to go between the fixed and the traversing portions of a self-acting machine to clean part of it, was killed in consequence of the machine being started under the mistaken belief that he had come out, by the man who had ordered him to do the work.

Gaming.]—In *Stoddart v. Hawke*, 18 T. L. R. 22, an unsuccessful attempt was made to evade the prohibition of the Betting Act, 1853, against keeping a place for the purpose of receiving money on wagering contracts. The *modus*

operandi was to issue coupons in connection with sporting competitions at an office in London, and these coupons with the money staked were sent by the persons betting to an office in Holland. It was held that the use of the office in London was a necessary part of the system for the receipt of money, and that the office was therefore kept for that purpose, and a conviction of the keeper was upheld. See in this connection, Criminal Code, s. 197, as amended by 58 & 59 V. c. 40 (D).—*Thomas v. Smith*, 18 T. L. R. 69, was an action to recover part of the proceeds of a bet. After the defendant had made, as was held on the evidence, a bet on a horse-race, the plaintiff agreed with him to become interested to the extent of one-fourth. The defendant won the bet and was paid the money. It was held that the plaintiff could not enforce payment of his share. He would have been entitled to recover if the agreement had been made before the bet, as then the defendant would have been his agent to bet. The case depends, however, upon the provisions of the Gaming Acts.—Gaming in the seductive form of stock speculation was complained of in *Philp v. Bennett and Co.*, 18 T. L. R. 129, the plaintiff's claim being for payment of profits on stock transactions. The defendant swore that he had not purchased the stock which he had agreed to sell to the plaintiff; that the plaintiff had never asked for delivery of the stock; and that the transaction was a mere bet on the market price. *Bigham, J.*, gave judgment in the plaintiff's favour, however, mainly on the ground that the application to the defendant for stock, signed by the plaintiff, contained the words, "I agreeing to accept the amount of stock you may sell to me," and this being, in the learned Judge's view, clear evidence of intention on the defendant's part to deliver actual stock. This is the test in cases of the kind, as may be seen by reference to *Forget v. Ostigny*, [1895] A. C. 318.

Highway.]—In *Mayhew v. Sutton*, 18 T. L. R. 52, a Divisional Court held, following the principle of *Smith v. Boon*, 17 T. L. R. 472, noted 21 C. L. T. 330, that a person might be convicted of driving a motor car on a highway "to the common danger of passengers," though there were no passengers in the highway at the time.

Infant.]—The judgment in *Thurston v. Nottingham Permanent Benefit Building Society*, 17 T. L. R. 7, noted 21 C. L. T. 56, was varied by the Court of Appeal, 18 T. L. R. 135. The plaintiff, while an infant, borrowed money from the defendants to buy land and to build thereon, giving a mortgage to secure its repayment. The Court of Appeal held that the two transactions were distinct, and that the defendants were entitled to stand in the vendor's shoes and have a lien for so much of the money advanced as went to him for purchase money, but that they could not enforce the mortgage for so much as was used in the buildings. It must be borne in mind that there was no fraud or misrepresentation. Some cases bearing upon the point are referred to in the former note.

Innkeeper.]—In *Sealy v. Tandy*, 18 T. L. R. 38, the distinction in law between an inn and a mere alehouse (in this Province read "saloon") in regard to the proprietor's right to refuse a would-be customer is the turning point of the decision, which was that the proprietor of the alehouse had the right to request a person who was not a traveller and whom he did not wish to remain on the premises to leave, and to eject him on his refusal to do so. The case turned to a great extent upon the effect of s. 18 of the Licensing Act, 1872, and in dealing with questions of this kind in this Province s. 27 and the following sections of the Liquor License Act might have to be considered. The case is interesting, too, because of the literary flavour of the judgment of Mr. Justice Darling, who, in short space, travels from Chaucer to Dr. Johnson, quoting the latter's statement that one of the characteristics of an inn was that you were made welcome, and that the more noise you made, and the more trouble you gave, and the more good things you called for, the more welcome you were.

Insurance.]—*Biggar v. Rock Life Assurance Company*, 18 T. L. R. 119, raises the old question of the effect of untrue answers in an application for insurance. The answers were filled in by the company's agent, who was familiar with the facts, and the incorrectness of the answers was due either to his carelessness or to his fraudulent anxiety to

earn his commission. It was held that the agent in filling in the answers was the agent not of the company but of the applicant, and that the latter having signed the application was bound by it, even though he had not read it and did not know its contents. His claim was therefore disallowed, the policy providing that it was granted "on the express condition of the truthfulness of the statements contained in the proposal."

Landlord and Tenant.]—*Dalley v. Phillips and Marriott (Limited)*, 18 T. L. R. 18, gives a form of covenant by a lessee of a public house as to the safeguarding and renewing of the license, a form which was held to be stringent enough to make the lessee liable in damages when, owing to no fault of his, a renewal of the license was refused.—*Mumford v. Walker*, 18 T. L. R. 80, is a similar case in which the lessee was held liable for an offence committed by a sub-lessee.—In *White v. Harrow*, 18 T. L. R. 129, a lessee covenanted "not to object to any works to adjoining premises" which might be sanctioned by the lessor. It was held that he could not complain when, with the lessor's consent, the occupier of the adjoining premises proposed to erect thereon buildings which would interfere with the access of light to the demised premises. It was unsuccessfully contended that the covenant was void as repugnant to the grant and as inconsistent with the covenant for quiet enjoyment.

Master and Servant.]—That the Imperial Workmen's Compensation Act, 1897, has not yet had the desired effect of decreasing litigation in respect of accidents to workmen may be seen from the number of cases under this Act reported in recent numbers of the *Times Law Reports*. Most of these cases deal with questions which do not arise under the Ontario Act, such as the proper mode of computation of "average weekly earnings," what constitutes a "wholly dependent" condition, and so on, but several of them are more or less applicable in the interpretation of the Ontario legislation. There are also one or two cases of importance upon the general law of master and servant. *The Louise*, 18 T. L. R. 19, deals with one of these, a not unfamiliar one in our Courts, namely, whether servants by

whose negligence an accident was caused were the servants at the time of their general employers or of those for whom at the time special work was being done. In this case the crew of a tug which had been hired by the owners of, and was engaged in towing, a vessel, were held to be still the servants of the owners of the tug, and judgment was given against them for damages resulting from the unskilful navigation of the tug.—Under the Imperial Workmen's Compensation Act, 1897, "serious and wilful misconduct" of the person killed or injured is a defence, and this was in *John v. Albion Coal Company (Limited)*, 18 T. R. L. 27, in effect treated as much more than negligence and equivalent at least to "gross negligence," which would no doubt be an answer to a claim under the Ontario Act. The Court of Appeal, while pointing out that it was impossible to lay down any rule of law as to what was gross negligence and what was serious and wilful misconduct, decided that the County Court Judge who tried the case was right in holding that the defence was made out where a miner persisted in walking along a tramway in the mine, though warned that trams were coming up behind him, and was killed.—In *Reeks v. Kynoch (Limited)*, 18 T. L. R. 34, the same defence was raised, but this time unsuccessfully. A lad of nineteen, working at a machine for cutting screws, leaned over a circular saw, which was in motion, for the purpose of picking up an uncut screw which had fallen from its place, and one of his fingers was cut by the saw. He had been warned not to do this, and in an action brought by him the jury found that his doing so was contributory negligence on his part, and the action was dismissed, but on application then made an award was made in his favour under the Act. This award was upheld by the Court of Appeal, there not being in their view "serious and wilful misconduct," the element of wilfulness being absent.—The Workmen's Compensation Act, 1897, provides for compensation for injury caused by an accident, and in *Boardman v. Scott and Whitworth*, 18 T. L. R. 57, the Court of Appeal held that, where a man carrying in the course of his duty a heavy beam on his shoulder, gave himself a "pitch" to improve the balance of the beam, and in so doing injured the muscles of his

back, the injury was caused by an accident, that is, something fortuitous and unexpected.—In *Evans v. Penwyllt Dinas Silica Brick Company*, 18 T. L. R. 58, the defendants contended unsuccessfully that the applicant for compensation was a sub-contractor and not a workman. He was employed as a quarryman and was paid so much a ton for material worked. His tools were found for him and he used to hire the men who worked under him and discharge them. It was held that he was practically in the position of a labourer at piecework. Some stress was laid upon the fact that being in doubt as to his status he had given notice to terminate his engagement, and the defendants' manager had then agreed that he should in the event of injury be considered as having the status of workman. The element of personal labour would seem to bring the case within the Ontario Act, R. S. O. 1897 c. 160, s. 2 (3).—The Court of Appeal in *Thompson v. City Glass Bottle Company (Limited)*, 18 T. L. R. 69, reversed the judgment of the Divisional Court, 17 T. L. R. 594, noted 21 C. L. T. 368, the case in which the plaintiff was hurt while moving an old machine out of the way, it not being at the time, as the Divisional Court thought, "machinery or plant connected with or used in the business of the employer." The Court of Appeal took the less narrow view, that a machine which is not being used because it is either being repaired or about to be repaired is still within the Act. They also held that there was clear evidence of negligence in the foreman who had, within the meaning of the Act, superintendence intrusted to him.

Mortgage.]—The Court of Appeal (18 T. L. R. 61), while affirming the judgment of Buckley, J., in *Lisle v. Reeve*, 17 T. L. R. 96, noted 21 C. L. T. 61, as to an alleged illegal clog on the equity of redemption, did not agree with some of his observations as to the law, particularly his statement that an equity of redemption can never exist unless there exists a legal right of redemption, and that to ascertain whether there is an equity of redemption the first step is to ascertain whether, according to the contract, and having regard to all the terms of the contract, there is a legal right to redemption. The Court of Appeal decided

the case upon a question of fact, holding that the agreement that the mortgagor should have no right to redeem was subsequent to and independent of the original mortgage bargain.

Newspapers.]—The *King v. Tibbits*, 18 T. L. R. 49, is an extremely important case in which the Court for Crown Cases Reserved upheld the conviction of the editor and a reporter of a newspaper upon an indictment charging them with “an unlawful attempt to obstruct and prevent the due course of law and justice,” and with “a conspiracy to obstruct and pervert the course of law and justice.” See the Criminal Code, s. 154. In the paper in question there were published, while charges of felony and misdemeanour were being dealt with by way of preliminary investigation and by trial, “couched in a florid and sensational form, a number of statements highly detrimental to” the accused, purporting to be the result of investigations of the reporter, referred to in the articles as “Our Special Crime Investigator.” The Lord Chief Justice in a very interesting judgment, after pointing out the undoubted power to punish conduct of this sort as contempt of Court, held that there was also power to proceed by indictment, and summed up the matter thus: “A person accused of crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible, and which is adduced at his trial in legal form and shape. Assume the accused to be really guilty of the offence charged against him. The due course of law and justice is perverted and obstructed nevertheless if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt, or imputations against his life and character to which the laws of the land refuse admissibility as evidence.” It is worth noting that the prosecution was instituted by the Crown authorities themselves, not by the accused, and after the accused had been convicted of the crimes charged against them. The case recalls the abortive attempt in *Regina v. Birchall*, 19 O. R. 697, to punish what was alleged to be somewhat similar unfair comment. May the conviction have a deterrent

effect upon those newspaper men of vivid imaginations who, under the abominable system so much in vogue, predetermine the guilt of persons accused of crimes of so-called public importance.

Nuisance.]—In *Parish v. Mayor, etc.*, of the City of London, 18 T. L. R. 63, the defendants were ordered to remove a urinal which, in the exercise of their statutory power to erect urinals for the accommodation of the public, they had built in an alley or court-yard, about two feet from the only entrance to the plaintiff's warehouse, the *ratio decidendi* being that such a power does not authorize the public authority to do anything which constitutes a private nuisance to individuals. See the Municipal Act, R. S. O. 1897 c. 223, s. 552.—In this connection the case of *London and North Western R. W. Co. v. Mayor, etc.*, of Westminster, 18 T. L. R. 74, may be noted, where under the same Act an underground lavatory was constructed by the municipal authorities. It was held that they could not put the staircase in part under the footpath adjoining the plaintiff's building, the Act providing only for their right to use the road exclusive of the footway, the general rule in England being that the adjoining owner owns the land to the middle of the street. But see in this Province, R. S. O. 1897 c. 223, ss. 599, 600.

Partnership.]—The case of *Brand v. Sandground*, 18 T. L. R. 96, emphasizes the distinction between the remedy against partners and the remedy against the partnership assets. A partnership was dissolved by a consent judgment in an action in the Chancery Division, and a receiver of the partnership assets was appointed. After this an action was brought in the King's Bench Division against the partnership in the partnership name, upon a bill of exchange accepted before and falling due after the dissolution, service having been effected upon only one partner. A charging order against the partnership assets was then obtained in the Chancery Division by the judgment creditor, and the partners who had not been served in the King's Bench action moved against this order, contending that the King's Bench judgment was void as against them, because the applicants were not co-partners at the time of the accruing of

the cause of action—Order 48 *a*, r. 1 (Con. Rule 222)—and had not been served, although the co-partnership had to the knowledge of the plaintiff been dissolved before the commencement of the action—Order 48 *a*, r. 3 (Con. Rule 223). Farwell, J., upheld the order, on the ground that he had no jurisdiction to deal with the judgment in the King's Bench Division. He went on to say, however, that the Rules relied on were for the protection of individual partners, and were not concerned with the property of the partnership, as to which Order 48 *a*, r. 8 (Con. Rule 228) governed.

Photograph.]—The principle that a photographer is bound by an implied contract not to use a negative for his own profit against the wishes of the customer is applied in *Stedall v. Houghton*, 18 T. L. R. 126, and the photographer was restrained from exhibiting a photograph of the plaintiff's wife and children. The photographer's contention was that the wife, who at the time the photograph was taken was not on good terms with her husband, and from whom he afterwards obtained a divorce, was the only person who had the right to complain. It was held, however, that in obtaining the photograph the wife acted as the husband's agent, the expenditure being a reasonable one and in effect "for a necessary," so that the right vested in the husband.

Public Officers Protection Act.]—*Smith v. Northleach Rural District Council*, 18 T. L. R. 30, a case under the Public Authorities Protection Act, 1893, throws some light upon the meaning of the analogous sections (17, 18, and 22) of the Ontario Public Officers Protection Act, R. S. O. 1897 c. 88. The Act provides in effect that if a plaintiff proceeds with his action after tender of amends, and does not recover more than the sum tendered, the defendant shall be entitled to costs to be taxed as between solicitor and client. In the action in question three issues were raised, and as to one the defendants made a tender of £10 and paid that sum into Court, denying liability. The plaintiff accepted the sum paid in and discontinued the action. It was held that the defendants were not entitled to costs of the two issues as between solicitor and client, the Act being applicable only to cases which proceeded to judgment.

Sale of Goods.]—The contract in *Dupont v. British South Africa Company*, 18 T. L. R. 24, which related to the purchase of bullocks and bran, etc., provided for payment of one-half the price upon shipment and the other half upon delivery. It was held that the property passed upon shipment, and that the purchasers had to bear the loss occasioned by the death during the voyage of a number of the bullocks.

Service of Process.]—Under many of the Rules (*e.g.*, Ccn. Rules 222, 231) and statutes (*e.g.*, the Division Courts Act, R. S. O. 1897 c. 60, ss. 84, 186), it becomes important to determine for the purpose of service of process, where the residence or place of business of a person is. The case of *In re Charles Bright*, 18 T. L. R. 37, may be of some use in a question of this kind. A bankruptcy petition was presented against a debtor who, it was admitted, was domiciled in Buenos Ayres, but who, it was contended, had within the meaning of the Bankruptcy Act, "within a year before the date of the presentation of the petition, ordinarily resided or had a dwelling house or place of business in England." The Court of Appeal upheld the jurisdiction chiefly on the ground that the debtor, who was shewn to have spent portions of four years in London, transacted while there his private business at the office in London of a company in which he was largely interested.

Settled Estates.]—In *In re William Aldam's Settlement*, 18 T. L. R. 83, some difficult questions as to mining leases under the Settled Land Acts are dealt with, questions, however, which are not at all likely to arise in this Province, though perhaps the case should be noted under R. S. O. 1897 c. 71, s. 3.

Ship.]—In *The Anna*, 18 T. L. R. 25, a dispute as to demurrage was adjudicated upon, the contention of the charterers that, under the special wording of the charter-party, demurrage could not be claimed being overruled, but their supplemental defence that the delay was really that of the crew of the vessel being allowed in part.—In *Hopkins v. McBride*, 18 T. L. R. 53, it was held that an agreement made abroad by the master of a ship to pay the seamen remuneration additional to that stipulated for in their

articles, in consideration of their working the ship home, was void, there being no proof that the ship was unseaworthy, or that any unusual risk or danger existed.—The question of exemption from the burden of compulsory pilotage was considered in the case of *The Bristol City*, 18 T. L. R. 101.—*Blackburn and Sopsten v. Liverpool Brazil and River Plate Navigation Company*, 18 T. L. R. 121, was a bill of lading case, and an exception of “perils of the seas or navigation of whatever nature or kind soever (whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or others of the crew, or otherwise howsoever),” was held to apply where an engineer intending to fill a tank opened the wrong valve and thus let water run upon and damage a quantity of the cargo.

Sunday Observance.]—*The King v. Bros*, 18 T. L. R. 39, is a case to which the attention of the Lord’s Day Alliance could be given with advantage. A magistrate was applied to, under the local statute, 3 Geo. IV. c. 106, prohibiting the baking of bread on the Lord’s Day in the part of London to which the Act applied, to issue a summons against a baker of the Jewish faith, who, having shut his bake-shop on Saturday, baked bread on Sunday for his co-religionists. The magistrate refused to issue a summons, on the ground that such a prosecution would be vexatious, and a Divisional Court held that he was within his right in so doing, their view being that, as the magistrate would have the right to refuse to inflict punishment if the defendant were convicted, he had the right to refuse to put him to the annoyance of defending vexatious proceedings. It is evident from the judgments that the same rule would have been applied in a prosecution—or, as one of the Judges suggested, persecution—for a similar offence under the statute of Charles II. Under the latter statute, indeed, preliminary consent to a prosecution is expressly required, a provision not carried into the Ontario Lord’s Day Act, R. S. O. 1897 c. 246.—In *Vinters v. Freedman*, 18 T. L. R. 77, the same result was arrived at by a different road. The magistrate having dismissed the charge, because the offence was in his

opinion so trifling that it was inexpedient to inflict punishment, a Divisional Court held that he was entitled, under s. 16 of the Summary Jurisdiction Act, 1879, to do this, although the defendant had previously been convicted upon a similar charge.

Trade-mark.]—Owing to the special statutory provisions many of the English trade-mark cases are not applicable in this Province, but the case of *Bass Ratcliff and Gretton (Limited) v. John Davenport and Son's Brewery (Limited)*, 18 T. L. R. 108, while to some extent depending upon these provisions, may be found useful. It was there held that the geometrical figure of a diamond was a device common to the brewery trade before its adoption by the plaintiffs as their trade-mark, and therefore that their right was not exclusive; and also that the colour of the figure was of no importance, there being no right to monopolize the use of any particular colour. The prior common use need not be the use in exactly the same form as that adopted by the would-be exclusive proprietors, or even in forms very much resembling the new one. To make the new trade-mark valid and exclusive there must be the element of novelty; possibly a mere combination of well-known symbols and words but something novel as a whole. Even assuming the diamond trade-mark to be good, the Court thought that a figure resembling a diamond but with its lateral ends squared and the defendants' name and the special brand of beer plainly printed on it was not likely to deceive, and therefore that the plaintiffs failed on the merits.

Waterworks.]—Under a special Act a company were bound to supply water for "domestic purposes" at a certain rate, domestic purposes being so defined as to exclude the supply for "any trade, manufacture, or business whatsoever." It was held (*Pidgeon v. Great Yarmouth Waterworks Company*, 18 T. L. R. 97), that the company were bound to supply water to a boarding-house keeper at the named rate, the distinction being that the water was being used for the ordinary purposes of domestic life by the inmates of the house, and not for the purposes of the boarding-house keeper's business.

Will.]—In *Brown v. Skirrow*, 18 T. L. R. 59, a will was held not to have been properly executed where the testatrix signed it at a counter in a shop, one witness being at that counter, and the other witness being at the opposite counter and not at the time aware that the testatrix was signing a will, or paying any attention to what she was doing. —In *re Lord Kensington*, deceased, *Earl of Longford v. Lord Kensington*, 18 T. L. R. 89, is a case as to the effect of *Locke King's Act* (R. S. O. 1897 c. 128, ss. 37, 38), the decision being that where mortgaged and unmortgaged properties are given to a devisee by one gift in the aggregate, and not item by item, the gift must be accepted or rejected in its entirety.

EDITORIAL REVIEW.

The Liquor Act of Manitoba.

The decision of the Judicial Committee of the Privy Council, given on the 22nd November last, in the matter of the Liquor Act of Manitoba, reversing the decision of the Court of King's Bench for Manitoba (21 Occ.N. 212, 13 Man. L. R. 239), has not only caused consternation among politicians and activity among prohibitionists, but has set constitutional lawyers at work to revise their opinions or impressions of the constitution. The argument was heard by the Committee in July last. Mr. Haldane, K.C., Mr. C. H. Campbell, Attorney-General for Manitoba, and Mr. R. O. B. Lane were counsel for the appellant, and Mr. Edward Blake, K.C., and Mr. F. H. Phippen (of the Manitoba Bar) for the respondents. Mr. E. L. Newcombe, K.C., watched the case for the Dominion Government. The judgment of the Board (Lords Hobhouse, Macnaghten, Davey, Robertson, and Lindley) was delivered by Lord Macnaghten, who said that the only question the Board would attempt to answer was the first one asked: Had the Legislative Assembly of Manitoba jurisdiction to enact the Liquor Act, and, if not, in what particular or respect has it exceeded its power? The Court below had answered: It exceeded its powers in enacting the Liquor Act as a whole. "The drink question," said Lord Macnaghten, as reported in the Times Law Reports, "was not to be found specifically mentioned either in the classes of subjects enumerated in s. 91 (B. N. A. Act), and assigned to the Legislature of the Dominion, or in those enumerated in s. 92, and thereby appropriated to Provincial Legislatures. The omission was probably not accidental. The result had been somewhat remarkable. On the one hand, according to *Russell v. The Queen*, 7 App. Cas. 829, it was competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion, and when duly brought into operation in any particular district

deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada. On the other hand, according to the decision in Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348, it was not incompetent for a Provincial Legislature to pass a measure for the repression or even the total abolition of the liquor traffic within the Province, provided the subject was dealt with as a matter 'of a merely local nature' in the Province, and the Act itself was not repugnant to any Act of the Parliament of Canada." Lord Macnaghten went on to say that a careful perusal of the judgment of Lord Watson in the latter case led to the conclusion that, in the opinion of the Board, the case fell under s.-s. 16 of s. 92, "generally all matters of a merely local or private nature in the Province," rather than under s.-s. 13, "property and civil rights in the Province," and that seemed to the Board, as now constituted, the better opinion. "The controversy, therefore, seemed to be narrowed to this one point: Is the subject of the Liquor Act a matter 'of a merely local nature in the Province' of Manitoba, and does the Liquor Act deal with it as such?" Their Lordships answered these questions in the affirmative, regarding the case decided in 1896 as conclusive upon that point, shewing as it did that "matters which were substantially of local or of private interest in a Province—matters which were of a local or private nature from a Provincial point of view—were not excluded from the category of 'matters of a merely local or private nature,' because *legislation dealing with them might or must have an effect outside the limits of the Province, and might or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.*" The view of the Board is apparent from the words quoted and especially from those italicized. Next month we shall publish a critical article on the subject.

Company Law.

The recent (9th November last) decision of the Judicial Committee reversing the judgment of the Court of Appeal

for Ontario in *Earle v. Burland*, 27 A. R. 540, 21 Occ. N. 16, is dealt with in this issue under "Recent Cases from the Times Reports."

The Brief Digest.

Accompanying this number we publish the last of our brief monthly or semi-monthly digests of unreported cases in Ontario. Our readers generally have not expressed a wish to have it continued, and we must therefore assume that it is not generally used or valued, in spite of the fact that a few subscribers have written to say that they hope it will not be allowed to drop, and have said some kind things about it. The present instalment contains the cases decided in December, 1901, and these will be included in the Annual Digest for that year.

Trinity's New Chancellor.

The University of Trinity College, Toronto, is to be congratulated on its new Chancellor, Mr. Christopher Robinson, K.C., who has had a long and active life at the Ontario Bar, of which he is regarded as the unofficial head, but who has hitherto declined all public positions and honours which have been offered to him. His eloquence, learning, and dignity peculiarly fit him for the Chancellorship; he is the ideal successor of the former Chancellors, his own father, Sir John Beverley Robinson, John Hillyard Cameron, and George William Allan.

The Universities and The Legal Profession.

We are glad to see the ties which bind the Universities to the profession of the law being strengthened in Toronto. Trinity's Chancellors have all been lawyers, though Mr. Allan was not best known in his capacity of barrister. The Provincial University has for many years had Judges and Queen's Counsel for its Chancellors and Vice-Chancellors: William Hume Blake, Joseph Curran Morrison, Adam Crooks, Larratt Smith, Thomas Moss, Edward Blake, and now Chief Justice Sir William Meredith and Mr. Justice Moss. Each of the Universities has a splendid honour roll.

Advertising King's Counsel.

We regret to see the initials K.C. being used for advertising purposes. In this country the offices of barrister and solicitor being commonly held at the same time by the same person, it is sometimes difficult to make a distinction, but never until recently have we observed the initials K.C. tacked on to a man's name when it was obviously used in his capacity of solicitor. "A— B—, K.C., solicitor for the vendors," in an advertisement for the sale of lands, is not only ridiculous, but unprofessional. We also do not like to see "X— Y—, K.C.," on the door of a law office.

Illness of Sir John Boyd.

We are sorry to hear of the illness of the Chancellor of Ontario. He is suffering from erysipelas and from the effects of a severe chill. While it is comforting to learn that he is progressing so well that no alarm is felt by his family on his account, it is not improbable that rest and change of air will be necessary for him in his convalescence; so that he may not be seen at Osgoode Hall for some time.

New Judicial Privy Counsellors.

Sir Andrew Scoble and Sir John Winfield Bonser, the two new members of the Judicial Committee of the Privy Council, will strengthen that tribunal in the adjudication of appeals from India and Ceylon, says *The Times*. Sir Andrew Scoble, who is seventy years old, was called to the Bar at Lincoln's-inn in 1856, and, after being Advocate-General and member of the Legislative Council of Bombay, he was appointed Legal Member of Council in 1886, retiring in 1891. He sat as Conservative Member for Central Hackney from 1892 to 1900. Sir J. W. Bonser, who is fifty-four, was educated at Christ's College, Cambridge, of which society he was elected a Fellow, having been senior classic in 1870. Like his colleague, he was called at Lincoln's-inn, and was appointed successively Attorney-General and Chief Justice of the Straits Settlements, and Chief Justice of Ceylon in 1893. He retired from the latter office recently, and was sworn of the Privy Council on the occasion of the King's Birthday.

Sir Andrew Richard Scoble is well known in Canada, his father having been a member of the Provincial Parliament before Confederation. He has two sisters living in Toronto, the wives respectively of Mr. John George Hodgins, LL.D., and Mr. Thomas Hodgins, K.C., Master in Ordinary.

Discovery of Telephone Messages.

In a Scottish case the pursuer sought discovery of the notes or memoranda of telephonic communications passing between the defender and certain public commissioners, and stated that the person in charge of the telephone in the commissioners' office was in the habit of making a memorandum of each telephone message as it was received. In spite of the defender's protest that the pursuer's demand was unprecedented, the Court granted the "diligence" craved. The value to be attached to such telephonic memoranda as evidence is, of course, another question.

Some Amusing Reporters' Errors.

Mr. Hussey Burgh, who was the acknowledged leader of the Irish Bar and the holder of the great office of Prime Serjeant, with precedence of the Irish Attorney-General, and subsequently Lord Chief Baron of the Irish Exchequer, in a debate in the Irish House of Commons, where he was renowned as an orator, said he "founded himself on the authority of the eminent Serjeant Maynard;" it appeared in all the newspapers next day that he founded himself on the authority "of an eminent sergeant-major." The late Mr. Baron Dowse, who was a member of the Irish Judiciary from 1872 till his death in 1890, in a speech to a jury in Cork, where he appeared as "special" counsel, quoted Tennyson's words, "a cycle of Cathay," which was changed in the report of his speech into "a circus in Bombay." Mr. Baron Dowse remarked from the Bench that "the ordinary Irish resident magistrate was as incompetent to state a case as to write a Greek ode." He was reported to have said that "the ordinary Irish resident magistrate could no more state a case than he could ride a Greek goat." (*Law Times*.)

Recent American Decisions.

Attachment of Debts.—Money deposited by a third person with a justice of the peace, as bail for one who has been

committed by the justice, and which is receipted for to him, is held, in *McAlmond v. Bevington* (Wash.), 53 L. R. A. 597, until the contrary is shewn, to presumably belong to such third person, and not to be subject to garnishment for the prisoner's debt after the latter's discharge.

Cheque.—Mere failure of an indorsee to present a cheque for payment for eleven months, during which time the maker paid the amount to the payee on his assurance that the cheque was mislaid and that he would return it when found, is held, in *Bradley v. Andrus* (C. C. A. 3rd C.), 53 L. R. A. 432, not to estop him from enforcing payment, where the maker relied wholly on the word of the payee in making his payment. A note to this case collates the authorities as to the effect on the drawer's liability of delay in presenting the cheque where the drawee remains solvent.

Evidence.—Upon the question of the procurement of a will by undue influence, evidence that, sixteen years before it was executed, proponent entered testator's family, brought about an estrangement between him and his wife, which resulted in a divorce, and subsequently married him, is held, in *Re Shell* (Colo.), 53 L. R. A. 387, not to be admissible.

Evidence of the finding of money at a place named in a confession is held, in *Whitley v. State* (Miss.), 53 L. R. A. 402, to be inadmissible, because it was not voluntary. With this case is a note collating the authorities on admissibility of evidence obtained by an involuntary or inadmissible confession.

Entries in bank books, not made by the cashier, are held, in *State Bank of Pike v. Brown* (N. Y.), 53 L. R. A. 513, to be inadmissible against sureties on his bond, when there is no proof as to who made them, that the one making them was dead or beyond the jurisdiction of the Court, or that they were made in the usual course of business at the time of the transactions recorded. A note to this case reviews the authorities as to use of persons' books of account as evidence upon issues between other parties.

Fixtures.—Machinery not manufactured especially for a building, but of a kind which can be purchased generally in the market, is held, in *Neufelder v. Third Street and S. R*

Co. (Wash.), 53 L. R. A. 600, not to become, in favour of a mortgagee, part of the realty by being attached by bolts and screws to the building, if it is not intended to become part of the premises, and can be removed without any material injury to or alteration of the building.

Insurance.—A policy of life insurance issued on the life of a minor is held, in *Union Central L. Ins. Co. v. Hilliard* (Ohio), 53 L. R. A. 462, not to be invalid as a wagering contract, although it is induced by a third person who has no insurable interest in the life of the insured, and who joins in a promise, evidenced by promissory notes, to pay the premiums, and although the policy is assigned to the company as collateral security for a loan made to such third person. With this case is a note reviewing the authorities on the validity of life insurance to secure a debt to the insurer.

Railways.—An employee of a passenger railway company, who accepts transportation from the company as a mere gratuity, and not in consideration for his services, is held, in *Peterson v. Seattle Traction Co* (Wash.), 53 L. R. A. 586, to stand like anyone else travelling on a free pass conditioned that the user should assume risk of injury, notwithstanding the transportation would probably not be bestowed in the absence of employment.

Trade-Name.—Failure, for a period of ten years, of a retail dealer to protest against the use, in the wholesale business, of a trade-name which conflicts with the name under which his business is conducted, is held, in *Nolan Brothers Shoe Co. v. Nolan* (Cal.), 53 L. R. A. 384, not to deprive him of the right to restrain the use of such name in a rival retail business.

Will.—A clause in the will of a merchant expressing the desire that a certain person be retained in the employ of the firm is held, in *Jewell v. Louisville Trust Co.* (Ky.), 53 L. R. A. 377, to create no precatory trust which can be enforced against his widow after she has purchased the business and is carrying it on alone.

THE CANADIAN LAW TIMES.

FEBRUARY, 1902.

LUNATICS AND THEIR ESTATES.

SIR EDWARD COKE tells us that of all the terms used to describe persons of unsound mind, "*non compos mentis* is most sure and legall:" Co. Litt., 246. b.

He divides such persons into four classes:—"1. Idiota, which from his nativitie, by a perpetual infirmitie, is *non compos mentis*. 2. Hee that by sicknesse, grieve, or other accident, wholly loseth his memorie and understanding. 3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he hath not understanding. Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken:" *ib.* 247. a.

The word "lunatic" was "coined in more ignorant times:" per Lord Hardwicke, L.C., in *Ex parte Barnsley*, 3 Atk., p. 174: and is "derived from the Latin word *luna*, in respect of lucid intervals which lunatics are usually in the enjoyment of; or in consequence of a notion formerly prevalent, that the moon has an influence upon mental disorders:" Shelford on Lunacy, p. 4; see also, *Ex parte Cranmer*, 12 Ves. 452.

The word has now lost its old precise and technical signification, and is used in the Ontario statute (R. S. O. c. 65) to describe all insane persons, and "includes an idiot or other person of unsound mind:" (s. 1).

Senile imbecility has been held sufficient under the statute: *Re Kelly*, 6 P. R. 220.

It was pointed out in *Re Kelly* that loss of faculties through old age has been always held to be comprehended in the term "unsound mind."

In *Ridgway v. Darwin*, 8 Ves. 66, reference was made to the case of Mr. Charlton Palmer, who was "not insane, but his mind by years and attention to business was worn out."

So, in *Ex parte Cranmer*, 12 Ves. 448, Lord Erskine says:—"A man may have passed a great and illustrious life; and by the course of nature his faculties may decay; so that he may not be fit either to govern himself or his affairs. Why should not a man be entitled to protection in this second state of infancy, as well as the first?"

"This is not a man who has sometimes understanding, and sometimes not: his understanding is defunct; he has survived the period that Providence has assigned to the stability of his mind. Upon this the jurisdiction (which God forbid should not exist in such cases) is clear."

The following remarks of Mr. Shelford on this case (*Lunacy*, p. 88 (g)) are interesting:—"Such is the perishable fabric of the finest genius, that Lord Somers, the Duke of Marlborough, Dean Swift, and Lord Mansfield, might, at the close of their lives, have been made the subject of such a commission." To which Mr. Wood Renton (p. 270) adds:—"Lord Erskine's own name unhappily might be added to the list."

In view of this state of the law, it is not easy to understand two cases, *In re W.* and *In re B.*, noted in 21 C. L. T. Occ. N. p. 340.

Two very aged persons, one over 80 years of age, the other between 85 and 90 years, were from extreme age and mental and physical weakness incompetent to manage their affairs. They had not been declared lunatics, and no declaration to that effect seems to have been asked or made. They were not entitled to moneys in Court. An order was pronounced in each case appointing persons to act "in the nature of a

guardian or committee of the person and estate," and assuming to give such persons authority to sell real estate, etc.

It is difficult to see what jurisdiction there is, in respect of one not declared to be a lunatic, to appoint a guardian or committee of the person, or, apart from statute, to authorize a sale of his real estate. See *Beall v. Smith*, L. R. 9 Ch. p. 92. The only apparent authority for the former proposition is a case of *Vane v. Vane*, 2 Ch. D. 124, "questioned in *Re Bligh*, 12 Ch. D. 364, and corrected in *Re Brandon's Trusts*, 13 Ch. D. 773: *Wood Renton*, 267 (4). In the two latter cases applications were made in regard to moneys in Court, and it was expressly held that the Court of Chancery had no power to appoint a guardian of the person of one who is of unsound mind; that had to be done in the usual way by proceedings in lunacy; orders were made merely for payment out of the moneys in question to the person proposed as guardian, to be applied for the benefit of the petitioner.

And in regard to the sale of real estate it is submitted with deference, that, apart from the express provisions of R. S. O. c. 65, above referred to, the Court has no such jurisdiction as was exercised in the above cases.

Warnock v. Prieur, 12 P. R. 264, illustrates very forcibly the importance of strictness of practice in all matters relating to lunatics. It would probably be safer in all such cases as *Re W.* and *Re B.* to follow the practice adopted in *Re Kelly*; repugnant though this may be to the feelings in such cases, as pointed out by Lord Erskine in *Ex parte Cranmer* (*supra*).

There was at one time an important practical difference between the position of an idiot and that of a lunatic in regard to the rights of the Crown to their estates.

The King as *parens patriæ*, the "political father and guardian of his kingdom," had the protection of all his subjects, and of their lands and goods, and was considered especially bound to take care of all those who, by reason of their imbecility and want of understanding, were incapable of taking care of themselves.

In the case of idiots, found by office, the King was held entitled to a beneficial interest in their estates, and might take to his own use the profits thereof, after making adequate provision for the maintenance and necessary comforts of the idiot and his family; the King was not bound to more than provide for this maintenance, and was entitled by his prerogative to all the surplus of the estate: *In re Fitzgerald*, 2 Sch. & Lef. 436.

In the case of lunatics, the King was a mere trustee, bound to find necessaries for them and their households, but not entitled to the surplus profits for his own use, and was bound to account for the unapplied moneys on the recovery or death of the lunatic.

In either case, however, the Crown, on the recovery or death of its charge, rendered back the estate to him, or to those lawfully entitled to it. See R. S. O. (vol. 3) c. 341.

The distinction gradually ceased, however, to be of much importance, as juries returned verdicts of *non compos mentis*, instead of idiocy, wherever they could, and it ultimately became the practice of the Crown to grant the surplus profits of the estate of the idiot to some of his own family: *Encyclopædia of Laws of England*, VIII., p. 54.

Then the relation of the Crown to both classes approached more nearly the relation of trustee to beneficiary as it is understood in modern times. Lord Erskine described it thus:—"The whole prerogative is this; that it falls to the King to take care of those who cannot take care of themselves." *Ex parte Cranmer*, 12 Ves. p. 449.

The history of English legislation on this subject begins with the statute "*De Prærogativa Regis*," 17 Edw. II. cc. 9 and 10. It was a declaratory Act, in affirmance of the common law.

The Crown has, from at least the sixteenth century, exercised its control over the persons and property of lunatics, mainly by the Lord Chancellor.

It was not, however, as head of the Court of Chancery that the Lord Chancellor exercised the jurisdiction in lunacy, but as the representative and delegate of the Crown, under the sign manual. The theory of the law was, that

when a person was found idiot or lunatic, the Sovereign alone had power to grant the custody of him and his estate by sign manual, and, therefore, to save repeated applications to the Crown, the power in question was delegated by sign manual, countersigned by two secretaries, to the Lord Chancellor on his coming into office.

But after the custody of the idiot or lunatic and his estate had been granted by virtue of this authority, the Lord Chancellor acted in other matters relative to the lunatic not under the sign manual, but by virtue of his general power as keeper of the King's conscience; and the orders of the Court of Chancery in matters of lunacy were enforced by attachment, not as being warranted by the sign manual, but by the general power of the Court: *Encyclopædia of English law*, VIII., 55.

Since the statute *De Prærogativa Regis*, numerous statutes have been passed in England from time to time, regulating such matters.

By the Ontario Judicature Act, the High Court has the "like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of idiots, lunatics, and their estates:" s. 26.

The method of exercising this jurisdiction is regulated by R. S. O. c. 65. (See Judicature Act, s. 40 (3)). By virtue of this legislation the High Court in Ontario is now possessed of all the power of the Crown in lunacy matters: R. S. O. c. 65 (2).

The subject divides itself into two heads: (a) The method of obtaining a judicial finding as to the fact of lunacy, and, (b), proceedings thereafter in relation to the lunatic's estate.

(a) The fact of lunacy.

The methods of finding this are three: (1) Inquisition by commission (R. S. O. c. 65, ss. 3, 4); (2) Inquiry without commission (*ib.* ss. 5-7); (3) Summary application to a Judge (*ib.* s. 8).

(1) The first of these is practically obsolete in Ontario, having been superseded by the more convenient and less

costly summary application. The origin of it was the ancient practice, whenever the Crown had an interest in property, to issue in each particular case an "inquisition" to ascertain whether, under the exact circumstances, any, and what, rights had accrued to it. It was in this way, and because where a person was lunatic or idiot the Crown had a right to take possession of his lands, that inquisition "*de lunatico inquirendo*," or "*de idiotate inquirendo*" originated.

Originally, and in theory, only issued to ascertain the rights of the Crown, in modern times, such inquisitions are always, in truth, for the benefit of the insane person and his family, especially his wife and children: The Insane and the Law, Pitt-Lewis, pp. 71, 72. See, for the practice, Wood Renton on Lunacy, p. 259, *et seq.*; Practical Statutes (Bicknell & Kappele), p. 243.

(2) The method provided by ss. 5-7 of c. 65 is also practically obsolete in Ontario. In cases of doubt, where an application has been made under s. 8, orders have been made referring it to a Judge of Assize to take evidence *viva voce*, and determine the question of sanity or insanity.

(3) Summary application (s. 8).

(a) By whom to be made.

Usually by some one or more of the near relatives of the supposed lunatic, if there are such.

It has been said that:—"When the petition is not by the nearest relations, the Court looks at it with particular jealousy, for it implies that the persons who ought to protect him, neglect their duty." *Ex parte Persse*, 1 Moll. 220.

But this is not an unvarying rule; the policy of the Court (as pointed out by James, L.J.) is not to "lay down any rule or establish any precedent which on the one hand should discourage proper applications to the Court for the protection of unfortunate persons who, from the state of their minds, may require the protection of the Court, and they require very often perhaps protection against their relatives quite as much as against any other persons; and, on the other hand, not to give too much encouragement to speculative petitions presented for the purpose of putting

profit into the pocket of solicitors:" In re E. S., 4 Ch. D. p. 304.

Hence applications have been allowed made by a creditor against his debtor (Re Bell, 2 Coop. t. C. 163), and even by an absolute stranger (Ex parte Ogle, 15 Ves. 112): cf. also Ex parte Persse, *supra*.

(b) How to be made.

By petition; styled, "In the matter of A. B., a supposed lunatic."

The petition should set out all material facts, should allege the fact of the lunacy, should shew who are the relatives of the lunatic, and what property he is possessed of, and should pray specially for a declaration of lunacy, and for the appointment of a committee of the person and estate, or one of these, as circumstances may require; it should ask for costs out of the estate, and for further and other relief. (See Practice Forms (Dunn and Bell), p. 419).

(c) It should be made returnable before a Judge of the High Court of Justice in Chambers. Neither the Master in Chambers nor local Judges have jurisdiction. (Rule 42 (5)).

(d) It should be indorsed as required by Rule 136, and also with the notice prescribed by Rule 937 and Form 70. It is usual also to add a notice that an order will be asked "declaring you the said A. B. to be a lunatic, and appointing a committee of your person and estate."*

(e) Evidence in support of petition.

(1) Affidavits of medical men: Re Fleming, 13 U. C. L. J. N. S. 197; two at least: Re Patton, 1 Ch. Ch. 192.

No matter how eminent the deponents are, their mere opinions will have very little weight.

"The affidavits should state such facts, from which the Court may judge for itself, whether the person is unsound or not." McIntyre v. Kingsley, 1 Ch. Ch. 281.

In Ex parte Persse, 1 Moll. p. 219, Hart, L. C., refused an order on an application supported by an affidavit of a medi-

*A very helpful collection of forms and precedents in proceedings relating to lunatics is to be found in Leggo's Chancery Forms, 2nd ed.

cal practitioner, setting out that the deponent had conversation with the supposed lunatic, that his language was incoherent, and that he was not of sound mind.

"This will not do," (said the Lord Chancellor). "The very words which gave the impression of incoherency should be set out. This is the inference, and the affidavit should state the facts. The precise facts and all the evidence that can be got together, should be laid before me. It is not a matter lightly to be granted."

These affidavits should also state the chances, if any, of recovery, and indicate the condition of the physical health of the alleged lunatic.

(2) In addition to these affidavits from medical men, there should be affidavits from members of the family of the alleged lunatic, and other persons who know him.

These affidavits must not consist of mere generalities or opinions, but must state with particularity the material facts pointing to unsoundness of mind and incapacity on the part of the alleged lunatic to manage himself and his affairs.

They should also state the alleged lunatic's age, and in general terms the nature and amount of his property, and give information as to his relatives.

These affidavits should not be sworn before the solicitor for the petitioner: *Re Hogan*, 3 Atk. 812; nor before his agent: *Duke of Northumberland v. Todd*, 7 Ch. D. 777. They must all be referred to in the indorsement on the petition, and must, therefore, be filed before service thereof.

(f) Service of petition.

The petition should be served on the lunatic personally: *Re Miller*, 1 C. C. R. 215; unless it be shewn that it would be dangerous to his health or state of mind to do so: *Re Mein*, 2 C. C. R. 429; e.g., where he is of a suicidal tendency: *Re Patton*, 1 C. C. R. 192; the mere fact that an affidavit that such service would be dangerous has been made by the medical superintendent of an asylum in which the alleged lunatic is confined, is not sufficient to justify the Court in dispensing with personal service. There should be corroboration: *Re Newman*, 2 C. C. R. 390; *Re Mein*, *ib.* 430.

The confinement might be wholly unjustifiable, and the refusal to permit service upon the lunatic might be to prevent his case being brought under the notice of the Court, and his being set at liberty.

By R. S. O. c. 317, s. 53, the Inspector of Prisons and Public Charities is *ex officio*, and by his name of office, committee of every lunatic who has no other committee, and who is detained in any public asylum (as defined in ss. 2 and 3 of the Act.)

But, notwithstanding this, personal service of a petition for a declaration of lunacy is necessary upon every person confined as insane in a public asylum, and service upon the Inspector is not sufficient: R. S. O. c. 317, s. 55.

LUNATIC OUT OF JURISDICTION.

A commission might issue against an alien (a) resident within the jurisdiction, either temporarily or permanently, and possessing property there; (b) resident abroad but possessing property here; (c) resident within the jurisdiction without possessing property here: *In re Bariatinski*, 1 Ph. Ch. 375; *Encyclopædia of English Law*, VIII., 58; and against a subject resident out of the jurisdiction, but possessing property here: *Ex parte Southcot*, 2 Ves. Sen. 401; *In re Kidd*, 31st July, 1901, decided by Ferguson, J., in Chambers, at Osgoode Hall.

In such cases, by a parity of reasoning, a declaration of lunacy may be made under s. 8, *supra*.

There does not seem to be any rule providing for service upon a lunatic out of Ontario of a petition for a declaration of lunacy. Rule 162 does not cover this case.

The safer course to adopt is probable to apply to a Judge in Chambers for directions as to service in such cases; the Master in Chambers has no power to deal with them: Rule 42 (5.) (Compare *In re Lanwarne*, 30 W. R. 759.)

(g) The order.

Where the Judge is satisfied that the petitioner's case is made out, he indorses on the original petition the following fiat: "I declare the within named A. B. to be a lunatic."

The style of the order which is then drawn up is: "In the matter of A. B., a lunatic."

The order, after declaring that the said A. B. is a lunatic, provides either for the appointment of some named committee of the person (and estate) "the first giving security," etc., or makes a reference to a Master to appoint some fit and proper person committee, upon giving security, etc.

Where the alleged lunatic is confined in a public asylum, a committee of his person is unnecessary, and in cases where the estate is small and easily managed, the Court will decline to appoint a committee of the estate, and will leave the Inspector to act as statutory committee.

It further directs an annual accounting by the committee [see R. S. O. c. 65, s. 10 (4)] in respect of the rents, issues, and profits of the real estate and of the personal estate of the lunatic, and orders payment into Court of any balances which may from time to time be found in the hands of the committee; it should also deal with the question of costs.

Sometimes also the Master will be directed to propound a scheme for the support of the lunatic and for the management of his estate.

(h) Costs.

These are in the discretion of the Court: see R. S. O. c. 65, s. 18.

A petitioner, even though unsuccessful, may be allowed costs out of the estate of the alleged lunatic, where he has acted *bona fide*, and reasonably, and for the benefit of the lunatic.

"The theory" (said Lord Halsbury, L.C.) "upon which proceedings in lunacy are taken is, that the proceedings are for the benefit and protection of the persons who are believed to be incapable, by reason of mental infirmity, of protecting themselves and their property. The principle, therefore, applicable to a litigant who has failed in his litigation, is not even *prima facie* applicable to a petitioner who asks for the protection of the law in favour of one requiring the law's protection." In re Cathcart, [1893] 1 Ch. p. 471.

The judgments in this case, reported in appeal as above, and in [1892] 1 Ch. 549, are very instructive as to the principles on which costs are dealt with in lunacy applications.

But where the petition is not instituted for the real interest of the lunatic, it may be dismissed with costs, even though the respondent is undoubtedly a lunatic: *In re Clark*, 14 P. R. 371; *In re Clare*, 3 Jon. & Lat. 571.

The character and motives of the petitioner will be considered.

A successful petitioner will, as a general rule, be allowed all his proper costs, between solicitor and client, out of the lunatic's estate.

In some cases such costs have been treated as necessities supplied to the lunatic.

In *Williams v. Wentworth*, 5 Beav. p. 329, Lord Langdale said: "When a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand arising in respect of the supply of food and clothing." See also *In re Meares*, 10 Ch. D. 552.

But they cannot be put upon the footing of maintenance, that being absolutely necessary for the sustenance of physical life: *Re Dumbrill*, 10 P. R. 216.

The costs incurred by the alleged lunatic in opposing the petition will generally be allowed out of the estate, as between solicitor and client: *Re Dumbrill*, *supra*.

Otherwise an alleged lunatic could not employ a solicitor to resist a petition, except on the peril of the solicitor losing his costs: *Wentworth v. Tubb*, 7 Jur. 738.

Unless the Court sees that there was something unfair, or frivolous, or needlessly litigious in the proceedings, these costs will be ordered to be paid: *ib.*

A collection of the cases on the subject of costs will be found in *Wood Renton on Lunacy*, pp. 378-383.

(i) Committee.

The general rule is to refer the appointment of a committee to the Master; the practice to be followed is, as nearly as the circumstances will permit, the same as in the appointment of receivers: Rule 765; see pp. 314, 315, *ante*.

Rules 759-766 govern the practice.

Who may be appointed.

"To prevent sinister practices," says Sir William Blackstone, "the next heir is seldom permitted to be committee of the person of the lunatic, because it is his interest that the party should die. But it hath been said that there lies not the same objection against the next of kin, for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may be entitled to enjoy; the heir is, therefore, generally made the manager of the estate, it being clearly his interest by good management to keep it in condition:" 1 Bl. Com. 305.

This doctrine, now happily obsolete, was deservedly characterized by Lord Macclesfield as "very shocking," and as "not grounded upon reason, but (having) prevailed in barbarous times before the nation was civilized:" Mr. Justice Dormer's Case, 2 P. Wms. 264.

The welfare of the lunatic is now the primary and paramount consideration.

As a general rule, the same person is appointed to be committee of the estate and of the person.

In some cases, however, this may not be desirable; separate committees may then be appointed of the person and estate.

In Pope on Lunacy (pp. 105-107) the following principal rules of guidance are said to stand prominently forward: (1) The committee of the person must be resident within the jurisdiction. (2) Where the lunatic is married, the personal custody will be granted to the husband or wife, as the case may be.

But in one case the Court refused to appoint as committee of the person of a lunatic, her husband, who had treated her with great cruelty, and who, in the opinion of the Court, would have appropriated and spent on himself the allowance for maintenance: *Re Davy*, [1892] 3 Ch. 38.

"In nine hundred and ninety-nine cases out of a thousand" the husband will be appointed: per Lindley, L.J.: *ib.*,

p. 39. But he has no indefeasible right, and the Court will exercise a discretion.

(3) Where the lunatic is unmarried, the custody of his person is usually committed to one or more of the next of kin.

(4) But the claims of consanguinity do not create any right, and in a proper case a kinsman may be set aside in favour of a stranger.

(5) Subject to the preceding rules, a person of the same sex as the lunatic is preferred.

(6) The wishes and inclinations of the lunatic and even his prejudices will be regarded in making the appointment: In *Ex parte Fletcher*, 6 Ves. p. 427, Lord Eldon refused to appoint a Master in Chancery as committee of a lunatic "irritated by a prejudice against lawyers in general, of whom his abhorrence is as extreme as it is unfounded." See also *Wood Renton*, pp. 341-344.

The lunatic does not necessarily reside with the committee of the person, but the latter is responsible for his comfort.

"The committee of the person" (says Shelford) "has an important and delicate trust reposed in him; it is his duty to administer all the comfort and amusement which the nature of the case will admit, and the funds of the lunatic will afford; and if the unhappy person be not under his immediate care, the committee ought to engage humane and proper persons to take charge of him, and to consult such intelligent and kind physicians as will employ their utmost skill and efforts for the purpose of restoring the individual to the enjoyment of his senses and his liberty, and not, as it is apprehended is too often the case, prolong and aggravate his disease by unnecessary and petty acts of tyranny, by insults and provocations, which even a person of sane mind would find much difficulty in bearing with perfect composure:" Shelford on Lunacy, 142.

The same general rules that apply to the choice of a committee of the person apply to the appointment of a committee of the estate. Relations or persons interested in the estate are preferred to strangers: *Wood Renton*, p. 347.

(j) Security to be given. !

A bond, with two or more responsible persons as sureties, in double the amount of the personal estate, and of the annual rents and profits of the real estate, taken in the name of, and filed in the office of, the accountant : R. S. O. c. 65, s. 10 (4).

The solicitors of the petitioner or the committee will not be accepted as sureties: Re Gibson, 13 P. R. 359.

(k) Effect of appointment.

The *custody* of the lunatic, and of his estate only, and not any *legal estate* whatever in his property, is granted, passed, or vested by the grant of custody.

The power of a committee is said to be that of a bailiff: Elmer, 7th ed., p. 75; not, indeed, of the lunatic, but of the Crown: cf. Isaacs v. Chinery, 12 T. L. R. 302; Pope, 159.

He is also a trustee, amenable to the Court, and compellable to give an account of his stewardship.

He "best consults prudence by confining his independent action within narrow limits and taking the direction of the Court on every act of management not absolutely trivial or matter of detail:" Pope, 159.

The committee of the estate is the proper person to sue or defend on behalf of the lunatic: Rule 217.

A committee (like a receiver, see Article in 21 C. L. T., pp. 317-319) must obtain the sanction of the Court before he sues or defends on behalf of the lunatic, on peril of having his costs disallowed on the passing of his accounts.

The committee sues in his own name as plaintiff, the lunatic being joined as co-plaintiff : 1 Daniel's Chy. Prac., 6th ed., pp. 116-117; Holmsted & Langton, pp. 387-389.

A lunatic who has been so found must defend by the committee of his estate, who, as well as the lunatic, is a necessary party: *ib.* pp. 181-183.

Persons of unsound mind, not so found, must defend by guardian. See Rule 218, as to mode of appointment, which must be strictly followed. See Holmsted & Langton, p. 390, for practice; and Warnock v. Prieur, *supra*.

[See Rules 157, 219, 220, as to service upon persons of unsound mind.]

An action may be instituted by a next friend of a person of unsound mind, not so found, for the protection of his property.

"The law of the Court of Chancery undoubtedly is, that in certain cases where there is a person of unsound mind, not so found by inquisition, and therefore incapable of invoking the protection of the Court, that protection may, in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend. But every person so constituting himself officially the guardian, committee, and protector of a person of unsound mind, does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceedings:" *Beall v. Smith*, L. R. 9 Ch. pp. 91, 92; *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15.

The first duty of the committee after his appointment is to file the bond required by R. S. O. c. 65, s. 10 (1).

The case of *In re Nevins*, 5 Man. L. R. 137, may be usefully studied by solicitors acting for committees of the estates of lunatics; it contains a summary of the law relating to the duties and responsibilities of trustees.

(To be continued.)

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CONSOLIDATION OF IMPERIAL STATUTES IN FORCE IN ONTARIO.

More than a hundred years have elapsed since the first Parliament of Upper Canada abolished the French law in this Province, and enacted that in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as they stood on the 15th day of October 1892, as the rule of decision of the same.

The effect of this provision, as is well known, was not only to introduce the English common law and equity law, but also to incorporate as part of the Provincial law a considerable body of the statute law of England. This provision was supplemented later on, from time to time, when the Superior Courts of Law and Equity were established, by providing that those Courts should have the like jurisdiction as their English prototypes possessed on certain days specified, which was early held to include the jurisdiction conferred on the latter Courts by statute; and, further, by the 20 V. c. 56, s. 1, the jurisdiction which the English Court of Chancery possessed on the 10th June, 1857, in all cases where there was no adequate remedy at law, was also conferred on the Provincial Court of Chancery, and still later, by 28 V. c. 17, the jurisdiction in regard to enabling minors, with the approbation of the Court, to make binding settlements of their real and personal estates on marriage, possessed by the English Court of Chancery on the 18th March, 1865, was also conferred on the former Provincial Court of Chancery.

By 22 V. c. 93, it was also provided that the practice of the Surrogate Courts should, as far as circumstances would admit, be according to the practice in Her Majesty's Court of Probate in England; and by the same Act the Court of Chancery was given the same equitable jurisdiction in matters of revenue as the English Court of Exchequer then possessed.

The effect of these various enactments, which have been kept in force, and are to be found to-day embodied in the Revised Statutes of Ontario, is to incorporate into the statute law of Ontario a considerable number of statutes, and parts of statutes, of the Imperial Parliament, and these statutes to-day constitute the law by which many subjects of common interest are regulated in Ontario. For instance, the law of real property, the law of landlord and tenant, of executors and administrators, of trusts and trustees, infants and lunatics, the administration of justice, are all more or less governed by English statutes which have been brought into operation in Ontario by virtue of the legislation above referred to.

If in England the statutes had ever been revised and consolidated, as has been from time to time done in Canada, it might possibly be an easy task to pick out from the great mass of English statute law those parts of it which are applicable in Ontario, but, unfortunately, no such consolidation and revision has ever taken place. The utmost our English brethren have had the courage to do, has been to prepare elaborate indices of the statute law, and from time to time pass statutes weeding out, and repealing, statutes which have obviously become spent and inoperative, or which conflict with later legislation. This, no doubt, is of considerable assistance to the student of English statute law, but it still leaves that branch of law to a large extent a crude and undigested mass of *disjecta membra* which it is very hard to master.

The same strange reluctance to put this branch of law into a plain and comprehensible shape which has characterized the lawyers and statesmen of England, has also been remarkable among the statesmen and lawyers of this Province. More than once the extreme desirability of letting light into this region of chaos has been suggested to those in power, but such suggestions have always, until quite recently, been met by a *non possumus*, as though the subject were too holy, or too intricate, or too delicate, for any profane modern touch of improvement.

There can be no doubt that, even among so called liberal statesmen and lawyers, there has been a feeling of reverence for the past which has made any attempt to interfere with the cobwebs and dust of our ancient statute law in their eyes a more or less sacrilegious act, and one not to be thought of. To dare, for instance, to revise and consolidate *Magna Charta*, or the Statutes of De Donis, or *Quia Emptores*, would, in their eyes, seem almost as inadmissible as to attempt to improve Holy Writ. And yet there is no sort of doubt that many sections of *Magna Charta*, or, to speak more correctly, the Confirmation of the *Charta*, which alone is printed in the statute book, are as completely out of date and useless at the present day as are the laws of Cnut or Edward the Confessor.

Why should laws be continued on the statute book which have obviously lost all vitality? All law is supposed to be a vital rule of conduct: the moment it is dead, it had surely better be decently buried by a formal repeal, than be allowed to linger "superfluous on the stage," pretending to be something which it is not.

There was no doubt some convenience in enacting the Provincial statutes to which we have referred; it saved the legislators the labour of attempting to frame a code of law, or to define with precision those particular English statutes which were intended to be adopted; but the result of it is that it has been left to the Provincial Courts to decide from time to time in particular cases whether any particular English Act relied on by a litigant is or is not in force; unless, therefore, the question has come into actual litigation, whether any particular Imperial Act is in force, it has been hitherto more or less a matter of doubt whether or not it is so, which could only be resolved with certainty at the end of a law suit, which was a very curious position for a law to be in.

One would have thought that the obvious inconvenience of this state of things would have proved so great that some strenuous effort would have been long since made, not only to reduce this branch of law to order, or, at all events, to define with precision the laws actually in force. As it is,

we have had to roam through statute books embracing English legislation from the thirteenth century to the present time, to pick out the particular portions which may possibly be still vital and operative here. Take, for instance, the law of landlord and tenant. If we would find the authority for distraining for rents-seck, we must go to 4 Geo. II. c. 28; or for rents due on expired leases to 8 Anne c. 18 (or 14); for a husband's right of distress for arrears of rent due to his deceased wife, or the right of distress in case of rents due to tenants *pur autre vie*, we must refer to 32 Hen. VIII. c. 37; or if we would learn by what right grain and growing crops may be distrained, we must refer to 2 W. & M. c. 5, and 11 Geo. II. c. 19. Then, if we would know to what extent beasts "which gain a man's land" are exempt from distress for rent, we must go to 51 Hen. III. st. 4; and that chattels must not ordinarily be distrained off the demised premises, to the Statute of Marlbridge. Then, as to the fraudulent removal of goods by tenants, and the rights of landlords consequent thereon, we have again to refer to 11 Geo. II. c. 19; and we must refer to 1 P. & M. c. 12, and 11 Geo. II. c. 19, if we would know where the property distrained for rent is to be impounded; and for the penalty for pound breach, or rescue, we must go to 2 W. & M. c. 5, which also regulates the sale of the distress; and for the liability of a distrainer for excessive distress, we have to go again to the Statute of Marlbridge, 52 Hen. III., and the Statute of Westminster, 3 Edw. I. c. 16, and 2 W. & M. c. 5. Then, as to the right of landlords in reference to goods taken in execution, 8 Anne c. 18 (or 14) has to be looked at; and for the liability of lessees for waste, the law is to be found in the Statute of Marlbridge. To 4 & 5 Anne c. 3 (or 16) we have to refer on the question of attornment by tenants upon an assignment of the reversion. This, it may be observed, is but one branch of law; if we were to take the law relating to executors and administrators, it would be necessary to roam through the statutes from the Statute of Westminster (13 Edw. I. c. 23) to 21 & 22 V. in order to pick out from the mass, 25 Edw. III. st. 5; 31 Edw. III. st. 1; 21 Hen. VIII. cc. 4, 5; 43 Eliz. c. 8; 1 Jac. I. c. 17; 30 Car. II. c. 7; 4 W. & M. c. 24;

11 Geo. IV. and 1 W. IV. c. 47; 2 & 3 V. c. 60; 21 & 22 V. c. 95: in all of which a section here and there may be found bearing on the subject. For the law relating to the administration of justice, or real property, we have to make similar excursions.

In view of this chaotic state of things, it must be with some satisfaction that the profession has learned that the present Ontario Government has succeeded in reducing this branch of law to some sort of certainty, order, and system, and the result has been to gather the various Imperial statutes which have been made law in Ontario by virtue of Provincial statutes, arranged in a systematic order into a small volume, which is to constitute the third volume of the Revised Statutes, and when published the public and profession will no longer have to refer to the Imperial statutes for Ontario laws, save only those that are in force here *ex proprio vigore*; and when the next general revision and consolidation of the Ontario statutes takes place, we presume all those Imperial statutes which are now included in volume 3 will find their appropriate place with the other statutes of Ontario.

Assuming this revision and consolidation to have been carefully executed, as we trust it may prove to have been, it will be a work to which the present Attorney-General, upon whose initiative it has been undertaken, may look back with some satisfaction as not the least useful and beneficial project that has marked his term of office.

The consolidation and revision has been executed by Mr. Holmsted, the Senior Registrar of the High Court, under the supervision and direction of a strong committee consisting of Sir John Boyd, K.C.M.G., the Chancellor of Ontario and President of the High Court, the learned Chief Justices of the Common Pleas and King's Bench, Mr. Justice Moss, and Sir Thomas Taylor, the former Chief Justice of Manitoba.

RECENT CASES FROM THE TIMES REPORTS.*

Benefit Society.]—The Friendly Societies Act, 1875, provides that a member may nominate some person to whom any money payable at his death shall be paid, and that in default of nomination the money shall be paid to the person who appears to a majority of the trustees to be entitled by law to receive it. In *In re Griffin, Griffin v. Griffin*, 18 T. L. R. 142, the Court of Appeal held that nomination was not the only mode of alienation, and that the general rule as to assignability applied. The Court did not express any opinion as to the effect of assignment after nomination, or nomination after assignment. Compare the Ontario Acts, R. S. O. 1897 c. 211, s. 12, and R. S. O. 1897 c. 203, s. 151 *et seq.*; and see *Johnston v. Catholic Mutual Benevolent Association*, 24 A. R. 88; *Fawcett v. Fawcett*, 26 A. R. 335; *Book v. Book*, 1 O. L. R. 86; *Gillie v. Young*, 1 O. L. R. 368.

Carriers.]—The effect of the limitation of carriers' liability arises in an unusual way in *Berry v. South Eastern, etc., Railway Committee*, 18 T. L. R. 159. The carrier's liability was limited to "£50 for any horse." One of a pair of horses was killed in transit owing to the negligence of the defendants' servant. It was held that, as all the damage arose from the mishap to one horse, the plaintiff could recover only £50, and not, in addition, the depreciation in value of the surviving horse as one of a pair, and the special expenses subsequently incurred in reshipping the survivor and caring for it when acceptance of it was refused.

Company.]—A company was formed to make and work a railway in Brazil and to take over contracts and concessions from the Brazilian Government. Under a contract taken

*Including the cases in No. 8, Vol. 18, being the last number published before the Christmas vacation.

over, the Brazilian Government had the option to purchase the undertaking at the end of thirty years and to pay for it in Brazilian bonds. The company had power to lease, exchange, transfer, mortgage, pledge, sell, surrender, or otherwise deal with and dispose of all or any part of the undertaking. It was held—*Loeffler v. Donna Theresa Christina Railway Company (Limited)*, 18 T. L. R. 149—that the company could, upon a sale to the Brazilian Government before the expiration of thirty years, accept payment in Brazilian bonds, and were not bound to accept cash only. Such a sale being, the Court thought, either an accelerated exercise by consent of the express option, or not a sale strictly—which would in the absence of express power have to be for cash—but a dealing with and disposition of the undertaking under the special provision of the articles of association.—It was directed in *In re The Spiral Globe (Limited)*, 18 T. L. R. 154, that registration of debentures permitted after the proper time should be without prejudice to rights acquired before the registration, the rights particularly in contemplation being those of the liquidator of the company as representing creditors generally.—The Court of Appeal in *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, 18 T. L. R. 161, affirmed the judgment of Kekewich, J., 17 T. L. R. 117, noted 21 C. L. T. 49, the question being whether a contract entered into with a trustee for an intended company could be enforced against the company after its incorporation.

Criminal Law.]—A man cannot be convicted, so it is decided in *Rex v. Jones*, 18 T. L. R. 156, of attempting to discharge a revolver with intent to kill, if it is proved that the man knew that the revolver, though apparently loaded, was loaded with cartridges not intended for it, which could not be discharged by it; the intent being in truth to frighten. It is scarcely necessary to add, however, that, under several sections of the Criminal Code, proper punishment for such an act could be meted out.

Crossed Cheques.]—The judgment of Bucknill, J., in *Gordon v. London City and Midland Bank (Limited)*, 17 T.

L. R. 176, noted 21 C. L. T. 118, was reversed by the Court of Appeal. The plaintiff's book-keeper forged his indorsement to cheques, and then deposited them to his own credit with the defendants at their local branch, first adding his own indorsement, and in many instances first crossing the cheques. The local branch placed the amount of the cheques to the depositor's credit, and, after crossing the cheques in favour of their head office, sent them forward and were credited with the proceeds. It was held by the Court of Appeal that the bankers thus received payment for themselves and not for a customer, and were not protected under s. 82 of the Bills of Exchange Act, 1882. See the Dominion Bills of Exchange Act, s. 81. Some of the cheques were payable to bearer, and as to these the bankers were held to be protected. It was also held that a draft drawn by one branch of a bank on another branch of the same bank is not a cheque, not being "drawn by one person on another."

Damages.]—Two useful points of practice are dealt with in *Chattell v. Daily Mail Publishing Co.*, 18 T. L. R. 165, an action for libel. The plaintiff in her claim asked £1,000 damages. The defendants did not defend, and interlocutory judgment was signed for damages to be assessed. The jury gave a verdict for £2,500. It was held that the amount claimed was the limit, however, and that, no leave to amend the claim having been given, the verdict could not stand. It was also held that the insinuations by the plaintiff's counsel in his address to the jury that the defendants had asked for an extension of time to defend merely for the purpose of enabling them to search for evidence in justification of the libel, and not in good faith, was unfair and improper, and in itself a ground for setting aside the verdict. On the merits the case is of interest as being a recognition of the doctrine that to overstate the age of an actress—youth being a valuable trade property—is libellous.—The question in *General Accident Assurance Corporation v. Noel*, 18 T. L. R. 164, is the same as that dealt with in the recent case of *Snider v. McKelvey*, 27 A. R. 339, and the decision was the same, namely, that under an agreement not to compete, with

a provision to pay a liquidated sum in the event of breach, the injured person cannot have both an injunction and damages, but must elect which remedy to pursue.—The judgment of the Court of Appeal in *The Winkfield*, 18 T. L. R. 178, reversing that of *Jeune, P.*, 17 T. L. R. 567, noted 21 C. L. T. 371, is a very interesting one on the question of measure of damages by a bailee in possession against a wrongdoer. The bailee was the Postmaster-General, and he claimed damages for the loss of registered letters which were in a vessel sunk in a collision. It was held that, though he was not liable to the bailors (the senders of the letters), he could recover the full value of the letters, with an obligation to account to the bailors for the damages recovered.

Judgment.]—In *Birch v. Birch*, 18 T. L. R. 151, it was held that a judgment in a probate action upholding an alleged will could be set aside on the grounds of perjury and fraud in a second action against defendants who took under the alleged will but had not been privy to the fraud.

Landlord and Tenant.]—*Charrington and Co. (Limited) v. Camp*, 18 T. L. R. 152, is another case between landlord and tenant of a public house. The lessee closed the public house in breach of a covenant in the lease. *Joyce, J.*, without deciding whether the lessor should have given notice of the breach, made an order before trial appointing a receiver to hold the license, and, for the purpose of preserving it, also gave him possession of the public house.—The judgment of the Court of Appeal in *Daly v. Edwards*, 17 T. L. R. 115, noted, 21 C. L. T. 58, as to forfeiture for breach of covenant not to assign or sub-let without leave, was affirmed by the House of Lords, *sub nom. Edwards v. Barrington*, 18 T. L. R. 169.

Municipal Corporations.]—*Bull v. Mayor, etc., of Shore-ditch*, 18 T. L. R. 171, is worth noting as to the liability of a municipal corporation for an accident resulting from a heap of earth being left in the highway. There was much discussion in the case as to misfeasance and nonfeasance—a distinction not important in Ontario—and in the end it

was held that the case should have been left to the jury. The case is not unlike *McGregor v. Harwich*, 29 S. C. R. 443, but the point which the plaintiff there failed to make out—notice to the defendants of the existence of the obstruction—had, in the English case, evidence to support it.

Particulars.]—The much talked of slander action of *Wernher Beit and Co. v. Markham* is gone into at considerable length on a motion to strike out particulars, reported 18 T. L. R. 143. The charge was that the plaintiffs were “thieves and swindlers in connection with the part they have played in financial operations in South Africa.” Particulars alleging that the plaintiffs had made politics subservient to their personal ends for the purpose of enriching themselves, were struck out as irrelevant and embarrassing.

Principal and Agent.]—In *Legge v. Byas Mosley and Co.*, 18 T. L. R. 137, there was applied the rule stated in (among other cases) *Sweeting v. Pearce*, 9 C. B. N. S. at p. 540, that “the legal presumption of authority given to a person who is to receive satisfaction for another for a money demand is that he is to receive it by payment of money only.” The defendants, who were insurance brokers, attempted to set off, in satisfaction of part of a claim for a loss suffered by the plaintiff, a claim of their own against the plaintiff’s agent, who had instructions to collect. It was held that they had no right to do this, even with the agent’s acquiescence, and that the plaintiff was not bound to have recourse to the agent, but was entitled to recover the full amount from the defendants. In *Donogh v. Gillespie*, 21 A. R. 292, the same principle was applied in the case of a banker intrusted with a draft for collection.

Ship.]—The question of quantum of damage in a collision case was considered in *The Acanthus*, 18 T. L. R. 160, the question being whether the whole expenses of putting the damaged vessel in dry-dock were recoverable.—In *The Port Victoria*, 18 T. L. R. 165, expenses incurred in getting out of the way of a vessel which, owing to negligence, was drifting down upon another, were held to be recoverable.—

Manchester Liners (Limited) v. British and Foreign Marine Ins. Co., 18 T. L. R. 183, deals with the construction of a policy of marine insurance in respect of money deducted by charterers during the time a vessel was laid up for repairs.

Solicitor.]—The validity of a solicitor's retainer was called in question in **Brooks Jenkins and Co. v. Mayor, etc.**, of Torquay, 18 T. L. R. 139. A local authority, by resolution not under seal, retained a solicitor to do certain work, and after some costs had been incurred their seal was, pursuant to resolution to that effect, affixed to the original resolution. The solicitor then proceeded with the work. It was held that the local authority could not after that dispute the retainer, for either there was a new contract under seal for new consideration—viz., the solicitor's undertaking to proceed with and finish the work; or a binding confirmation under seal of the original contract, which required no new consideration to support it. The principle that where the benefit of a contract has been received by a statutory body of the kind in question, payment may be validly made, was also invoked; as to which see such cases as **Bernardin v. North Dufferin**, 19 S. C. R. 556; **Waterous Engine Works Co. v. Palmerston**, 21 S. C. R. 556. The Act in question provided that a contract must be in writing, and it was contended that the signature of both parties was essential. But it was held that the object of the Act was that the terms of contracts should be in writing, and that the fact that the solicitors had not signed the resolution or any formal contract was not fatal. While the corporate body for whom work is done may not be able to dispute the informal retainer, the danger of an adverse motion by the opposing solicitor must not be lost sight of, with the result arrived at in **Barrie Public School Board v. Town of Barrie**, 19 P. R. 33.

Trust.]—In **Evans Williams v. Byron**, 18 T. L. R. 172, trustees who left money in a solicitor's hands for investment were held liable for its loss through his fraud, their conduct, though honest, not being, in the opinion of the

Court, reasonable. The facts are fully stated, and the case should be kept in mind with *Clark v. Bellamy*, 27 A. R. 435, and *Stewart v. Snyder*, 27 A. R. 423. The relieving Act is not a "general indemnity clause for honest men who neglect their duty."

Will.]—In *In re Moses*, *Beddington v. Beddington*, 18 T. L. R. 147, the Court of Appeal deals at great length with the question of the exercise by will of a power of appointment.—*Gattward v. Knee*, 18 T. L. R. 163, and *May v. May*, 18 T. L. R. 184, are cases in which letters written by soldiers on active service were admitted to probate as testamentary instruments.

EDITORIAL REVIEW.

Death of Mr. Justice Gwynne.

With much regret, and with deep sympathy for his family and friends, we record the death of Mr. Justice Gwynne, of the Supreme Court of Canada. He died at Ottawa on the 6th January last, having attained the advanced age of 87. He was engaged in the active discharge of his duties as a Judge up to about a fortnight before his death, and he was quite as vigorous and energetic when last seen in Court as in his earliest days upon the Bench, 33 years ago.

John Wellington Gwynne was born in Ireland in 1814, the son of a Dublin clergyman. He came to Canada in 1832, but apparently returned to Dublin, for we hear of him at Trinity College; he was called to the Bar of Upper Canada in 1837; elected a Bencher of the Law Society in 1849; and created a Queen's Counsel in 1850. He was appointed a puisne Judge of the Court of Common Pleas on the 12th November, 1868, and promoted to the Supreme Court of Canada in January, 1879. He had thus a long judicial life; he was appointed to the Bench a year earlier than the Chief Justice of Canada, who is eleven years younger, and who survives his distinguished colleague.

Mr. Justice Gwynne was remarkable for knowing both law and equity at a time when there were very few who practised at both Bars. He had strong convictions, an active mind, great facility in expression, and a strong desire to do justice. He was an excellent Judge, and a most estimable man,—generous, kindly, courteous, and sincere.

Sir William Meredith, Chief Justice of the Common Pleas, at the opening of the sitting of a Divisional Court at Osgoode Hall on the 6th January, spoke as follows of the deceased jurist:—

“Before proceeding with the business appointed for to-day, it is fitting that reference should be made to the

loss which the Canadian judiciary and people have sustained by the death of the Honourable Mr. Justice Gwynne, which occurred at an early hour this morning.

"Appointed a puisne Judge of the Court of Common Pleas on the 12th November, 1868, he sat as a member of that Court, of which this Division is the successor, until the 14th January, 1879, when, upon the resignation of Sir William Richards, then Chief Justice, he was appointed a puisne Judge of the Supreme Court of Canada, of which he remained a member until his death.

"Seldom has it fallen to the lot of a Judge in this country to remain in the active discharge of his duties until he has attained the ripe age of 88 years, yet he who has just passed away was permitted to do so, retaining to the last in full vigour his intellectual powers.

"The departed Judge leaves behind him a record of an unusually long and active, as well as distinguished, judicial service, and the memory of him will remain not only for this, but for the kindness and courtesy which he uniformly exhibited towards the Bar, and to all those who were brought in contact with him throughout the course of his judicial career."

County Judge of Halton.

Mr. John M. Hamilton, Judge of the County Court of Halton, and previously for many years Judge of the District Court of Algoma, has retired, upon the usual allowance; and Mr. T. A. Gorham, a Port Arthur barrister, has been appointed to the Halton judgeship.

County of Carleton Law Association.

The report of the board of trustees of the County of Carleton Law Association for the year 1901 shews that the association has been in existence for fourteen years, and that its affairs are in a prosperous condition. The present membership is 73, and there is a cash balance on hand of \$87.43. The annual grant from the Law Society amounted to \$520, and that of the Ontario Government to \$60.68, while the annual subscriptions from members amounted to \$290. The sum of \$329.08 was expended in the purchase

of books; 71 volumes were purchased by the association; and 32 were presented by Mr. Douglas Brymner. There are 2,111 volumes in the library, the value of which is about \$6,400, and which are insured for \$4,000. The efforts of the association during the past year were chiefly devoted, as the report shews, to opposing the Law Reform bill introduced at the last session of the Ontario Legislature, and to endeavouring to procure better accommodation for the members and other lawyers in the Ottawa Court House.

The following officers were elected for the year 1902:—President, R. G. Code; Vice-President, John F. Orde; Treasurer, F. A. Magee; Secretary, E. F. Burritt; Trustees, W. D. Hogg, K.C., F. H. Chrysler, K.C., William Wyld, J. P. Fisher, and John Bishop.

Selected Bar Anecdotes.

The following verdict was rendered by a coroner's jury in Mississippi: "We, the jury, find that the deceased came to his death by a stroke of an eastbound train, No. 204, on I. C. R. R., at Fentress, Miss., in Choctaw county, on the 27th day of November, 1898, he being in a reasonable state of intoxication."

On one occasion the bailiff of a Court over which Mr. Justice Maule was presiding had been sworn to keep the jury locked up "without meat, drink, or fire, candles only excepted." One of the jurymen, being thirsty, asked for a glass of water, and the bailiff asked the Judge if it could be allowed. "Yes," said the latter. "It certainly isn't meat, and I shouldn't call it drink."

Recent American Decisions.

Distribution of Estate.—In the distribution of the estate of an intestate, a first cousin of the half blood on the maternal side is held in Ecton v. Grant (Ga.), 53 L. R. A. 723, to take the estate in preference to a second cousin of the whole blood.

Insurance.—A policy containing a clause making it incontestable after two years from date of issue is held in Murray v. State Mutual L. Assur. Co. (R. I.), 53 L. R. A.

742, not to be contestable after that time, even for false and fraudulent answers in the application.

An insurance company is held in *Metropolitan L. Ins. Co. v. Smith* (Ky.), 53 L. R. A. 817, to be liable to a husband for the amount of premiums received by it from his wife for insurance on his life, where the policy was taken without his knowledge, and the money was paid by her out of funds with which he had provided her for household expenses. With this case is a note reviewing the authorities as to the wife's right to insure the life of her husband.

Limitation of Actions.—That money is obtained by fraud is held in *Smith v. Blachley* (Pa.), 53 L. R. A. 849, not to prevent the running of the Statute of Limitations, against an action to recover it back, from the consummation of the transaction, unless investigation is prevented by affirmative efforts on the part of the wrongdoer.

Malicious Prosecution.—A termination of a prosecution for obtaining money by false pretences, in favour of the defendant, which will support an action for malicious prosecution, is held in *Craig v. Ginn* (Del.), 53 L. R. A. 715, not to be effected by his discharge secured by an agreement by which defendant, who insists on a postponement which is objected to by plaintiff, agrees to pay the amount found due by his accounts, and half the costs.

Negligence.—A person managing and controlling a public place of amusement to which he invites the public, on payment of an admission fee, who sells intoxicating liquor to one in attendance at such place, and thereby renders him drunk and disorderly, well knowing that when in that condition he is liable to commit assaults upon others, is held in *Mastad v. Swedish Brethren* (Minn.), 53 L. R. A. 803, to be bound to exercise reasonable care to protect his other patrons from such assaults, and to be liable in damages for failure to do so at the suit of one assaulted.

Nuisance—Prescription.—The right to conduct water from a roof across a sidewalk in such a way that it freezes and renders the walk dangerous to public travel, thereby creating a public nuisance, is held in *Leahan v. Cochrane* (Mass.), 53 L. R. A. 891, not to be acquired by prescription.

A suit by a private individual for private injuries inflicted upon him by the maintenance of a public nuisance is held in *Charnley v. Shawano Water Power & R. I. Co.* (Wis.), 53 L. R. A. 895, to be barred by lapse of time. With these cases is a note collating the authorities as to prescriptive right to maintain a public nuisance.

Railways.—The reasonable exercise of care to protect the property of a sleeping passenger is held in *Cooney v. Pullman Palace Car Co.* (Ala.), 53 L. R. A. 690, not to be shewn, where the company allows a number of passengers to leave the car with baggage in their hands without paying any attention as to whose it is, and an employee is present who knows the baggage of the sleeping passenger and by attention might prevent its removal from the car by a stranger.

A mere general limitation as to value expressed in a bill of lading and amounting to no more than an "arbitrary pre-adjustment of the measure of damages," although the shipper assents in writing to the terms of the document, is held in *Central of Georgia R. Co. v. Murphey* (Ga.), 53 L. R. A. 720, not to exempt a negligent carrier from liability for the true value.

Trust.—The vesting of a title to real property of a married woman in her husband at her death, because of his refusal to procure some one to draw her will, by which she wished to devise the land to third persons, is held in *Ransdel v. Moore* (Ind.), 53 L. R. A. 753, to be a sufficient consideration for his promise to hold it in trust for them, so that they may enforce the promise.

Warehouseman.—The destruction by an incendiary fire of wheat stored in a warehouse under a contract calling for its redelivery, "damage by the elements excepted," is held in *Pope v. Farmers' Union & Milling Co.* (Cal.), 53 L. R. A. 673, not to excuse the warehouseman from his obligation. With this case is a note reviewing the authorities as to what constitutes damages "by the elements" within the meaning of contracts with stipulations referring thereto.

BOOK REVIEWS.

Wyatt Paine on Bailments.—A commentary on the law of custody and possession, as distinguished from property, in chattels; by Wyatt Paine, of the Inner Temple and North-Eastern Circuit, Barrister-at-law, Author of "The Inebriates Acts, 1879 to 1898." London: Sweet & Maxwell, Limited: 1901.

The subject well deserves separate treatment, and is ably treated by Mr. Paine. The following are the principal heads of the subject, and they give an idea both of the scope and method of the treatment:—Carriers and carriage by sea and land; Pledge; Hire-purchase; Bills of sale; Deposit; Mandate; Goods in the custody of the law; Nature of the possession of chattels by executors and trustees; Rights, obligations, and liens of Artificers, Auctioneers, Bankers, Innkeepers, Pawnbrokers, Solicitors, Unpaid vendors, Warehousemen. There is also a supplementary chapter on the carriage of passengers—more or less remotely connected with bailment; and (*mirabile dictu!*) appendices of Indian and Australasian cases. Jealous Canadians will perhaps resent the absence of a Canadian appendix, and indeed it is rather hard to suggest a reason for it. The author does not help us here, for he simply tells us that "it has been thought that the addition of a selection of leading Australasian and Indian decisions may add to the legal value and utility of the work;" while he adds a modest hope that his book "may prove useful to the members of that profession to which he belongs, not only in the United Kingdom, but also in that larger Britain which is so indissolubly bound to the motherland by the ties of affection, interest, policy, and, perhaps not least in cogency, by the sanctions of custom and law." If it is to be the fashion for English text books to include references to Colonial cases, Canada should not be forgotten. Perhaps Mr. Paine will take a note of this for his second edition; but after all we are indebted to him for following in this regard the lead of another author; and it may be hoped that the new Imperialism will soon extend, in the fullest measure, to legal text-books. Taken as a whole the present book is scientific, clean-cut, and thorough.

Safford and Wheeler's Privy Council Practice.—The Practice of the Privy Council in Judicial Matters in Appeals from Courts of Civil, Criminal, and Admiralty Jurisdiction in the Colonies, Possessions, and Foreign jurisdictions of the Crown, and in Appeals from Ecclesiastical and Prize Courts, together with the Practice as to matters heard upon special reference and applications for the prolongation of Patents; with Forms of Procedure and Precedents of Bills of Costs. (Founded upon "Macpherson's Practice of the Judicial Committee of the Privy Council.") By Frank Safford, Recorder of Canterbury, and George Wheeler, of the Judicial Department of the Privy Council, Barristers-at-law. London: Sweet and Maxwell, Limited: 1901.

One-fourth of the entire population of the whole world has the right to appeal to the British Sovereign in Council. Since the issue, in 1873, of the last edition of Mr. Macpherson's work on the Practice of the Privy Council, the Empire has increased by more than one-fourth both in area and in population. These statements certainly justify this addition to what may be termed Imperial legal literature. The plan of the book is as follows: Part I. The Imperial statutes which affect the jurisdiction, constitution, and practice of the Sovereign in Council and the Judicial Committee. These are followed by Orders in Council of general application in appeals, with precedents of forms and bills of costs. Part II. A table of appeals and an account of each particular possession, colony, or foreign jurisdiction, with the rules governing the steps which have to be taken abroad in the appeal. The law in force and the Court from which the appeal lies are indicated in each instance. Part III. A treatise on the general practice in appeals. Part IV. Appeals from Courts of special jurisdiction. Part V. The practice in applications for the prolongation or extension of letters patent for inventions. This plan, though novel, is admirable. The whole makes a big volume, nearly 1,200 pages. It is obviously impossible to attempt any criticism of such a work; it is easy to see, however, that no labour has been spared; and the names of the authors and publishers are a guaranty of carefulness and accuracy.

The work is appropriately dedicated to the King—of course, by permission, which is very rarely accorded.

THE CANADIAN LAW TIMES.

MARCH, 1902.

LUNATICS AND THEIR ESTATES.

(*Concluded*).

(b) THE LUNATIC'S ESTATE.

THE following general observations made by Mr. Pope in his book on Lunacy (2nd ed., p. 156) may well be reproduced here:—

“The Court, in the management of the lunatic's estate, aims as far as it can to represent the lunatic himself, and supply the place in society and the state which his withdrawal has rendered void. It would, however, be neither expedient nor possible to permit the colour of individual character to enter into this representation. The character of the administration should be consistent, and for the most part uniform. Accordingly, we find in the actual practice of the Court, which is, as it were, the mind and soul of the *persona* of the lunatic, as the committee is the eye and ear, mouth and hand, a definite character expressed—the character, namely, of the prudent and occasionally selfish man of the world. Traits of a more benevolent disposition have appeared in the chapter on Maintenance; but the general management is that of a man tentative and unadventurous; open-handed, to avoid probable loss; sparing, to make possible gain: supremely concerned for his own comfort, and disregardful of the interests and expectations of others; finally,

so absolutely satisfied with the existing condition and probable destination of his property, that nothing but his own comfort will induce him to change either."

Four plain rules guide the Court in the management of the estate:—

(1) The interest of the lunatic himself determines all dealings with his property.

(2) The quality of a lunatic's estate will not, if possible, be changed during the continuance of his disability. If the lunatic recovers, he may reasonably expect to find his property in the same state as when he became of unsound mind.

(3) The Court, in the management of the estate, will adopt reasonable precautions and contract reasonable expense for its maintenance, and, within bounds, its ordinary improvement, even where the circumstances of the lunatic are not such as to make an addition to his income necessary.

(4) The Court will not speculate with the lunatic's property: Pope, pp. 160-162.

The statute specifies two cases in which an application may be made for a sale of the real estate of a lunatic:

(1) Where the personal estate is insufficient for the discharge of the debts of the lunatic; (2) Where the personal estate and the rents, profits, and income of the real estate are insufficient for the maintenance of the lunatic or that of his family, or for the education of his children: ss. 11, 12.

(1) For payment of debts.

The committee of the estate may apply by petition for authority to mortgage, lease, or sell so much of the real estate as may be necessary for this purpose: s. 11 (1).

The petition must set forth the particulars and amount of the estate, real and personal, of the lunatic, the application made of any personal estate, and an account of the debts and demands against the estate: s. 11 (2).

The petition is to be presented to a Judge in Chambers, and notice must be given to, or the consent obtained of, "all parties interested in the real estate:" s. 11 (3).

It has been held that where the heirs at law and next of kin are unknown, or where they reside at a distance and service upon them would be attended with great expense, the Court may, in a proper case, proceed to the sale of a lunatic's estate without requiring notice to be served on such persons: *In re McGrath*, 2 Ch. Ch. R. 436.

The Secretary thought, in that case, that the words 'parties interested in the real estate,' mean persons having charges or incumbrances thereon.

The Court, if satisfied that the case is a proper one, may order such relief to be granted as shall seem fit, and will direct that the moneys so to be raised shall be applied in payment of debts, etc.: s. 11 (4, 5, 6).

Where the estate of a lunatic is under the control of, and is being dealt with by, the Court, provision is usually made for the maintenance of the lunatic before the claims of creditors are provided for: *Re Dumbrell*, 10 P. R. 216; *In re Clarke*, [1898] 1 Ch. p. 340.

This principle has been affirmed in many cases; it "has been the practice of the Court for centuries:" per Rigby, L. J., in *Davies v. Thomas*, [1900] 2 Ch. p. 472.

Lord Eldon, L.C., said: "I never remember an instance upon the report of debts of stripping the lunatic, and putting him in a situation of absolute want. I have known the Court throw great difficulties in the way of creditors to prevent that:" *Ex parte Dikes*, 8 Ves. 79 (a).

"If the creditors cannot be paid without invoking the aid of the Court in lunacy, the Court has always refused such aid, if to grant it would be to reduce the lunatic to the condition of a pauper:" per Lindley, L.J., in *In re Plenderleith*, [1893] 3 Ch. p. 335.

"Lunacy plus pauperism is the most abject state to which humanity can be reduced. Beside it, a creditor not getting paid his debt is a very petty grievance. The Court had long ago to weigh the two evils in the scales of justice, to determine whether a helpless lunatic was to be stripped by his creditors or to be maintained *durante vita*, at their expense,

and it was held that the stronger claim lay with the lunatic. The Court of Chancery has incurred a great deal of popular odium and obloquy 'traduced by ignorant tongues,' but whatever be its sins and shortcomings, its protecting care of lunatics and infants, not to speak of unprotected women, will always redound to its honour:" 10 L. Q. Rev. 12.

But while the Court will not allow the property of a lunatic in its custody to be applied in paying his creditors, without first providing for his maintenance, it has no jurisdiction to interfere with the rights of creditors to seize and sell, by legal process, property of the lunatic which, at the time of seizure, is not in the custody of the Court: *In re Clarke*, [1898] 1 Ch. 336: See also *Davies v. Thomas*, [1900] 2 Ch. 462.

And the rule only applies where the estate is being administered in lunacy, and has no application where the estate is being dealt with under an assignment for the benefit of creditors: *Re Dumbrill*, 10 P. R. 216.

Where the estate of the lunatic is sufficient, not only the claims of creditors but debts which are morally, though not legally, binding on the lunatic, may be allowed: *Wood Renton*, p. 368.

Where W., a lunatic, had, while sane, given a promissory note for £50,000, payable in instalments of £5,000 each, to H., in discharge of what he deemed a moral obligation, arising out of the fact that by the sudden death of L., leaving a will unexecuted, a very large fortune had come to him (W.), which was apparently intended for H., and had paid three of such instalments, the Court ordered the balance of £35,000 to be paid by way of bounty: *In re Whitaker*, 42 Ch. D. 119.

It was said by Cotton, L.J., in that case (p. 126), that undoubtedly the Court had jurisdiction to perform that intended bounty, "because we often (although not to so large an amount as this) give, out of the personal estate of a lunatic, that which is mere bounty on his part when we see that it is in accordance with his views and declarations before he became lunatic. That generally occurs in the case of charities where the lunatic has himself, while he was of sound mind, supported institutions of a charitable nature, and we

continue that support, and perform for him when he becomes a lunatic that which we can see was his own intention while of sound mind."

And Lindley, L. J., said (p. 128): "The unpaid balance is a debt of honour, not in the sense of a gambling debt, which I consider a debt of dishonour, but a debt of honour which this Court ought to recognize, if it can with justice do so."

See, also, *In re Nevins*, 5 Man. L. R. 137.

(2) For maintenance of lunatic and family.

Section 12 of the statute provides for this case.

An application may be made not only by the committee, but by any member of the family of the lunatic, for a mortgage or sale of the whole or any part of the lunatic's real estate, as may be necessary.

The practice under this section is the same as in applications under sec. 11 (*supra*).

The obligation ordinarily imposed upon a husband of maintaining his wife is not removed by her lunacy or by his own. See *Hill v. Hill*, 2 O. L. R. 289, 541.

In some cases (for which see *Wood Renton*, pp. 370-373) the Courts have made allowances not only to persons having legal claims for maintenance upon the lunatic, but also to relations and others who had no claim upon him, but in whom he had shewn himself interested, and whom he would probably have helped, himself, had he been of sound mind. Cf. *In re Nevins*, 5 Man. L. R. 137.

The guiding principle is the benefit of the lunatic, and the allowance is made because it would be a disgrace to him that certain near relatives should not be maintained and educated.

But such applications are now regarded with "the greatest possible jealousy and caution."

"The practice (said Jessel, M.R.) of giving away a lunatic's property ought to be narrowed rather than extended. It is not the province of this Court to give general charity at the expense of a lunatic's estate." *In re Evans*, 31 Ch. D. p. 301; Cf. *In re Darling*, 39 Ch. D. p. 212.

AMOUNT ALLOWED FOR MAINTENANCE OF LUNATIC.

This is a matter of discretion depending upon the circumstances of each case.

The comfort of the lunatic is the primary consideration.

It was said by Lord Chancellor Hart that: "The maintenance of a lunatic is not limited, as an infant's is, within the bounds of income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income, and for solid enjoyments and substantial comfort, the Court will, if necessary, go beyond the limits of income:" In re Persse, 3 Moll. 94.

And no special regard will be paid to the claims of next of kin, or even creditors: Ex parte Baker, 6 Ves. 7; In re Evans, 21 Ch. D. p. 299.

EFFECT OF SALE OR MORTGAGE.

"It is a rule never departed from, not to vary or change the property of the lunatic, so as to affect any alteration as to the succession to it:" Ex parte Annandale, Amb. p. 81.

The character of the lunatic's property, so far as regards his heirs, devisees, next of kin, and personal representatives, is not changed by any mortgage, lease, or sale thereof: R. S. O. c. 65, s. 13. They have the same interest in the surplus which remains of the money raised as they would have had in the estate if no disposition thereof had been made: see Campbell v. Campbell, 19 Gr. 254; Thompson v. McCaffrey, 6 P. R. 193.

TERMINATION OF OFFICE OF COMMITTEE.

The tenure of office of the committees of the person and estate respectively is terminated by the death of the holder, by the death of the lunatic, or by the recovery of the latter and the granting of a *supersedeas*: Pope, 2nd ed., p. 142.

Either committee may, of course, be removed for misconduct in office: *ib.*

In every case of removal or discharge of the committee of the estate, and of the committee of the person when he is, from the form in which maintenance is allowed, liable to

account, the final account must be passed in the usual way, and the balance, if any, paid over before he can be properly discharged.

On the discharge being completed the committee's sureties will be released and the bond cancelled: *ib.*, p. 145.

Any balance found due to a committee who is being discharged, or when a *supersedeas* has issued, is ordered to be paid to him by the lunatic, or out of his estate: *ib.*, p. 201.

REMUNERATION OF COMMITTEE.

The rule in England is thus stated:—"The committee of the estate has no right, legal or equitable, to any allowance in respect of trouble taken by himself or others whom he employs as agents in the execution of his trust, even if the next of kin consent to the application, as he is presumed to have undertaken the office out of regard for the lunatic or his family, and in any event from charitable motives:" Wood Renton, 349; *In re Annesley*, Amb. 78; *In re Nevins*, 5 Man. L. R. 137.

But, inasmuch as, even in England, persons of this benevolent disposition are not always available, the above rule has been constantly broken in upon by exceptions: see Wood Renton, p. 349.

An exception was made in *In re Annesley*, to meet the justice of the case; but "to save making a precedent," the expedient was adopted of giving to the applicant, who was committee of the person also, an increased allowance for the maintenance of the lunatic.

In Ontario, a committee is entitled to a reasonable allowance for his care, pains, and trouble, to be fixed by the Master.

RECOVERY OF LUNATIC.

Upon the recovery of the lunatic what used to be technically known as a *supersedeas* must be applied for.

The application should be by petition in the name of the quondam lunatic.

It should be supported by strong evidence of sanity from medical men and others acquainted with the lunatic, and

should indicate that the witnesses are aware of all the grounds on which the lunacy was previously determined, and affirm the removal of them: Pope, p. 204; *Ex parte Holyland*, 11 Ves. 10.

"There is no part of the duty, that occurs in the exercise of this jurisdiction," (said Lord Eldon) "more unpleasant, and requiring greater caution, than that of determining when a commission should be superseded; for, though you may, upon evidence, arrive at a safe conclusion, establishing lunacy, it is very difficult to determine when the mind is restored; depending upon the circumstance whether the party is led to those topics upon which it was affected." *Ex parte Holyland*, 11 Ves. 9.

"In one case," said Lord Eldon, "I succeeded in getting Lord Thurlow, after a very long conversation with the party, to supersede the commission; and was satisfied from many conferences with him that he was perfectly rational; but immediately after the petition was heard, coming to thank me for my exertions, he in five minutes convinced me that the worst thing that could have been done for him was to get rid of the commission." *ib.*, p. 10.

It is not necessary to shew that the applicant's mind has been restored to its original state. What must be shewn—and shewn conclusively—is restored competence on the part of the lunatic to manage himself and his affairs: *Wood Renton*, p. 322.

The burden of establishing this fact positively, and therefore by stronger evidence than might have sufficed to defeat an application for a declaration of lunacy, rests upon the applicant: *ib.*

Where the insanity has taken the form of delusions, the most satisfactory proof of the recovery from an unsound state of mind is the conviction, on the part of the applicant, of the non-reality of the delusions which arose from the disease: *In re Dyce Sombra*, 1 Mac. & G. 116.

Notice of the application should be served upon the committee and upon the persons at whose instance the declaration of lunacy was originally made: *Elmer*, 7th ed., p. 120.

DEATH OF LUNATIC.

The jurisdiction of the Court does not completely cease on the death of the lunatic.

From the necessity of the case it continues to a certain extent. The Court retains its control over the committee, who remains liable to account and to deal with the estate as the Court may direct.

Orders or reports may be made, after the lunatic's death, upon proceedings originating prior to it, where such orders or reports are for the purpose of winding up the lunacy, or for enforcing obedience to orders made during the lunatic's lifetime: *In re Brillinger*, 3 Ch. Ch. R. 290; *In re Nevins*, 5 Man. L. R. 137.

Before the confirmation of the Master's report appointing a committee of the person and estate of a lunatic and propounding a scheme for her maintenance, the lunatic died:—

Held, notwithstanding the death, that an order should be made (the executors of the deceased consenting) confirming the report, and for the discharge of the committee and the surrender of the bond given by him, on his passing his accounts and paying over any balance and delivering any property in his hands to the executors: *In re Garner*, 1 O. L. R. 405.

On the final passing of the accounts after the death of the lunatic, besides the persons otherwise entitled to attend, the legal personal representative of the lunatic should be present either in person or by his solicitor: Pope, 2nd ed., pp. 196, 197.

An order for the administration and distribution of a deceased lunatic's estate will not, in general, be made under proceedings in lunacy.

Independent proceedings must be taken for the purpose: *In re Brillinger*, *supra*.

The following orders, made under very special circumstances, may be noted for the guidance of practitioners.

In *In re Rooks*, in which case the lunatic had died intestate, after appointment of a committee, an order was made by the Chancellor on the 3rd January, 1883, appointing the com-

mittee to represent the personal estate of the deceased until administration should be granted in due course, with power meanwhile to get in the outstanding personal estate and to collect the rents and profits of the real estate, directing him to account to the administrator when duly appointed.

In *In re Alpaugh*, an application was made to Mr. Justice Ferguson on the 19th September, 1883. The lunatic's property had been sold by order of the Court; part of the purchase money had been paid into Court, and part was secured by mortgage to the accountant. The committee had taken out letters of administration to the estate of the deceased lunatic. An order was made for the passing of the final accounts of the committee, and for the cancellation of the bond given by him, and for his discharge. Also, for an advertisement for debts of the deceased other than those already ascertained in the lunacy proceedings, and for an inquiry as to the parties entitled to share in the moneys. The order further directed payment out in accordance with the report.

In *In re Grogan*, the lunatic was dead, there was no personal representative, and the committee desired to obtain his discharge. An order was made by Vice-Chancellor Proudfoot, on the 3rd March, 1879, for the committee to procure administration of the estate of the deceased, and further order was reserved until the administrator had been appointed.

The limits of a paper such as this will only permit of reference to some of the more common points in connection with the subject, and those most likely to be needed and useful in practice.

The treatises of Elmer and Pope, and the bulky book on lunacy by Wood Renton, all referred to in the preceding pages, must be consulted in respect of matters not here dealt with.

The collection of cases to be found in the notes to R. S. O. c. 65 in Bicknell & Kappele's "Practical Statutes" will be found helpful.

Toronto.

N. W. HOYLES.

RECENT CASES FROM THE TIMES REPORTS.*

Amendment of Judgment.]—In *Doswell v. Norton*, 18 T. L. R. 228, Bucknill, J., amended a judgment by inserting in it a direction that costs should be on the lower scale, his attention not having been called to the fact that, owing to the nature of the case, costs on the higher scale would be taxable in the absence of special direction. This was, he held, an “accidental slip or omission,” within the meaning of the Rule.

Attachment of Debts.]—In *Yates v. Terry*, 18 T. L. R. 262, a person to whom a debt was payable assigned it, after one attaching summons had been served upon the debtor, and before a second attaching summons had been served upon the debtor. The latter, ignoring the assignment of which he had received notice before the service of the second summons, paid into Court the full amount of the debt, appropriating the money in payment of the first attaching claim in full, and *pro tanto* in payment of the second. It was held that the intermediate assignment was valid, and the debtor was ordered to pay to the assignee a sum equal to the balance left after payment of the first attaching claim.

Bicycle.]—The position of the bicycle as a toll-provoking medium was further considered in *Simpson v. Teignmouth Bridge Co.*, 18 T. L. R. 234. It was held that a bicycle with a saddle borne on springs was a “carriage hung on springs” within the meaning of the Act in question, but that the Act was, from its context, intended to apply only to carriages, etc., intended for animal draught. See the previous decision on the same Act, *ante*, p. 21.

Bills of Exchange.]—The important point in *Herdman v. Wheeler*, 18 T. L. R. 190, is that a bill of exchange is not

*Including the cases in No. 12, Vol. 18, week ending 5th February, 1902.

"negotiated" within the meaning of s. 20 of the Bills of Exchange Act, 1882 (Canadian Act, s. 20), and the holder protected, unless there is a transfer by one holder to another. The defendant signed a note in blank and handed it to an agent with instructions to fill it in for a certain sum to obtain a loan. The agent filled it in for twice this sum and obtained the amount from the plaintiff, giving the plaintiff the note and filling in the plaintiff's name as payee. It was held that the plaintiff, though he had acted in entire good faith, could not enforce payment of the note.—*In Stevenson v. Brown*, 18 T. L. R. 268, the maker of a note wrote across its face and signed "Payable at the London and Provincial Bank, Walthamstow." It was held that the note was not, within the meaning of the Bills of Exchange Act, s. 87 (1)—Canadian Act, s. 86 (1)—"in the body of it made payable at a particular place," and therefore that presentment at the bank named was not essential.

Bond.]—In *In the Goods of Cowardin*, 18 T. L. R. 220, a well settled principle was applied with a rather unusual result. A surety to an administration bond executed it on the assurance that the person named as co-surety would also execute it. Afterwards this proposed co-surety refused to execute the bond, and another co-surety was obtained, the change not being assented to by the first surety. On his application, the bond was held to be invalid and the grant of administration was recalled.

Building Contract.]—*Hobbs v. Turner*, 18 T. L. R. 235, may be of use in framing building contracts. It was held, under a contract to build a house for a lump sum, with a provision that the owner might get certain specified portions of the work done by other persons, and in that event deduct certain specified amounts, that the owner and not the builder was liable to the person doing these portions of the work.

Company.]—In *Randt Gold Mining Co. v. New Balkis Eersteling*, 18 T. L. R. 218, purchasers from a company of shares which had been forfeited by the company for non-payment of a call, were held liable for the amount of the

call when subsequently again made.—In *In re Leas Hotel Company*, 18 T. L. R. 236, a charge, to secure debentures on all the company's "lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future," was held to include the goodwill and business of the company, and so to justify the appointment of a manager of the undertaking on behalf of the debenture holders.—*Bond v. Barrow Hematite Steel Co.*, 18 T. L. R. 249, contains a useful set of articles in reference to the formation of preference shares, and deals with the right of the holders of such shares to compel the payment of a dividend to them out of profits which the company in good faith wished to hold as a reserve fund and contingent fund.—In *Ireland v. Hart*, 18 T. L. R. 253, there was a contest as to the ownership of shares, the defendant claiming under a transfer taken by him in good faith from the apparent owner, who held the shares for a limited purpose. It was held that, as the true owner's equitable title had been asserted before the transfer to the defendant had been assented to by the company, it was entitled to prevail.—In *re W. Key and Son*, 18 T. L. R. 263, is an interesting case as to lien on shares. While an action was pending by a company against a shareholder for a declaration of lien upon his shares for a debt alleged to be due to the company, he became bankrupt, and his trustee in bankruptcy applied to be registered as holder of the shares. It was held that the company had no right to place on the register or on the certificate (which ought to follow the register) a memorandum as to the claim of lien.—In *Keatinge v. Paringa Consolidated Mines*, 18 T. L. R. 266, there was an abortive attempt to issue shares at a discount by the roundabout method of allowing a commission on their purchase.

Contempt of Court.]—In *re Labouchere*, 18 T. L. R. 208, is another contribution by the editor of *Truth* to the decisions upon contempt of court by newspaper comment upon litigants. In this instance Labouchere escaped punishment by shewing that the article in question was one of a series commencing long before the litigation in question, and had not been called forth by that litigation.

Costs.]—*Twist v. Tye*, 18 T. L. R. 211, was a contest as to mental capacity of a testatrix, the finding being against the will. The executors who propounded the will were not only refused costs out of the estate, but were ordered to pay the costs of the next of kin, on the grounds that the conduct of the testatrix had in no way led to the litigation, and that the executors knew all the circumstances and took the risk of being able to support the will.

Criminal Law.]—In a long and interesting account of the trial of *Dr. Krause*, 18 T. L. R. 238, there is to be found the legal holding that on an indictment for persuading a person to murder another, some communication to the persuaded person must be made out; so that, where the alleged persuasion is by letter, evidence of the receipt of the letter must be given. There may be, however, and in this there was, a conviction for an attempt to persuade, where the letter does not in fact reach the person to be persuaded.

Damages.]—The judgment in *Michael v. Hart and Co.*, 17 T. L. R. 761, noted 21 C. L. T. 447, as to the measure of damages in an action against brokers for wrongfully closing an account, came before the Court of Appeal, 18 T. L. R. 254. It was held, applying the well settled principle, that the plaintiff was not bound to treat the contract as at an end when the defendants committed an anticipatory breach of it, and to measure his damages as at that date, but that, on the contrary, he was entitled to wait till the time for performance and then claim his damages. The question whether he was entitled, as decided below, to recover damages according to the highest price reached by the stock between the date of the anticipatory breach and the time fixed for completion, was not dealt with in the Court of Appeal, a compromise having been agreed upon, subject however to the right of appeal upon the other points involved.

Defamation.]—*Hope v. P'Anson*, 18 T. L. R. 201, raises a somewhat interesting point as to privilege arising out of the publication in the *Racing Calendar* of reports of certain

proceedings of the Jockey Club stewards, and stewards of a local race, in reference to a dispute between the plaintiff, who had entered a horse for the race in question, and the owner of another horse. The contentions unsuccessfully urged by the defendants were that the stewards had acted in a quasi-judicial capacity, and that at any rate the plaintiff, having bound himself to observe the rules for the conduct of race meetings, had impliedly bound himself to consent to the publication in the Racing Calendar—the official organ of the Jockey Club—of reports of all matters connected with the race.

Discovery.]—The judgment in *Carr v. Anderson*, 18 T. L. R. 128, *ante* p. 25, ordering the plaintiff in an action for an account of dealings with property taken possession of by the defendant, to give particulars of the property claimed by him, was reversed, 18 T. L. R. 206, the Court of Appeal saying that to let the order stand would make the plaintiff account to the defendants.—The judgment in *In re the London and Northern Bank*, 18 T. L. R. 130, *ante* p. 26, as to collateral examination in winding-up proceedings in reference to questions raised in pending litigation by the liquidator, was upheld: 18 T. L. R. 206.

Evidence.]—*Neville v. Benjamin*, 18 T. L. R. 283, turns upon the question of the time at which death is to be presumed to have taken place in a case of disappearance. A young man of 24 disappeared on the 1st September, 1892, irregularities in his accounts having been discovered. His father died in 1893, leaving a large estate for distribution among his children. Letters of administration to the son's estate were issued in 1901, upon the presumption that his death had occurred on or after the 1st September, 1892. In this action, after advertisements had been extensively circulated and inquiries made without effect, it was held that the son's death should be presumed to have taken place on the 1st September, 1892, and the trustees were authorized to distribute the son's estate on the footing of his having predeceased the father, but this was to be without prejudice to a claim for repayment from the benefi-

aries thereafter if evidence of the date of the death could be obtained.—In *Burrows v. Bedford School Board*, 18 T. L. R. 292, an action to recover damages because of injuries resulting from the blowing down of a wall, it was held that the plaintiff could not, to rebut the defence of act of God, put in as evidence the statistical returns of the Meteorological Office, which were based upon information supplied to a great extent by volunteer observers, and therefore could not be treated as public records. In such a case it is necessary to call as witnesses the persons who have made the observations. Apparently the same strict doctrine has not been applied here, where the meteorological records have frequently been appealed to: see, for an example, *Garfield v. Toronto*, 22 A. R. 128.

Extradition.—In the case of *The King v. Dix*, 18 T. L. R. 231, the rule is again recognized that extradition can be ordered only when the prisoner is charged with what is a criminal offence according to the law of both the demanding country and the arresting country, though the offence need not in each country be of exactly the same nature or importance. The receiving by a bank manager of money on deposit while the bank was in insolvent circumstances, not being a criminal offence in England, extradition of an American bank manager for that offence was refused; but extradition on the charge of fraudulently discounting with the bank worthless bills was directed, that being proved to be an offence in America in the nature of embezzlement, and being in England an offence under the Larceny Act.

Gaoler.—*Mee v. Cruickshank*, 18 T. L. R. 271, is reminiscent of *Hamilton v. Massie*, 18 O. R. 585, the result of the case being different. In the English case, which turned very much upon special legislation, the governor of a gaol was held liable for the acts of his warders, who, after the trial and acquittal of the plaintiff, detained him for about an hour and compelled him to answer questions as to his name, parentage, and other particulars.

Heirlooms.—An abortive attempt to settle chattels as heirlooms is dealt with in *In re Hill*, 18 T. L. R. 267.

Husband and Wife.]—The payment by a husband to his wife, with whom he is living, of an adequate allowance for dress and personal expenses, puts an end, the Court of Appeal say in *Kemmington v. Broadwood*, 18 T. L. R. 270, to the wife's *prima facie* right to pledge as his agent her husband's credit for articles of clothing purchased by her.

Infant.]—It was decided in *In re Helyar*, 18 T. L. R. 207, that the testamentary guardians of an infant were entitled to receive, as against the executors and trustees of the testator's will, the rents and profits of an estate of which the infant was tenant for life.

Insurance.]—In *Hough v. Guardian Fire and Life Assurance Co.*, 18 T. L. R. 273, the old question as to agency was raised. The plaintiff was the owner of a quantity of rags stored with a wharfinger, and the insurance in question of the rags was taken in the name of the wharfinger; the agent of the defendants, who was aware of the facts, thinking that that was the proper mode. It was held that the company were bound by the agent's act and knowledge, and that they must be treated as if they had themselves settled the form of the policy.

Landlord and Tenant.]—The Court of Appeal, 18 T. L. R. 228, reversed the judgment in *White v. Harrow*, 18 T. L. R. 129, *ante* p. 30, as to the effect of a covenant by a lessee "not to object to any works to adjoining premises," on the ground that the words "adjoining premises" included only buildings in physical contact with the demised building, and not also buildings near enough for works to them to effect materially easements enjoyed by the demised building.

Limitations Act.]—*Taylor v. Hollard*, 18 T. L. R. 287, emphasizes the point that part payment to take a case out of the Statute of Limitations must be of such a nature as to amount to an acknowledgment of liability. The plaintiff obtained judgment in England against the defendant.

He then sued the defendant in the Transvaal upon this judgment, and obtained judgment there for part of the claim, and this part was paid under sequestration proceedings. It was held that this payment, obtained *in invitum*, was of no avail against the defence of the statute upon a subsequent action in England for the unpaid part of the original English judgment. With a view to a possible appeal to the House of Lords, the question of the limitation applicable to the case of a judgment was formally raised in this case. It was also held that the enforcement of the Transvaal judgment was an election to accept it in satisfaction of the English one.

Local Improvement Acts.]—Under what was in effect a covenant to pay all present and future taxes, rates, and assessments, a lessee was, in *Surtees v. Woodhouse*, 18 T. L. R. 222, held liable to pay local improvement rates which had become a charge on the land before the date of the covenant, though not payable until after that date.

Martial Law.]—The principle that when a state of war exists, the civil courts have no jurisdiction to call in question the propriety of the action of military authorities is applied in the much discussed *Marais* case, 18 T. L. R. 185.

Master and Servant.]—The judgment in *Fitzpatrick v. Richard Evans and Co.*, 17 T. L. R. 253, noted 21 C. L. T. 194, that a workman employed by a person who had contracted with a mine-owner to sink a shaft in a mine, had not been made a servant of the mine-owner by being obliged to sign an agreement to conform to regulations as to work therein, was affirmed by the Court of Appeal: 18 T. L. R. 290.

Mortgage.]—*Noakes and Co. v. Rice*, 18 T. L. R. 196, is a case which has excited great interest in England. The House of Lords there held, affirming the judgment of the Court of Appeal, that a covenant in a mortgage of a public house binding the mortgagor to buy liquor from the mortgagee came to an end upon the redemption of the mortgage, though not in terms limited to the time of the existence of the mortgage.

Negligence.]—*Bynoe v. Bank of England*, 18 T. L. R. 276, raises a novel point in the law of negligence. The action was brought by the plaintiff, after his conviction and imprisonment for forgery, against the Bank of England and one of the officers thereof to recover damages, the allegations being that his conviction had been the result of untrue evidence given by the officer of the bank as to the time at which, on a certain day, certain notes of the bank were returned to the bank; that the records of the bank had been, owing to negligence, incorrectly kept; and that the officer had, owing to his negligence, not discovered their incorrectness. The Court of Appeal held that, as the conviction had not been set aside, the action could not be maintained, treating the case as analogous to that of an action for malicious prosecution.—In *Maxwell v. British Thomson-Houston Co.*, 18 T. L. R. 278, the defendants, who had contracted to equip a tramway for electric traction, gave a sub-contract for the erection of the iron poles and the fixing of the wires. The workman of the sub-contractor negligently left a derrick close to the tram-line, and the plaintiff while passing on a tram was injured. It was held that, as the work was being done on a highway, the defendants were bound to take reasonable precautions to protect the public, and could not escape from that duty by delegating the work to a sub-contractor.

Registry Act.]—The judgment in *Hunt v. Luck*, 17 T. L. R. 3, noted 21 C. L. T. 63, that intending mortgagees, who were aware that tenants of the property were paying their rents to an agent, were not put upon inquiry as to that agent's principal, who claimed adversely to the intending mortgagor, was affirmed: 18 T. L. R. 265

Resulting Trust.]—The status (in England) of the deceased wife's sister comes up in *In re Scottish Equitable Life Assurance Society*, 18 T. L. R. 210, where it was held that a woman who had gone through the ceremony of marriage with her deceased sister's husband, and had then lived with him as his wife, was in law a stranger to him, so that

there was a resulting trust in favour of his estate of a policy of assurance on his life taken out by him in her favour, the premiums having been paid by him. The case is useful as a recognition of the statement in *Lewin* that the doctrine of resulting trust in favour of the person advancing the consideration applies to any chattel interest taken in the name of a stranger just as much as to cases of purchase of real estate.

Sale of Goods.]—*Molling and Co. v. Dean and Son*, 18 T. L. R. 217, turns to some extent upon the Sale of Goods Act, but, as that Act is a codification of the law, decisions under it are of general value. In this case the plaintiffs in Germany printed for the defendants in England a large number of books, part of them being intended, as the plaintiffs knew, for the American trade. The books were delivered to the defendants, those of the American trade being specially packed by the plaintiffs. These books were sent by the defendants to the American sub-purchaser, and were rejected by him and reshipped to the defendants. The defendants then inspected the books themselves, and notified the plaintiffs that they accepted a certain number and rejected the rest. It was held that America was the proper place for inspection; that the shipment of the books to America was not an acceptance of them; that in a case of this kind, where the quality of each article could be tested, there could be part acceptance and part rejection; and that the defendants were entitled to set off against the price of the accepted books the loss of profit on the expected American sale, the expense of shipping the books to and from America, and the duty paid in America. There was a minor claim for damages for some blocks supplied by the defendants to the plaintiffs and not returned. It was held that the defendants were not entitled to the full value of new blocks, but that regard ought to be had to the fact that the blocks necessarily were, after the printing had been completed, more or less worn.—*Gilbertson and Co. v. Anderson and Coltman*, 18 T. L. R. 224, is another case of practical use, in

which it was held that a delivery order is not a negotiable instrument so as to give an indorsee thereof a right without more to sue the indorser for loss in the event of short delivery. As a general rule such a document is merely an authority to deliver up the goods if they are on hand, and is not a warranty that the goods mentioned in it are ready to be delivered.

Service of Writ.]—In *Dunlop v. Cudell and Co.*, 18 T. L. R. 229, service of a writ of summons in England on a foreign corporation was upheld, the foreign corporation having hired a stand at a cycle show in England for nine days, and having kept a representative in attendance to take orders for goods.

Solicitor and Client.]—*Wright v. Carter*, 18 T. L. R. 256, is an interesting case as to gifts to a solicitor by, and purchases by a solicitor from, his client. Adopting as the guiding principle that stated in *Rhodes v. Bate*, L. R. 1 Ch. 252, *Kekewich, J.*, proceeds to discuss whether in the case in hand there was to be found the necessary "competent independent legal advice."

Statutory Powers.]—*Mayor of East Fremantle v. Aunois*, 18 T. L. R. 199, is an example of the application of the principle that persons acting under statutory authority in the execution of a public trust are not liable, if they act in good faith and with reasonable care and discretion, to an action by a person injured by the exercise of their powers. Unless compensation is given by the Act there can be no relief.—*Canadian Pacific R. W. Co. v. Roy*, 18 T. L. R. 200, is worth looking at in the same connection. The Judicial Committee held in that case that the law of the Province of Quebec is the same as that of England in regard to the liability of a railway company for damage caused by the emission of sparks from their engines, it being necessary to shew negligence in the exercise of the statutory powers to justify recovery.

Trade Name.]—In *Willox v. Pearson*, 18 T. L. R. 220, an application for an injunction by the publishers of an evening newspaper called the *Evening Express*, to restrain the defendants from publishing in the same place a morning newspaper under the name of the *North Express*, was refused, the papers not being similar in appearance or contents, and the defendants having acted in good faith.

Will.]—The judgment in *In re Pitt-Rivers*, *Scott v. Pitt-Rivers*, 17 T. L. R. 220, noted 21 C. L. T. 136, as to an alleged secret trust in favour of the public, was reversed. 18 T. L. R. 272.

EDITORIAL REVIEW.

Death of Mr. Justice Lister.

The Hon. James Frederick Lister, one of the puisne Judges of the Court of Appeal for Ontario, died suddenly at Toronto on Sunday the 9th February last.

He had sat in Court during the previous week, and had spent the previous day at Osgoode Hall. The cause of his death was *angina pectoris*.

He was born at Belleville, Upper Canada, in 1843; admitted an attorney in 1865 and called to the Bar in 1875; practised at Sarnia; created a Queen's counsel in 1900; and raised to the Bench as one of the Judges of the Court of Appeal in 1898. He sat in the Canadian House of Commons as member for West Lambton from 1882 till 1898.

As a man he was chiefly remarkable for strength of will and clearness of perception. His fighting qualities were much admired when he was in Parliament.

He was hardly known as a lawyer outside of his own county, before his elevation to the Bench, and his appointment can scarcely be described as having at the time been favourably looked upon by the Bar. But his capacity and industry were recognized, and candid critics admitted that if the Bench was to be a training school for lawyers, Mr. Lister was at least a promising pupil.

It is difficult to estimate the judicial value of the work of a member of an appellate court. Mr. Justice Lister had not the opportunity, like the Chief Justice and Mr. Justice Osler, of demonstrating his quality in the arena of *nisi prius*; nor had he the large and varied experience at the Bar of his two other colleagues in the Court of Appeal; the Bar knew him only by the questions he asked and the remarks he made upon the Bench, and by the considered opinions which he afterwards delivered; and the most that can fairly be said

of him as a Judge is that he was attentive, painstaking, and thorough; legal learning he could scarcely be said to possess; he might and probably would have acquired it, had he been spared. He was certainly sensible and fair-minded; he was courteous, too, and was, therefore, a favourite with the Bar.

Many public tributes were paid to the memory of the deceased Judge. We quote the following as being both truthful and appreciative:

Sir William Meredith, Chief Justice of the Common Pleas:—

“He had given much of his life to the public service before going on the Bench, and with the great good sense which he possessed, his knowledge of human affairs, and his knowledge of the ways of the people, he was a most useful member of the Ontario judiciary. His place will be difficult to fill. Those members of the Bar who had an opportunity of meeting him recognized in him an upright, just, and able Judge, and a man who was always courteous to the profession. The relations between him and his fellow-members of the Bench were of the most cordial character, and we shall long miss him from amongst us.”

The Chief Justice of the King's Bench (Falconbridge):—

“James Frederick Lister was in character essentially and intensely strenuous and manly. At the Bar he was an able, forcible, and resourceful advocate, in the political arena a fair and fearless combatant, as a Judge robust of intellect, earnest of purpose, clear and unbiassed in judgment, the fortunate possessor of an unlimited fund of that inestimable quality, common sense. There was no taint of cowardice or meanness in his composition. In the domestic and social relations of life he was all that was amiable, tender, and genial. I can hardly tell how much he will be missed by his brother Judges in our daily familiar and friendly intercourse at Osgoode Hall.”

Mr. Æmilius Irving, K.C., Treasurer of the Law Society of Upper Canada:—

“The late Mr. Justice Lister, if but a few years on the Bench, by his assiduity, power of concentration, and broad

experience, had impressed the Bar with the conviction that he would ripen into a Judge not inferior in general attributes to those who had preceded him and given lustre to the country. At the present moment we look to the memory of the man, and we can all join in acknowledging that he embodied the highest spirit of honour in his profession and the most cordial consideration towards the Bar."

Mr. Justice Mills.

The Hon. David Mills has, since our last issue, resigned the office of Minister of Justice and Attorney-General for Canada, and has been appointed a puisne Judge of the Supreme Court of Canada.

The following sketch of his career is taken from the *Toronto Globe*:—

"The Hon. David Mills is a descendant of an old Puritan family, which went from Plymouth to Holland, in the time of Charles I., thence to New England with the Puritans, and to Nova Scotia at the time of the American Revolution. He is a son of Nathaniel Mills, who came from Nova Scotia to Ontario in 1817. He was born in the township of Oxford, Kent, in March, 1831, and graduated at Michigan University. He was called to the Ontario Bar in 1883, and made a Queen's counsel by the Ontario Government in 1890. He was employed by the Ontario Government to defend the north-western boundary of the Province in 1872, and was one of the counsel employed in the argument before the Privy Council in England in 1884. Mr. Mills also represented Ontario in the cases relating to Indian titles and Queen's counsel. He represented Bothwell in the House of Commons from Confederation until 1896, with the exception of one session after the election of 1882, when he was deprived of his seat, to which he was restored by the Supreme Court. Mr. Mills was Minister of the Interior in the Mackenzie Administration from October, 1876, until October, 1878. He was appointed Senator in November, 1896, and entered the Laurier Administration as Minister of Justice, succeeding Sir Oliver Mowat, in November, 1897. During last year Mr. Mills represented Canada at the Colonial Conference respecting the suggested reorganization of the

Judicial Committee of the Privy Council, and was chosen chairman of the conference. On the establishment of the faculty of law by the University of Toronto in 1888, Mr. Mills was chosen to fill the chair of constitutional and international law. He is the author of 'The English in Africa,' and several brochures on international law and politics. More recently he has contributed articles to the Empire Magazine dealing with the position of Great Britain in Central America, and he has published a collection of his own poems."

The new Judge is, therefore, seventy-one years of age, though he is a barrister of only nineteen years' standing. He was called to the Bar late in life, and never had the advantage of general practice, or of experience as counsel, except in one or two constitutional cases. He is undoubtedly well read in constitutional law, and in the few cases of that character which come before the Supreme Court of Canada, his learning will be valuable—if he can apply it. We think his lack of experience as a lawyer will stand very much in his way even in cases of that character. But what are we to say about other cases—the large majority of the cases which come before the Court? How is a man utterly without experience of the law to decide them to the advantage of the community? We have heard of men becoming lawyers after promotion to the Bench, and there was certainly one distinguished case of the kind in Canada. But we never heard of a man attempting to learn law on the Bench at the age of seventy-one. Nor did we ever hear, and we venture to think such a thing has never been known in any part of the British Empire, of a man attempting such a task in a supreme appellate court.

Mr. Mills took his seat on the Bench on the 18th February, and was congratulated by his successor in the office of Minister of Justice, who alluded to the new Judge's "knowledge of the law and usage of the High Court of Parliament." The Chief Justice of Canada said that he hoped to find in Mr. Mills "a genial colleague." We remember a grim jest about a notoriously bad man being commended (at his funeral) by a conscientious and cautious neighbour as "a good smoker!"

The Supreme Court Bench.

The Supreme Court of Canada, as now constituted, consists of six Judges—two from Ontario, two from Quebec, and two from the Maritime Provinces. Two only out of the six were promoted from lower Courts. The remaining four came up from the Bar, and only one of them from active practice at the Bar. The composition of the tribunal has never been regarded by lawyers as satisfactory, but there can be no doubt that it is less so now than at any former period of its existence.

The New Minister of Justice.

The country is to be congratulated upon the promotion of the Hon. Charles Fitzpatrick from the post of Solicitor-General to that of Minister of Justice and Attorney-General for Canada. He is forty-eight years of age, an excellent lawyer, and a brilliant advocate, as well as a skilful parliamentarian.

The New Solicitor-General.

Mr. Henry George Carroll, the new Solicitor-General, is thirty-six years of age, and has represented Kamouraska in the House of Commons since 1891.

Compulsory Retirement of County Judges.

It has been announced at Ottawa that it is proposed to ask Parliament to vest in the Dominion Government power to compel County Judges, when they reach a certain limit of age, to retire from their judicial offices.

Before the proposal takes definite shape it may be proper to call attention to certain constitutional provisions which affect the civil rights of the County Judges, which may be affected by the provisions of the proposed measure.

The "Act of Settlement," which was a constitutional compact between the Crown and Parliament, deprived the Crown of its prerogative to appoint and dismiss Judges during pleasure; for, with the assent of the Crown, it provided that "Judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but

upon the address of both Houses of Parliament it may be lawful to remove them."

This constitutional compact was re-enacted in 1 Geo. III. c. 23, the preamble of which recites the Act of Settlement, and His Majesty's speech from the throne as follows: "And whereas your Majesty has been graciously pleased to declare from the throne to both Houses of Parliament that you look upon the Independency and Uprightness of the Judges as essential to the impartial administration of justice as one of the best securities to the rights and liberties of your subjects, and as most conducive to the honour of your Crown." The Act then provides—

" 1. That the commissions of Judges for the time being, shall be, continue, and remain in full force, during their good behaviour, notwithstanding the demise of His Majesty (whom God long preserve) or of any of His Heirs or Successors, any law, usage, or practice to the contrary notwithstanding.

" 2. Provided always, that it may be lawful for His Majesty, His Heirs, and Successors, to remove any Judge or Judges upon the Address of both Houses of Parliament.

" 3. That such salaries as are settled upon Judges for the time being, or any of them, by Act of Parliament, and also such salaries as have been, or shall be granted by His Majesty, His Heirs and Successors, to any Judge or Judges, shall *in all time coming*, be paid and payable to every such Judge and Judges for the time being, so long as the Patents or Commissions of them, or any of them respectively, shall continue and remain in force."

These provisions—either as part of our constitutional law, or as part of the law affecting "civil rights"—it is claimed, became part of the law of Upper Canada by the Act of 1792; and have been continued by the Act of Union (1840), s. 46, and the B. N. A. Act (1867), s. 129.

But, whatever may be the legislative power of the Parliament of Canada to pass a law for the compulsory retirement of the present County Judges, it is clear that the compulsory retirement of the present Superior Court Judges can

only be enforced under s. 99 of the B. N. A. Act,—which cannot be altered by any Act of the Canadian Parliament—its provisions being:

“The Judges of the Superior Courts shall hold office during good behaviour; but shall be removable by the Governor-General on Address of the Senate and House of Commons.”

Death of Chief Justice McCell.

We omitted in our last issue to refer to the death of the Hon. Angus J. McCell, Chief Justice of the Supreme Court of British Columbia, which occurred on the 16th January, 1902, at Victoria. The late Chief Justice was a comparatively young man, having been born (in Ontario) in 1854. He was called to the Bar of Ontario in 1879, and subsequently went to British Columbia, where he was admitted and practised his profession. He was appointed a puisne Judge in 1896, and became Chief Justice on the death of Mr. Davie, in 1898.

It is said that the members of the Bar of British Columbia have petitioned the Minister of Justice to appoint Mr. E. P. Davis, K.C., to the position of Chief Justice.

The Hamilton Law Association.

The trustees' annual report for 1901 shews a membership of 68, a library of 3,766 volumes, of which 104 were added during the year, and a generally prosperous condition. Among other matters touched upon were the deaths of two distinguished Hamiltonians, Sir George Burton and Mr. B. B. Osler, the election of four Hamilton barristers as Benchers, the Bar dinner held in honour of Mr. Justice Britton, and the annual Bar picnic at Winona Park. The names of the officers for 1902 have not been supplied to us.

The County of York Law Association.

The annual meeting of the association was held in the Library at the City Hall, Toronto, on Monday the 27th January last, and the following officers were elected for

1902:—President, J. B. Clarke, K.C.; Vice-President, Hamilton Cassels; Treasurer, Walter Barwick, K.C.; Curator, Angus MacMurchy; Secretary, Shirley Denison; Auditors, D. E. Thomson, K.C., and C. S. MacInnes.

Board of Trustees: H. L. Dunn, Goodwin Gibson, E. F. Gunther, R. J. MacLennan, W. E. Middleton, D. W. Saunders, and the above officers.

Committee on Legislation: J. T. Small (convener), John Hoskin, K.C., E. D. Armour, K.C., D. E. Thomson, K.C., T. Langton, K.C., W. E. Middleton, D. W. Saunders, E. T. English, C. A. Masten, W. D. McPherson, Gordon Waldron, A. T. Kirkpatrick, W. E. Raney, and George Kerr.

The annual report of the trustees records the removal of the Library to the City Hall, and the gratifying fact that the change has not had any injurious effect upon the membership of the association nor upon the average daily attendance in the Library. Indeed, the membership has increased from 298 to 313. The report also mentions the efforts of the association in successfully opposing and securing the withdrawal of a bill which was before the Ontario Legislature in 1901, entitled "An Act respecting legal procedure and County Courts jurisdiction." The library now contains 4,536 volumes, of which 646 have been added in the past year. The insurance upon books is \$10,000. The affairs of the association are excellently managed, and a flourishing condition is the result.

Death of Mr. Cadman Jones.

Mr. Henry Cadman Jones, of the Chancery Bar, died at St. Leonards in January last. Born in 1818, he went to Trinity College, Cambridge, and graduated in 1841 as second Wrangler and second Smith's Prizeman, being beaten in both examinations only by Sir George Gabriel Stokes. Later he was elected to a Fellowship. Almost as good a classical scholar as he was a mathematician, it is said that he hesitated for which tripos to compete. Becoming a pupil of Christie, the great conveyancer, and afterwards of John

Rolt, subsequently Attorney-General and Lord Justice, Cadman Jones was called by Lincoln's-inn in 1845. His opinion was highly valued, and he acquired a moderate Court as well as conveyancing practice. From 1857 to the foundation of the Law Reports of 1865 Mr. Jones was associated in the successive series of reports of cases heard by the old Court of Appeal in Chancery, known as De Gex and Jones; De Gex, Fisher, and Jones; and De Gex, Jones, and Smith, the junior in the last-mentioned series being Mr. Horton Smith, K.C.; and he continued to report Chancery appeals for the Law Reports from their inception until about three years ago. In 1860 he drafted the consolidated orders of the Court of Chancery. He was the senior draftsman, also, with Mr. Arthur Wilson—then a law reporter on the common law side, but subsequently a Judge of the Supreme Court of Calcutta—of the Judicature Rules. He led a busy and useful life. (*The Law Times*.)

The Testimony of Bystanders.

An interesting experiment in evidence has been made by Dr. von Liszt, a Berlin professor of criminal law. A few days ago he was lecturing on Tarde before an audience of jurists which included a district Judge. At the close of the lecture the professor hurriedly left the platform with the excuse that he had a pressing engagement and could not stop to answer questions. Before he had reached the door, however, a member of the audience asked in a loud voice what were Tarde's relations to Christianity. "A nice question to ask," a second gentleman observed in very insulting accents. "Hold your tongue," retorted the first speaker, to which the second speaker replied, "What disgusting vulgarity." The first speaker thereon rose in a fury, threw himself on his opponent, seized him by the throat, and threatened him with a revolver. The audience naturally became greatly excited. The tumult which followed was brought to a close by the voice of Dr. von Liszt, exclaiming, "Gentlemen, you have all seen the struggle which has just taken place. We will proceed at once, if you please, to record the evidence in the case." Dr. von Liszt, with the aid of two assistants, had

arranged beforehand the details of the exciting scene, which was to the audience a sensational surprise. A few witnesses were examined on the spot, and the others in the course of the next few days. The result was astounding. Only one witness (and he was not the Judge) was able to give a correct account of the quarrel; the other accounts were full of errors, some of a gross character. (*The Law Times*.)

A Southern Law School.

An 'enterprising law school in Nashville, (Tennessee, "The National College of Law," apparently has an eye on possible Canadian students, for we find its advertisement in this issue of the CANADIAN LAW TIMES.

Recent American Decisions.

Bankruptcy and Insolvency.—An attachment creditor, claiming that an assignment for creditors is fraudulent as to him, and maintaining a hostile attitude toward the receiver of the estate, and allowing the receiver to insure the attached property for the benefit of the estate, is held in *McLaughlin v. Park City Bank (Utah)*, 54 L. R. A. 343, to have no right, after money is collected on the insurance policy, to claim a trust in his favour on account of his attachment on the burned building, which might have satisfied his execution had it not been burned. With this case is a note as to the right of a creditor to participate under assignment or deed of trust for the benefit of creditors, which he has repudiated.

Contributory Negligence of Infant.—The question whether or not a boy of ten years old is guilty of negligence contributing to his injury is held in *Roberts v. Spokane Street R. Co. (Wash.)*, 54 L. R. A. 184, to be for the jury, where at a street crossing he attempts to ride a bicycle across street railway tracks, and in so doing passes behind one car and comes immediately in front of another approaching from the opposite direction, which, because of its defective condition, cannot be stopped in time to avoid collision with him.

Contributory Negligence of Infant's Parent.—In an action for the death of a child, the father as administrator being plaintiff, it is held in *Tucker v. Draper* (Neb.), 54 L. R. A. 321, to be error to instruct the jury that contributory negligence of the father is no defence.

Evidence.—Evidence of good character, while not a defence, is held in *Daniels v. State* (Del.), 54 L. R. A. 286, to be a circumstance tending to strengthen the legal presumption of innocence, and to be weighed and estimated by the jury according to the weight of the testimony by which it is supported, in connection with that to which it is opposed.

Forgery.—An instrument in the following form: "Mr. Sage: Please let this boy have a single rig,—a good one,—and oblige. I will bring it back myself: George Clinger:"—is held in *Hickson v. State* (Neb.), 54 L. R. A. 327, to be the subject of forgery.

Guardian and Ward.—A contract binding upon the ward or upon his estate, however beneficial to the ward it may be, is held in *Andrus v. Blazzard* (Utah), 54 L. R. A. 354, to be beyond the power of the guardian, and to impose a personal liability upon himself.

Insurance.—The existence of a law imposing upon a son the duty of supporting his father in case the latter becomes unable to support himself, is held in *Life Insurance Clearing Co. v. O'Neill* (C. C. A. 3rd C.), 54 L. R. A. 225, to give the son no insurable interest in the father's life, in the absence of any expenditures, past or prospective, toward such support. With this case is a note reviewing the authorities as to insurable interest in life of parent or child or other relative by blood.

An assignment of a policy upon a person's own life to another having no insurable interest is held in *Chamber-*

lain v. Butler (Neb.), 54 L. R. A. 338, to be lawful if done in good faith, and not by way of cover for a wager policy.

Landlord and Tenant.—A stipulation in a lease of a farm for a term of years, that all property of every kind and description belonging to the tenant that shall be on the premises, or brought thereon during the term of the lease, shall be held as security for the payment of the rent, and that there shall be a lien on the same for the payment of such rent, is held in Brown v. Neilson (Neb.), 54 L. R. A. 328, to be ineffectual to create a lien for rents due and in arrears, on the crops grown on the leased premises, and other property not *in esse* at the time of the lease, but afterwards brought thereon by the lessee.

Negligence as to Infants.—The owner of an unenclosed lot adjacent to a highway in a thickly populated part of a city, who leaves unguarded thereon a heavy section of cement pipe of unstable equilibrium, which is an attractive plaything for children to roll about, and who knows that they resort there for that purpose, is held in Kopplekom v. Colorado Cement Pipe Co. (Colo.), 54 L. R. A. 284, to be liable to a child who is injured by the pipe toppling over on him while he is playing with it.

One who makes an excavation upon his land is held in Savannah F. & W. R. Co. v. Beavers (Ga.), 54 L. R. A. 314, not to be bound to so guard it as to prevent injury to children who come upon the premises without his invitation, express or implied, but who are induced to do so merely by the alluring attractiveness of the excavation and its surroundings.

Negligence—Druggist.—Negligence in putting up a prescription is held in Burgess v. Sims Drug Co. (Iowa), 54 L. R. A. 364, to render a druggist liable for injuries caused thereby, although the negligence is that of a registered pharmacist employed by him, which class alone is allowed by statute to fill prescriptions.

Negligence—Violation of Statute.—One who beat a horse in violation of the statute for prevention of cruelty to animals is held in *Osborne v. Van Dyke* (Iowa), 54 L. R. A. 367, not to be able to escape liability for an injury caused by a blow falling on a bystander, on the ground that he used reasonable care to avoid the accident, which was caused by the shying of the horse and the slipping of his own foot. and that such result of his acts was not anticipated.

BOOK REVIEWS.

American Bar Association.—Report of the Twenty-Fourth Annual Meeting, held at Denver, Colorado, on the 21st, 22nd, and 23rd August, 1901. Philadelphia: Dando Printing and Publishing Co.: 1901.

The minutes of the annual meeting and a transcript of the various reports and addresses make, when printed, a large volume, which contains matter both useful and entertaining.

The delegates and visitors were welcomed in a humorous speech by Mr. Platt Rogers, of the Colorado Bar, who assured them, however, that he and his Colorado associates were equally prepared to speed the parting of their guests, inasmuch as they had their full complement of attorneys in the State already, and any considerable addition from members of the American Bar Association would completely demoralize the industry.

The address of the president for 1901, Mr. Edmund Wetmore, of New York, was, as the constitution of the association requires, devoted to communicating the most noteworthy changes in statute law on points of general interest made in the several States and by Congress during the preceding year. The president thus covered a wide field; he dealt with Corporations and Trusts, Labour, Creditors' Rights and Protection of Title to Property; Taxation, Municipal Ownership, Elections, The Administration of the Law, Education, Husband and Wife, and Public Health.

Papers were read upon the following subjects: The Insular Cases, by Mr. Charles E. Littlefield, of Rockland, Maine; Implied Limitations upon the Exercise of the Legislative Power, by Mr. Richard C. Dale, of Philadelphia; The Evolution of Mining Law, by Mr. Charles J. Hughes, of

Denver, Colorado; *The Lawyer*, Hamilton, by Mr. Henry D. Estabrook, of Colorado, Illinois — who epigrammatically affirmed “that the legal mind is the scientific mind with an ethical kink in it;” *The Law of New Conditions*, Illustrated by the *Law of Irrigation*, by Mr. Platt Rogers, of Denver, Colorado; *The Undergraduate Study of Law*, by Mr. Nathan Abbott, of Leland Stanford Junior University; *Shall Law Schools give Credit for Office Study?* by Mr. H. Sawyer Richards, of Iowa State University; *Legal Education and Preparation therefor*, by Mr. Clarence D. Ashley, of New York University; *The Graduating Examination in the Law School*, by Mr. Raleigh C. Miner, of the University of Virginia; *Is Law a Field for Woman’s Work?* by Mr. William P. Rogers, of Indiana University.

The discussions upon some of these papers were very interesting, and particularly so the remarks of Miss Mary L. Lathrop, of the Colorado Bar, upon the subject of Professor Rogers’s paper. She briefly related some of her experiences in the practice of the law, and furnished an answer to the question “What betterment will come to society through women practising law?” She said that there were two women practising law in Denver; neither took divorce cases; and both had adjusted innumerable family quarrels without money and without price. The result was that the woman practitioner strengthened domestic ties; and she also stood for the betterment of the conditions surrounding women workers.

Mr. W. M. Rose, of Little Rock, Arkansas, was elected president for 1901-2, and the meeting of 1902 will be held at Saratoga Springs, New York.

Blyth’s Analysis of Snell’s Equity.—An analysis of the thirteenth edition of Snell’s *Principles of Equity*, with notes thereon, by E. E. Blyth, B.A., LL.D. (Lond.), Solicitor; Incorporated Law Society’s Clifford’s Inn (First) Prizeman, Mich. 1878, etc., etc. Seventh edition. London: Stevens and Haynes: 1902.

This little book will be useful to students in two ways: (a) it will to some extent serve as a guide to the reading of "Snell's Principles of Equity," for it is an epitome of the essential features of that book, together with extracts from other text-book writers inserted for the purpose of throwing light upon some of the dark passages in Snell; (b) it will serve the purpose of refreshing the student's memory if read immediately before an examination. Any student who attempts to use this book not as a companion to, but as a substitute for, Snell's book, is likely to meet with serious disappointment.

A. H. M.

General Digest American and English.—Bi-monthly advance sheets: No. 26, December, 1901. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co.

A most useful and satisfactory digest.

THE CANADIAN LAW TIMES.

APRIL, 1902.

IRREGULAR FORMS OF BILLS AND NOTES.

IN a previous issue of this periodical (April, 1898), the writer briefly discussed, under the above heading, the question of the liability to the payee of a bill or note, of a person who put his name on the back of it, with the intention of rendering himself liable as an indorser, but before the payee had indorsed it or had become the holder of it. It was there pointed out that the decision of the House of Lords in *Steele v. McKinlay*, 5 App. Cas. 754, had definitely settled the law of England against such liability. It was also shewn that the decisions of our own Courts in *Robertson v. Lonsdale*, 21 O. R. 600, *Duthie v. Essery*, 22 A. R. at p. 193, per *Burton, J.A.*, and *Robertson v. Davis*, 27 S. C. R. at p. 574, per *Sedgewick, J.*, were to the same effect, and clearly established the principle that, under such circumstances, the payee of a note could not maintain an action thereon against the indorser.

These decisions have since been followed in our Ontario Courts in *Clapperton v. Mutchmor*, 30 O. R. 595, *Canadian Bank of Commerce v. Perram*, 31 O. R. 116, *Small v. Henderson*, 27 A. R. 492, and *Robinson v. Mann*, 2 O. L. R. 63. In England the decision in *Steele v. McKinlay* has been followed in *Macdonald v. Whitfield*, 8 App. Cas. 733, and also in the recent case of *Jenkins v. Comber*, [1898] 2 Q. B. 168. It was, therefore, considered as clearly settled law, that a payee of a bill or note had no recourse whatever against an indorser on the instrument. It is true, as pointed out in

the previous article above referred to, that the Court of Appeal in *Duthie v. Essery*, apparently overlooking the definition of "a holder in due course" contained in s. 29 of the Bills of Exchange Act, allowed a transferee from the payee after maturity to recover from such an indorser. In *Canadian Bank of Commerce v. Perram*, however, Armour, C.J., refused to follow this decision, on the ground that it was not of equal authority with the decisions of the House of Lords above referred to.

The first doubt raised as to the absolute non-liability of such an indorser was in the judgment of Armour, C.J.O., in *Robinson v. Mann*. The note in that case was made by W. Mann & Co., payable to the order of the Molsons Bank, was indorsed by George T. Mann (the defendant), and was then delivered in that form to the bank, who discounted it and gave W. Mann & Co. the proceeds. A chattel mortgage, as security against this indorsement, was given by W. Mann & Co. to George T. Mann, who paid the note to the bank after maturity; and the action was brought by the assignee for creditors of W. Mann & Co. to set aside the mortgage; but we are not specially concerned with that part of the case. At p. 65 the Chief Justice says:—"Doubtless the Molsons Bank could not have recovered the amount of this note against the defendant in the form in which it was, and indorsed as it was by the defendant, the Molsons Bank never having indorsed it; but this does not prove that the defendant incurred no liability by his indorsement of it, for the circumstances under which it was made and indorsed and discounted, shew clearly that the Molsons Bank would have been entitled to have had it expressed according to the intention of the parties, and the mistake consisted of making them payees, instead of the defendant."

This case, however, differed from *Clapperton v. Mutchmor*, and *Harvey v. Bank of Hamilton*, 16 S. C. R. 714, in this, that here there was no collateral agreement between the indorser and the bank which the latter could have enforced. To quote the language of Osler, J.A., at p. 67:—"Here the bank dealt with the maker of the note alone, and took an

instrument which he could not have compelled the defendant to exchange for one in different form. Between the bank and the defendant there was no privity. He had made no representation to them, and they were in no better position to compel him to give them a different indorsement than their customer was." The decision of the learned Chief Justice seems, therefore, to be at variance with his previous decision in *Canadian Bank of Commerce v. Perram*, wherein he says, at p. 117:—"The note not having been indorsed by the plaintiffs, the payees, before the defendant put his name on the back of it, he incurred no liability in respect of it. He did not become liable as an indorser under the law merchant, nor did he become liable as a surety, because of the Statute of Frauds." And at p. 118:—"It was alleged that the note in question was made payable to the plaintiffs through inadvertence, but this we cannot aid or relieve against."

The plaintiff (Robinson), having failed in the Court of Appeal to get the mortgage set aside, appealed to the Supreme Court, where the appeal was heard on the 31st October, 1901, and was dismissed at the argument, counsel for the respondent not being called upon. The judgment of the Court was delivered orally by the Chief Justice, and the writer had been favoured by the Court reporter with a proof of his notes thereof in advance of the regular publication.* Not only was the validity of the chattel mortgage affirmed, but the Court also held that the note was one on which the Molsons Bank (the payees) could have sued the defendant. The judgment, in so far as it deals with this latter point, is as follows:—

"George T. Mann, the present respondent, indorsed a note signed by W. Mann & Co., and payable to the Molsons Bank. It is contended that he was not an indorser and as such liable to the bank, to whom the note so indorsed was delivered and by them discounted, Walter Mann receiving the proceeds.

"Next, what was the legal effect of this indorsement? Section 56 of the Bills of Exchange Act, 1890, provides

* Now reported, 81 S. C. R. 484.

that 'where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers.'

"Then when the bank took the note, was it not entitled to the benefit of the respondent's liability as indorser? Certainly it was, for, by force of the statute, the indorsement operated as what has long been known in the French commercial law as an 'aval,' a form of liability which is now by the statute adopted in English law.

"The argument for the appellant, as I understand it, is that this indorsement at most amounted only to a guarantee, and that, there being no consideration expressed in writing, the Statute of Frauds would have been an answer if the bank had sued the respondent. Some colour is given to this argument by the case of *Sanger v. Elliott*, as reported in 4 Times L. R. 524, but there the Bills of Exchange Act was not referred to, and it appeared that the bill had not been negotiated. It is to be remarked that that case is not to be found in the regular series of reports. Here, however, the note was negotiated, and the bank were holders in due course, and, consequently, the 56th section of the Act applies and creates a liability as indorser, independently altogether of the principle of guarantee. If the section referred to is to have any effect, it must apply in a case like this.

* * * * *

"I agree with the reasons given by their lordships in the Court of Appeal for deciding this case in favour of the respondent, but I do not agree with Mr. Justice Osler, who, I think, puts the case too favourably for the appellant when he says that the bank would have found it difficult to enforce the liability on the note against the respondent. In my opinion, the respondent was clearly liable under the 56th section of the Bills of Exchange Act already referred to."

This is a somewhat startling view of the law, and it will come as a surprise to the profession, in view of the previous decisions upon this point. The writer in his previous article had adopted the opinion of the learned author of

"Maclaren on Bills," that s. 56 of the Act was framed in accordance with the doctrine laid down in *Steele v. McKinlay*, rather than as an adoption of the old French law of "aval," which prevailed in Quebec before the passing of this Act. Mr. Justice Girouard, in his valuable treatise on the Bills of Exchange Act, after pointing out that the former "donneur d'aval" has now, under s. 56, become practically an indorser, continues, at p. 188:—"The donneur d'aval or guarantor being only responsible as indorser, his indorsement creates no obligation in favour of prior parties to the bill, and is solely for the benefit of those who take it subsequently, as laid down in *Steele v. McKinlay*, and other cases cited by Lord Blackburn, at p. 772. Therefore, if a third party, before delivery, indorse a bill payable to the order of the drawer, as in the case of *Steele v. McKinlay*, he will be held liable not to the drawer, but only to the parties subsequent to the latter. To hold him liable as the guarantor of the acceptor would require another operation entirely extrinsic of the bill."

To a similar effect is the judgment of Mr. Justice Sedgewick in *Robertson v. Davis*, which was decided in 1897, and was an action brought in Quebec by the payee of a note against a third person who had indorsed it "pour aval." He says, at p. 574:—"Upon the authority of *Steele v. McKinlay* in the House of Lords, this action is not maintainable. Under no circumstances can the payee of a promissory note or the drawer of a bill of exchange maintain an action against an indorser, where the action is founded upon the instrument itself."

These statements of the law seem more in accordance with the generally accepted opinion, and also with the long line of decisions above referred to. One cannot understand, therefore, how these two learned Judges could have acquiesced in the judgment of the Chief Justice, even though it may have been *obiter* as to the point in question. It is altogether unlikely that the matter will be left where it is at present.

M. J. GORMAN.

Ottawa.

WAIVER OF BREACH OF CONDITION BY INSURANCE COMPANIES.

It is a commonplace proposition that the necessity for performing a condition in a contract may be *waived* by the party in whose favour the condition is inserted, either expressly or by the implication resulting from his acts or conduct. The object of this article will be to discuss this proposition as applied to the forfeiture of a policy of insurance occasioned by the breach of a condition contained therein, having regard particularly to the large number of cases that have been decided on this subject in the Supreme Court of Canada and in the Courts of Ontario.

I. EXPRESS WAIVER.

In deciding whether a case of express waiver is made out, one or both of the following propositions will be material:—

1. Since the party against whom an express waiver is sought to be proved is a company necessarily acting through agents, the authority of an agent assuming to waive the breach of a condition must be established.

2. If there is a special condition in the policy prescribing the manner in which a waiver shall be evidenced in order to be valid, this must be strictly complied with.

1. *Authority of Agent.*

The language of Street J., in *Wells v. Independent Order of Foresters* (1889), 17 O. R. at p. 328, may usefully be quoted:—"In the case of waiver, where the element of estoppel does not come in, I think it is open to the defendants to require the plaintiff to prove the authority of the officer who is alleged to have waived the defendants' rights, and to insist that, in the absence of such proof, the alleged waiver cannot be held to have taken effect."

The general agent or resident secretary or manager in this country of a foreign company must be regarded in the same light as the general agent at the head office of the

company, and, in the absence of a condition prohibiting it, must be deemed to have power to waive strict compliance with the terms of the policy: *Campbell v. National Life Ins. Co.* (1874), 24 C. P. 133; *Moffatt v. Reliance Mutual Life Assee. Society* (1881), 45 U. C. R. 561.

But an inspector, whose duty was described as being "to examine into the circumstances, to adjust the loss, and to settle or report to the company," was held to have no authority to waive the non-compliance with a condition requiring notice in writing of other insurance: *Mason v. Hartford Fire Ins. Co.* (1875), 37 U. C. R. 437; *Western Assee. Co. v. Doull* (1886), 12 S. C. R. 446.

It was pointed out in *Mason v. Hartford Fire Ins. Co.* that waiver by an agent such as just described must relate distinctly to some matter in the line of his duty, e.g., if there was a condition that in adjusting the loss the insured should deliver to the inspector or agent of the company engaged in the adjustment an account or statement in writing of the various matters which the inspector should require him to furnish, and that if he did not do so the policy should be void, and if an adjustment were made by the agent without a statement in writing such as the condition required being furnished, or without the agent requiring any such statement because he was willing and content to do without it, the adjustment so made, free from fraud or collusion, of course, would be binding on the insurers, because that would be an act within the duty and powers of such an agent to deal with.

So in *Atlas Assee. Co. v. Brownell* (1899), 29 S. C. R. 537, it was held that a person, not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent having authority to waive compliance with a condition requiring the assured "to deliver within 15 days after the fire, in writing, as particular an account of the loss as the nature of the case permits," and, even if he had such authority, he could not after the 15 days, when the policy had already become forfeited, extend the time without express authority from his principals: *Cf. Commercial Union Assee. Co. v. Margeson* (1899), 29 S. C. R. 601.

A fortiori, an agent with powers limited to receiving and forwarding to the company applications for insurance, has no authority to waive the breach of a condition, such as one providing against a change of interest in the property insured, or one requiring notice of subsequent insurance: *Torrop v. Imperial Life Ins. Co.* (1896), 26 S. C. R. 585; *Western Assee. Co. v. Doull*, *ubi supra*; *Jacobs v. Equitable Ins. Co.* (1858), 17 U. C. R. 35.

2. Condition Requiring Waiver to be in Writing.

Similar questions to those just discussed may also arise in the case of implied waiver, but the authority of agents to make an express waiver may, in addition, be subject to a term in the policy requiring the waiver to be evidenced in writing in some particular manner, such a term being express notice to the assured of the lack of authority of any agent to make a waiver otherwise than in the manner prescribed: *Atlas Assee. Co. v. Brownell*, *supra*; *Commercial Union Assee. Co. v. Margeson*, *supra*.

The 20th statutory condition applicable to fire insurance contracts (R. S. O. 1897 c. 203, s. 168) provides that "no condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing, signed by an agent of the company;" and a term frequently inserted in insurance policies provides that waiver must be in writing, indorsed on the policy, and signed by the manager of the company. The effect of such conditions is merely to restrict the authority of an agent to make an express waiver, so that if a person sets up that the contract between him and the insurance company has been varied by express agreement, he must be able to shew that the variation has been assented to by an agent who is not prohibited from doing so by the terms of the contract itself. Such stipulations as these, however, are confined in their application to express waiver, because they are binding only to the same extent as other conditions of the policy, and may be impliedly waived in the same manner as other conditions.

II. IMPLIED WAIVER.

The doctrine of implied waiver as asserted against insurance companies is, as will presently be more explicitly pointed out, only another name for the doctrine of estoppel.

Assuming then that the insured has committed a breach of a condition which, in the absence of other circumstances, would avoid the policy, and that no express waiver of the breach has been proved, the essential elements necessary to preclude the insurer from insisting on the forfeiture of the policy appear to be:—

1. Knowledge on the part of the insurer of the breach.
2. Conduct of the insurer inconsistent with the intention to take advantage of the forfeiture.
3. Alteration in the position of the insured to his prejudice, reasonably resulting from the conduct of the insurer.

A good illustration of these three essential elements (which will be discussed seriatim below) is afforded by the recent case of *Mutchmor v. Waterloo Mutual Ins. Co.*, decided by Ferguson, J., in July last, and now standing for argument in the Court of Appeal. The policy was one against fire, and, under R. S. O. 1897 c 203, s. 168, had indorsed upon it and was subject to the 8th statutory condition, as follows:—
 “The company is not liable for loss if there is any prior insurance in any other company, unless the company’s assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected by any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.”
 At the time of the application for and issuing of the policy sued on, there was in fact prior insurance in the Hand-in-Hand Insurance Company, and also in the Sun Fire Insurance Company, which was not expressly assented to by the defendants, and no indorsement thereof was made on the

policy. The application for insurance in the defendant company, however, contained written notice of the prior insurance, and the 2nd statutory condition indorsed on the policy provided that "after application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out, in writing, the particulars wherein the policy differs from the application," and the jury found that the defendants had received written notice of the prior insurance. Subsequent to the issue of the policy sued on insurance was effected by the plaintiffs in two other companies, namely, the London Mutual Fire Insurance Company of Canada and the Lancashire Fire Insurance Company. The agent through whom the subsequent insurance in the Lancashire was effected was also the district agent of the defendants, and of course he had notice of the intention and desire to effect the subsequent insurance. The jury also found, in reply to questions, that the plaintiff notified the defendants of the existence of such insurance by leaving the policy with the agent; that the agent prior to the loss entered this policy in a record book of the defendants kept for the purpose; that this agent was the person who, in practice, received such notices on behalf of the defendants within his district; and that he did assent to such insurance; and the Judge held that the knowledge of the agent was the knowledge of the company. With regard to the so-called subsequent insurance in the London Mutual, the jury found that this was merely substituted for the insurance already existing in the Hand-in-Hand. All the insurance, both prior and subsequent, afterwards became known to the defendants at their head office.

This was the position of matters when the loss occurred. The company, then, with full knowledge of the facts of the case, sent their adjuster to adjust the loss, and an adjustment was accordingly made embracing a consideration of what proportion of the loss each company was to pay: and the jury found that the defendants by this act intended to treat the policy as a valid and subsisting policy, and that the plaintiff on the faith of such act altered his position by settling with the other companies for a sum less than he

would otherwise have demanded. *Held*, therefore, that there was evidence, of an unequivocal character, of an election by the defendants to treat the policy as valid, leading the plaintiff to believe that they would pay whatever was found due, which election they were not at liberty to withdraw, as the plaintiff had altered his position in consequence of it.

1. *The Insurer Must Have Knowledge of the Breach of Condition.*

(1) Acts done by the insurer in ignorance of the breach cannot give rise to the implication of waiver.

So where the directors of a company passed a resolution to pay a loss, in ignorance of the existence of an incumbrance which had not been disclosed by the insured, and made an assessment to meet it, but on discovery of the facts rescinded the resolution, it was held that the defendants had not by their resolution waived their right to set up the breach: *Phillips v Grand River Ins. Co.* (1881), 46 U. C. R. 334.

And where a company compromised with the assured by paying a portion of the sum insured, and subsequently discovered that the assured had himself feloniously caused the fire, the Court set aside the compromise and ordered repayment of the money: *Queen Ins. Co. v. DeVinney* (1878), 25 Gr. 394.

(2) In certain cases, however, the knowledge of an agent will be imputed to the company so as to estop them from setting up their want of knowledge, although he has in truth never notified his superiors of the facts.

So, where the assured in his application (which it was agreed should form the basis of the contract between him and the company), stated that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and at the time had in fact lost the sight of one eye, and this was known to the agent effecting the insurance, though not communicated to the company, it was held that the knowledge of the agent was, under the circumstances, the knowledge of the company, and that they were liable on the policy, and could not throw

upon the assured the consequences of the agent's breach of duty in not informing the company: *Bawden v. London, Edinburgh, and Glasgow Ins. Co.*, [1892] 2 Q. B. 534. Cf. *Wing v. Harvey* (1854), 5 D. M. & G. 265, and *McQueen v. Phoenix Ins. Co.* (1880), 4 S. C. R. 660.

Where, however, the policy contained a provision that notices of all previous insurances should be given to the company and indorsed on the policy or otherwise acknowledged by them in writing, or the policy should be of no effect, and another, that all notices for any purpose must be in writing, it was held that a verbal notice to the company's agent of a policy at the time of the application, but not mentioned therein, was not sufficient: *Billington v. Provincial Ins. Co.* (1879), 3 S. C. R. 182. Cf. *Peck v. Agricultural Ins. Co.* (1890), 19 O. R. 494; and distinguish *Graham v. Ontario Mutual Ins. Co.* (1887), 14 O. R. 358.

2. The Conduct of the Insurer Must be Inconsistent With the Intention to Take Advantage of the Forfeiture.

(1) It was held by Mowat, V.-C., that, if a company, after loss has occurred and after being notified of breach of condition, calls for proofs of loss which are furnished, this is such an election to treat the policy as subsisting as will preclude the company from afterwards setting up the forfeiture: *Canada Landed Co. v. Canada Agricultural Ins. Co.* (1870), 17 Gr. 418.

But this view was dissented from by the Court of Queen's Bench in *Abrahams v. Agricultural Mutual Ins. Co.* (1876). 40 U. C. R. 175. In this case Harrison, C.J., delivering the judgment of the Court, said at p. 180:—"No such rule has ever prevailed in Courts of common law in this Province. In many cases which I remember, and could name if necessary, there was not only the defence of insufficient proof of loss, but a condition making void the policy, and correspondence about the former without any reference to the latter, and no question of waiver ever raised or attempted to be raised."

The converse proposition that defects in the proofs of loss may be waived by a repudiation of liability on other grounds will be discussed below.

(2) The receipt, with knowledge of a breach of condition, of premiums accruing due after such breach, will operate as a waiver: *Wing v. Harvey* (1854), 5 D. M. & G. 265; *Armstrong v. Turquand* (1857), 9 Ir. C. L. 32; *McIntyre v. East Williams Mutual Fire Ins. Co.* (1889), 18 O. R. 79.

If, however, payment of premiums is received under circumstances which are as consistent with an intention not to waive any right as with a contrary intention, waiver will not be presumed. So, where the rules of a society provided for reinstatement upon the payment of the arrears of premiums, the passing of a medical examination, and the performance of other formalities, it was held that, as the payment of the arrears was only the first step towards reinstatement, and was consistent with the intention to insist upon the other preliminaries to reinstatement, the receipt of such premiums was not evidence of waiver: *Wells v. Independent Order of Foresters* (1889), 17 O. R. 317.

(3) Where a company, having subsequent to the loss learned for the first time of a breach of condition, submitted the question of the amount of the loss to arbitration, and paid part of the amount so found to be due, all the facts being known to the head office, the Privy Council in giving judgment for the insured said that there had been waiver of the most precise character: *Lancashire Ins. Co. v. Chapman* (1875), 7 *Revue Légale* 47; and cf. *Mutchmor v. Waterloo Mutual Ins. Co.*, *supra*.

A submission to arbitration, however, will not always be a waiver of a breach of condition: *Margeson v. Guardian Fire and Life Assce. Co.* (1898), 31 N. S. Reps. 359.

There may be an express reservation of objections on grounds other than to the amount of the loss. And in the case of a loss by fire, "if any difference arises as to the value of the property insured, of the property saved, or of the amount of the loss," and an arbitration is had under the 16th statutory condition (R. S. O. 1897 c. 203, s. 168), as to "such value and amount and the proportion thereof, if any, to be paid by the company," one would think there would be no waiver of objections on other grounds. The condition seems to contemplate an ascertainment of the

value, amount, or proportion, "whether the right to recover on the policy is disputed or not, and *independently of all other questions*," i.e., without a waiver of objections on other grounds.

But in *City of London Fire Ins. Co. v. Smith* (1888), 15 S. C. R. 69, Gwynne, J., points out that a reference under the condition referred to does not prevent the defendants from disputing the plaintiff's right to recover under the policy, but he thinks that it is inconsistent with the contention of the defendants that there never was any contract in existence by reason of the parties never having been *ad idem*.

(4) In the case of a ship-policy, where there was a constructive total loss and notice of abandonment, and the company, with full knowledge of all the facts, accepted the notice, and the agent, in pursuance of instructions to look after the interests of the company, took possession of the ship, it was held that the company could not, when called on to pay the amount insured, resile and rely on a breach of warranty: *Provincial Ins. Co. v. Leduc* (1874), L. R. 6 P. C. 224.

But receipt of notice of abandonment by the agent of an insurance company, and his statement that he would forward it to his principals, and that he believed that the loss would be paid, do not amount to acceptance of abandonment: *O'Leary v. Pelican Ins. Co.* (1889), 29 N. B. Reps. 510.

(*To be continued.*)

JOHN D. FALCONBRIDGE.

Toronto, December, 1901.

RECENT CASES FROM THE TIMES REPORTS.*

Adulteration of Food.]—In *Pearks, Gunston, and Tee (Limited) v. Houghton*, 18 T. L. R. 362, the question of selling “milk-blended” butter again came up (see 21 C. L. T. 444), and the vendors in this instance escaped punishment, there being in the opinion of the Court sufficient notice to the purchaser—by a conspicuous advertisement on the wall of the shop and by a printed notice on the wrapper—of the nature of the article he was getting.

Banker.]—*Forman v. Bank of England*, 18 T. L. R. 339, though turning very much on the special facts, may be noted as a case where damages were recovered against a bank for refusing payment of a customer’s cheque. The contest in the case was whether, under the circumstances set out, a cheque in favour of the customer, deposited by him, was to be treated as paid so as to entitle him to draw his own cheque against the proceeds.

Broker.]—The Court of Appeal, 18 T. L. R. 341, affirmed the judgment of Kekewich, J., in *Oliver v. Bank of England*, 17 T. L. R. 286, noted 21 C. L. T. 190, holding the bank liable to replace stock transferred under a forged power of attorney, with a right of indemnity, however, against the broker who had, in good faith, presented the power of attorney and obtained the transfer. *Collen v. Wright*, 8 E. & B. 647, as to an agent’s implied warranty of his authority to act, was held to govern the case.

Building Restrictions.]—*Wright v. Berry*, 18 T. L. R. 370, is chiefly useful as a warning not to complain too soon of a threatened infringement of building restrictions. The defendants had covenanted not to erect any building other than a detached or semi-detached house. They erected a building which the plaintiff alleged was to be used as an apartment home for poor people. It was shewn, however,

* Including the cases in No. 16, Vol. 18, week ending March 5th, 1902.

that the building consisted in its architectural scheme of a set of eight-roomed houses, and it was held, therefore, that in the erection of it there was no breach of the covenant, the question of the effect of user for the alleged purpose not being ripe for decision.

Company.]—In *In re London and Northern Bank (Limited)*, 18 T. L. R. 320, there was a contest between the holders of ordinary shares and the holders of preference shares as to the validity of the latter shares. The company had power to issue preference shares, but it was contended that there had been irregularities as to the appointment of directors, the holding of meetings, and so forth. It was held, however, that the company itself being estopped from asserting objections of this kind, the ordinary shareholders could not assert them either, as they took title through the company. Though not specifically referred to, s. 67 of the Companies Act, 1862, curing irregularities in procedure, may have had some influence on this decision.—In *Stephens v. Mysore Reefs Mining Co.*, 18 T. L. R. 327, general words in a memorandum of association were held to be applicable to and only in aid of the main object for which the company was formed, and not to empower the company (though in terms wide enough for that purpose) to embark in an entirely collateral undertaking.

Constitutional Law.]—In *Hull Electric Co. v. Ottawa Electric Co.*, 18 T. L. R. 344, in the Judicial Committee, the important constitutional point given effect to in the Court of Queen's Bench of Quebec, namely, that the regulation of the business of an electric light company within a municipality was a matter within the exclusive jurisdiction of Parliament as pertaining to trade and commerce, and therefore that a municipal by-law, validated by local Act, dealing with the subject, was void, was abandoned by the respondents. The appellants failed, however, upon the merits.

Contract.]—Though to a great extent depending upon special legislation, the cases of *Husey v. London Electric Supply Corporation*, 18 T. L. R. 296, and *Husey v. Gas Light and Coke Co.*, 18 T. L. R. 299, as to the right of an electric

light company and gas company respectively to make payment of arrears a condition of entering into or continuing a contract to supply electricity and gas, should be noted, the difficulty being one of not uncommon occurrence in this Province under analogous legislation and contracts.

Copyright.]—What is meant by “causing a manuscript to be printed” in s. 15 of the Copyright Act, 1842 (R. S. C. c. 62, s. 20) is considered in *Kelly’s Directories v. Ginn*, 18 T. L. R. 346. The defendants contracted to print a book which admittedly infringed the plaintiff’s copyright. Owing to press of work they were unable to do the printing, and the person with whom they had contracted employed other printers to do the work, the defendants’ name being given, however, on the title page as the printers. It was held, on the evidence, that the actual printers were neither the agents of, nor employed by, the defendants, and that the defendants therefore were not liable. At the trial they were, however, deprived of costs.

Criminal Law.]—In *Rex v. Kershaw*, 18 T. L. R. 357, evidence was admitted, on the trial of a lad for murder of a school companion, of answers made by him before his arrest, when questioned as to the place where his missing companion was likely to be found.

Damages.]—In *Richard Holden (Limited) v. Bostock and Company (Limited)*, 18 T. L. R. 317, the plaintiffs, who were brewers, were held entitled to recover from the defendants, who had sold to them for brewing purposes sugar containing arsenic, (a) the market value of a quantity of beer which the plaintiffs had been obliged to destroy and not merely the cost to them of reproduction; (b) fees paid by the plaintiffs to analysts; (c) the extra cost of beer purchased by the plaintiffs from other brewers to make good to customers beer previously sold; and (d) the cost of a notice to customers explaining the circumstances, sent out in good faith so as to minimize as far as possible the loss of business.

Donatio Mortis Causa.]—In *In re Weston, Bartholomew v. Menzies*, 18 T. L. R. 326, it was decided, after a somewhat

elaborate discussion of the authorities, that money in the post office savings bank was validly given by way of *donatio mortis causa* by the handing to the donee by the donor of his savings bank book. The test in such cases was held to be whether the document is more than a mere receipt and sets out in effect the contract in favour of the donor, and is in itself evidence of the donor's title. It was held in the same case that delivery by way of *donatio mortis causa* of certificates for shares in a building society did not vest the shares in the donee.

Duress.]—*Barnes v. Richards*, 18 T. L. R. 328, is an interesting case upon the question of duress. The action was brought to recover arrears of salary and damages for wrongful dismissal. The defendants pleaded a settlement before action, to which the plaintiff replied, duress. In answer to questions the jury found that the plaintiff had not been induced to make the settlement in question by threats of criminal proceedings, but that he had been induced to do so by "undue pressure" exercised by the defendants. The Lord Chief Justice held that this was not sufficient to entitle the plaintiff to say that he was not bound by the settlement and he therefore dismissed the action.

Factory Act.]—A beer-bottling establishment was held to be a factory within the meaning of s. 93 of the Factory and Workshop Act, 1878: *Hoare v. Truman*, 18 T. L. R. 349.

Fixtures.]—The judgment of the Court of Appeal in *Leigh v. Taylor*, 17 T. L. R. 90, 246, noted 21 C. L. T. 55, 193, as to tapestries not being fixtures as between remainderman and representatives of deceased tenant for life, was affirmed by the House of Lords: 18 T. L. R. 293.

Landlord and Tenant.]—*Plummer v. Johnson*, 18 T. L. R. 316, is a case of much practical interest. A lease contained a covenant by the lessee (whether for himself and his assigns, if that makes any difference, is not stated) to repair and keep in repair the demised premises. After the premises had been allowed to get out of repair, the lease was assigned to the defendant. It was held that he was liable

for the full amount of the damages resulting from the breach, and could not escape liability by shewing that the premises had been kept by him in as good a state of repair as they were in when he took the assignment.—*Grove v. Portal*, 18 T. L. R. 319, is an example of the strict interpretation placed upon covenants in a lease against alienation by the lessee. The defendant granted to the plaintiff the exclusive right of fishing with rods and lines in a river for a term, the plaintiff covenanting not to “underlet, assign, transfer, or set over” the demised premises. It was held that the grant by the plaintiff to a third person of a license to fish was not a breach of this covenant, the plaintiff’s own right to fish still continuing, and the covenant not in terms referring to the alienation of a part of the demised premises.—*Davies v. Jones*, 18 T. L. R. 367, is also a fishing case, the holding being that by a lease of land bounded by a stream the right of fishing in the stream passes to the lessee.

Lunatic.]—The Court can inquire into the state of mind of a foreigner temporarily residing within the jurisdiction, though having only some personal chattels within the jurisdiction: *In re Burbidge*, 18 T. L. R. 347.

Negligence.]—*McDowall v. Great Western R. W. Co.*, 18 T. L. R. 340, is in principle very like *Rombough v. Balch*, 27 A. R. 32. The defendants were held liable where the brakes of a van standing on their line near the highway were released by some boys, and the van in consequence ran down the line to the highway and injured the plaintiff. The probability of interference with the brakes was held to be a danger which the defendants should have guarded against.

Principal and Surety.]—Liability upon a bond to an employer guaranteeing the fidelity of a person employed, and in consideration of employment being given to that person, does not determine upon the death of the guarantor or upon the fact of the death coming to the knowledge of the employer. It is doubtful whether liability could be determined by notice by the guarantor, at any rate not unless

power to do so is expressly reserved in the guarantee: In *re Grace, Balfour v. Grace*, 18 T. L. R. 321. The point of the case is that the consideration for the guarantee—the taking into employment—was complete and indivisible, and not fragmentary and accruing from time to time.

Railways.]—In *Glasscock v. London, Tilbury, and South-end R. W. Co.*, 18 T. L. R. 295, the railway company were held liable in damages because of injuries sustained by a passenger in alighting (in daylight) from part of a train which projected beyond the station platform. It was held that there was an implied invitation to alight and that in the absence of warning the passenger was entitled to assume that the conditions were normal, and therefore was not necessarily guilty of contributory negligence because she did not look before stepping off the train. A different result was arrived at in *Quebec Central R. W. Co. v. Lortie*, 22 S. C. R. 336, but the difference in the construction of English and Canadian railway carriages may partly account for that. See also as a cognate case, *Keith v. Ottawa and New York R. W. Co.*, 1 O. W. R. 104.

Sale of Goods.]—The contract for the purchase of iron in question in *Kidston and Co. v. Monceau Ironworks Co.*, 18 T. L. R. 320, provided for the delivery by the plaintiffs to the defendants of a specification “in the beginning of May,” and the time of shipping was to be “May and June.” It was known to the defendants that the specification was to come from Japan and that the date of its arrival was therefore to some extent uncertain, and the defendants’ works were so extensive that the order in question could be filled on a week’s notice. It was held, in view of these facts, and having regard to the time allowed for shipment, that the delivery of a specification “in the beginning of May” was not a condition precedent, and that delivery in time to make it practicable in a business sense to ship the iron in May and June was all that was necessary. It was also held, in the alternative, that delivery of the specification between the 12th and 15th of May was a delivery in the beginning of May.

Settlement.—By the settlement in question in *In re Bozzelli's Settlement*, 18 T. L. R. 365, made by an English lady upon her marriage with an Italian, the wife had power, in the event of her husband predeceasing her, to settle part of the property in favour of her second husband. On the death of her husband she married his brother. It was held that, as the marriage was valid according to the law of Italy, and was not incestuous, the power to appoint took effect.

Shares.—The judgment in *Deverges v. Sandeman, Clark, and Co.*, 17 T. L. R. 51, noted 21 C. L. T. 66, as to the right to sell shares held under mortgage with no express power of sale and no time fixed for payment, was affirmed by the Court of Appeal: 18 T. L. R. 375. The case is of much practical importance, especially as to the nature and time of notice to be given before a sale is effected.

Trade Name.—In *J. & J. Cash (Limited) v. Cash*, 18 T. L. R. 299, the principle laid down seems to be that while a man cannot be restrained altogether from carrying on a trade in his own name, he must in so carrying it on take reasonable steps to prevent his goods being confounded with the goods of another person who has theretofore carried on trade under the same or a similar name and has acquired a reputation in so doing.

Trust.—The Court may allow one of several trustees to retire without appointing a new trustee in his place: *In re Chetwynd*, 18 T. L. R. 348.

Watercourse.—An appeal from the judgment in *Bailey v. Clark, Son, & Morland, Limited*, 17 T. L. R. 239, noted 21 C. L. T. 135, as to the rights of riparian owners on an artificial watercourse, was dismissed as to the question of pollution, but allowed as to the question of abstraction of water: 18 T. L. R. 364. It was held that no rights in such a watercourse arise by implication, but that they must depend upon grant or prescriptive easement or arrangement, proved or presumed from user.

Will.]—Owen v. Gibbons, 18 T. L. R. 347, was a case under s. 3 of the Inheritance Act, 1833 (R. S. O. 1897 c. 127, s. 26). A testator, who died in 1847, by his will made in 1845, devised real estate to trustees upon certain trusts, the ultimate trust being for his own right heirs forever. At the time of the testator's death his right heirs were his two daughters. It was held that they took as joint tenants under the will and not as coparceners by descent, and therefore that when the prior trusts came to an end the plaintiff, who claimed under the survivor of the two daughters, was entitled to the real estate.

EDITORIAL REVIEW.

Mr. Justice Garrow.

The Hon. James Thompson Garrow, K.C., has been appointed a Judge of the Court of Appeal for Ontario in the room of the late Mr. Justice Lister. Mr. Garrow was born at Chippewa, Ontario, on the 11th March, 1843, of Scottish parents. He was educated at the Goderich high school, called to the Bar of Ontario in 1869, and created a Queen's counsel in 1885. He practised at Goderich, which has been his home for many years. He has been a member of the Ontario Legislature almost continuously since 1890, and of the Executive Council, without portfolio, since October, 1899.

The country is to be congratulated upon obtaining Mr. Garrow's services on the Bench. He should make an ideal Judge. His practice at the Bar (never confined to Goderich) has been extensive and varied; he has gained in public life familiarity with the ways of men and a knowledge of the business of the country; he is known to be industrious, honourable, and fair minded—we believe him to be a sound lawyer and a clear reasoner as well.

The Provincial Cabinet and the Bench.

It is worthy of remark in connection with the appointment to the Bench of a member of the Provincial Executive, that such a thing has not happened before in Ontario since Confederation, and, indeed, there are only three instances of gentlemen who have at any time filled both offices. There have been some famous lawyers in Ontario Cabinets—John Sandfield Macdonald, Edmund Burke Wood, Matthew Crooks Cameron, Stephen Richards, Edward Blake, Adam Crooks, Oliver Mowat. The last-named was Vice-Chancellor before he became Premier of Ontario, and Mr. Wood and Sir Matthew Cameron were out of office when promoted to the Bench.

The New Chief Justice of British Columbia.

The Dominion Government has been very prompt in making the appointment of a Chief Justice of the Supreme Court of British Columbia, and (perhaps by way of restoring the average) has appointed a young man, Mr. Gordon Hunter, K.C., of Victoria, who was born at Beamsville, Ontario, on the 4th May, 1863. He is the eldest son of J. Howard Hunter, M.A., Inspector of Insurance for the Province of Ontario, and Ann Hunter (née Gordon). He was educated at Brantford Collegiate Institute and Toronto University. At the University he won the Lorne Silver Medal and the Lansdowne Gold Medal for general proficiency, and graduated in 1885 with the degree of B.A. with honours. He studied law in the office of Messrs. McCarthy, Osler, Hoskin, & Creelman, of Toronto, and was admitted to the Ontario Bar in 1888. Removing to the Province of British Columbia, he settled in Victoria, and in 1892 was admitted to the bar of that Province. He was the first official law reporter to the Supreme Court of British Columbia, but resigned that office to undertake the duties of Crown Solicitor for the Province. This latter office he resigned in 1894 to enter into partnership with the late Hon. Theodore Davie, at that time Attorney-General. This partnership continued until the appointment of Mr. Davie as Chief Justice upon the death of Sir Matthew Bailie Begbie. In 1896 Mr. Hunter married Ida, daughter of Charles Frederick Johnston, of Portland, Oregon. Of late years Mr. Hunter has been editor of the law reports and examiner for the Law Society of British Columbia. In 1900 he was appointed a Queen's counsel. He had an extensive practice, but found time to devote to public affairs, and was known as an eloquent and forceful speaker.

Hiring and Dismissal of Domestic Servants.

Of an interesting article in the *Law Times* (8th March) we quote a part:—

The term "domestic servant" signifies a servant living in the same house with the master, or, in other words, "a person subject to the command of his master as to the

manner in which he shall do his work:” *Yewens v. Noakes*, 44 L. T. Rep. 128. The definition includes a parlourmaid, housemaid, chambermaid, butler, valet, huntsman, and a head gardener living in a house “in the grounds within the domain belonging to his master.” But a governess, hotel manager, tutor, and housekeeper, are not domestic servants. It depends entirely upon the nature of the employment.

“The general rule of law is that if a master hire a servant without mentioning the time, that is a general hiring, and in point of law a hiring for a year, and in the case of domestic servants the rule is well established that the contract shall be determined by a month’s notice, or a month’s wages; but that depends upon custom:” see *Fawcett v. Cash*, 5 B. & Ad. 904, at p. 907, per Denman, C.J. Where no custom has been proved, the contract must be taken to be a hiring for a year. The engagement for service must be counted from the date of making it, and not from the beginning of the year.

A domestic servant is usually engaged verbally; therefore in these cases a contract for a servant’s hire may be proved by word of mouth. This principle of law equally applies although the terms of the agreement are by direction of the parties written down by a third person, such writing, though read over to the parties, not being signed by them: see *R. v. Wrangle*, 4 N. & M. 375. “No new contract arises by implication of law upon a simple dissolution of a special contract of hiring and service performed under such special contract, previous to its being dissolved:” per Tindal, C.J., in *Lamburn v. Cruden*, 2 Man. & Gr. 253.

Questions having reference to allowances to a domestic servant—*e.g.*, washing, beer-money, dress, journeys, and tea, depend, of course, upon the nature of the agreement entered into.

Domestic servants may be summarily discharged for wilful disobedience, grossly immoral conduct, embezzlement, larceny, or permanent disability: see *Harmer v. Cornelius*, 5 C. B. N. S. 236.

In *Cuckson v. Stones*, 1 E. & E. 248, it was decided that a domestic servant can claim his or her wages during temporary sickness.

Lastly, no master or mistress is bound to give a domestic servant a character, but, if one is given, there should be a free and candid disclosure without malice: see *Jackson v. Hopperton*, 16 C. B. N. S. 839. This principle of law was recently confirmed by Lord Alverstone, C.J., in a case tried before him.

Implied Condition Where Goods Sold for Particular Purpose.

The Court of Appeal (Ireland) gave judgment on the 25th February last in *Wallis v. Russell*—the “Cork crab case”—and they decided that when the plaintiff ordered in the defendant’s shop “two nice fresh crabs for tea,” she thereby made known to the defendant “the particular purpose for which the goods are required” (s. 14 (1) of the Sale of Goods Act, 1893), that that was evidence that the plaintiff relied on the defendant’s skill or judgment, and that therefore there was an implied condition that the goods were reasonably fit for the purpose for which they were intended. The Court decided also that the maxim *caveat emptor*, on which the defendant relied, did not apply. “*Caveat emptor*,” said Lord Justice Fitzgibbon, “does not mean in law or in Latin that the buyer must take chance; it means that the buyer must take care.” This important decision on the Sale of Goods Act, 1893, was based expressly on the assumptions that whatever may have been wrong with the crabs was not perceptible by either the vendor or the purchaser, and that the crabs were in fact poisonous.—*The Law Times*—Irish Notes.

“Ye Faithful Fisherman.”

He angles well by Night and Day
And uses every Art they say
To bring to land some good Fat Fish
Wherewith to grace his humble Dish.
“Let others sit and take their ease,
And bait their Hooks just as they please,

The Fish their modest Lures don't see,
I trust to Faith, and Pull," says he.
For he despises Frogs and Worms,
And technic skill he Folly terms,
And chiefly on his Faith relies
To land the much desired Prize.
At last a good Fat Fish he gets
By Hook, or Crook, or Line, or Nets,
And turning to the crowd, says he,
"My Faith's reward at last! ah see!"

IZAAK WALTON.

Selected Bar Anecdotes.

A member of the English Bar, not richly endowed with intellect, after years of brieflessness, married a rich wife. She died. Again he sought a bride with a large dower, and again became a widower. Then he thought he would return to his long-neglected profession. He approached an old friend, who had meanwhile become a Judge of the Supreme Court, and asked what, in his opinion, would be the wisest course for him to pursue. "Stick to the Probate and Matrimonial," said the Judge.

Lord Ludlow, who was exceedingly mild when on the Bench, saved a witness who was being badgered about a denial of intoxication. The Judge asked him kindly from the Bench: "Did you say 'I was not drunk, sir?'" "I never said anything about you at all," was the unexpected reply.

Recent American Decisions.

Contract by Intoxicated Person.—The fact that at the time of signing a note the maker is voluntarily intoxicated, to the extent that he cannot give proper attention to it, is held in *Wright v. Waller* (Ala.), 54 L. R. A. 440, not to render the note void. The authorities as to the validity of a contract made with an intoxicated person are collated in a note to this case.

Damages.—Damages for personal injuries caused by an explosion of an acetylene gas machine are held in *Tyler v. Moody & Offutt* (Ky.), 54 L. R. A. 417, to be recoverable in an action for breach of warranty of its safety.

Evidence.—Evidence tending to shew that a party to an action tried to bribe a witness to give false testimony in his favour is held in *Nowack v. Metropolitan Street R. Co.* (N.Y.), 54 L. R. A. 592, to be competent as an admission of weakness in his case.

Insurance.—Recovery upon a contract of life insurance not procured by the insured with the intention of committing suicide is held in *Campbell v. Supreme Conclave I. O. H.* (N. J. Err. & App.), 54 L. R. A. 576, not to be defeated by his suicide, unless the contract so provides in express terms.

Master and Servant.—A master's liability for injury to a servant by a defective tool furnished for his use is held in *Noble v. Bessemer Steamship Co.* (Mich.), 54 L. R. A. 456, not to be defeated by the fact that the defective condition was known to a fellow servant who procured the tool for use by himself and the injured one.

In an action against a railway company and its conductor for an injury caused by the alleged negligence of the conductor, a verdict in favour of the latter is held in *Doremus v. Root* (Wash.), 54 L. R. A. 649, to preclude a judgment against the company. With this case is a note reviewing the authorities as to judgment in favour of employee as bar to recovery against employer for employee's act or default.

Partnership.—Members of an insolvent partnership, if in good faith, and all the partners consent, are held in *Kincaid v. National Wall Paper Co.* (Kan.), 54 L. R. A. 412, to be entitled to appropriate their own interest in the partnership property to the payment of their individual debts in preference to those of the partnership.

A partner who, upon dissolution of the partnership and exhaustion of the social assets, pays judgments subsequently recovered against it on partnership debts, is held in *Sands's Administrator v. Durham* (Va.), 54 L. R. A. 614, to be entitled to be subrogated to the rights of creditors whose judgments he has satisfied against the real estate of his co-partner in the hands of a subsequent purchaser, to the extent to which his payments exceed his proportional part of the liability. The authorities as to the right of a partner who pays firm debts to subrogation against co-partner are reviewed in note to this case.

Perjury.—False testimony given in the course of proceedings which are merely erroneous or voidable, even if there be such irregularities or defects as would require a reversal of the cause on appeal, is held in *Morford v. Territory* (Okla.), 54 L. R. A. 513, to constitute perjury, if material.

Stoppage in Transitu.—The right of stoppage *in transitu* of a carload of lumber is held in *Brewer Lumber Co. v. Boston & A. R. Co.* (Mass.), 54 L. R. A. 435, not to be lost by the storage of the lumber by the carrier for failure to unload within the time required by its rules, when the freight charges remain unpaid, and the carrier has made no agreement to hold the property for the consignee.

Trade Union.—An injunction to restrain a representative of a labour union from enticing apprentices to break their contract and become members of the union, is held in *Flaccus v. Smith* (Pa.), 54 L. R. A. 640, to be properly granted at the instance of a manufacturer whose apprentices are under express contract not to join a labour union.

Way.—A municipal corporation which, in constructing a sewer in a public street, leaves a manhole uncovered for several weeks, and near it a pile of sand, with knowledge that children are accustomed to play in the sand, is held in *South Bend v. Turner* (Ind.), 54 L. R. A. 396, to be liable for injuries to a child who, while at play, falls into the manhole and is injured.

Will.—An absolute gift, and not a trust, is held in *Williams v. Committee of the Baptist Church of Baltimore (Md.)*, 54 L. R. A. 427, to be created by a will bequeathing a fund to a church and “suggesting” that it be used to complete the spire, or invested and the income used to carry on a church mission or for the benefit of the church poor.

A paper reading “This is good to Miss Rubie Ferris for eight hundred dollars for care and attendance rendered by her to me in my last sickness; this eight hundred dollars is to be collected out of my estate after my death, provided however, I die a bachelor:” is held in *Ferris v. Neville (Mich.)*, 54 L. R. A. 464, to be a will when it is duly executed as such.

BOOK REVIEWS.

Macey's Conditions of Contract Relating to Building Works: by Frank W. Macey, architect, author of "Specifications in Detail." Revised as to the strictly legal matter, by B. J. Levenson, Barrister-at-law. London: Sweet and Maxwell, Limited: 1902.

This work deals with conditions of contracts and with agreements as applied to all classes of building works, and with the law generally in its relation to various matters coming within the scope of the architectural profession. The constructional and practical sides of the subject are dealt with in Mr. Macey's former work.

We have always supposed that an architect must be something of a lawyer to excel in his profession. Hear Mr. Macey on this: "An architect must know and act in accordance with the law as far as it concerns him in his profession, and in its relation to buildings. Otherwise he may render himself liable both to the employer and other persons. For example, an architect should know the general law of contract as it applies to building works; he must also know the law with regard to easements, such as those of light and air; and all such other rights of property, both common and acquired."

The book contains a great deal of practical information, as well as numerous useful forms and precedents. An unusually complete index makes the matter readily available for reference purposes.

Ross's Procedure as to Firms and Corporations: Procedure of the Supreme Court relating to Firms, Corporations Proper, Companies Incorporated by Special Act, Registered Companies, Companies Formed by Letters Patent, Cost Book Mining Companies, Foreign Companies, Building,

Friendly, Industrial and Provident, Literary and Scientific, and Loan Societies, Clubs, and Charitable Institutions: by R. E. Ross, LL.B. (Lond.), of the Central Office, Royal Courts of Justice. London: Sweet and Maxwell: 1902.

This is an excellent office practice book. The difficulties of procedure in relation to firms, companies, societies, syndicates, and clubs, are so manifold and great, as to justify the production of a separate work dealing with the subject.

Best on Evidence:—The Principles of the Law of Evidence, with Elementary Rules for Conducting the Examination and Cross-examination of Witnesses. By W. M. Best, A.M., LL.B. Ninth Edition, with a Collection of Leading Propositions, by J. M. Lely, Barrister-at-law, Editor of "Chitty's Statutes of Practical Utility," etc. London: Sweet and Maxwell, Limited: 1902.

The first edition appeared in 1849, and it was stated in the original preface that the design was to examine the principles on which the rules of evidence are founded, tracing them to their sources, and shewing their connection with each other. It was not as a practical treatise, but as a scientific and theoretic work, that it acquired a reputation as a safe book to place in the hands of students of the laws, and to cite in the Courts as authority for the rules of evidence. It has, of course, a practical side too, in the application of the propositions enunciated.

It is nearly four years since the English Criminal Evidence Act, 1898, received the Royal assent, and this statute has been carefully summarized and commented on in the 9th edition, and its text printed in full in an appendix. This is the principal, though not the only, new feature distinguishing the 9th from the 8th edition, which appeared in 1893.

In discussing the modern objections to "kissing the book," Mr. Lely notes that this practice is not more than 150 years old in England, that at the end of the 17th century the ordinary established method was for the witness to swear by placing his hand on the book, and that the practice of kissing is peculiar to England and never has existed in any

other country. Strictly speaking, the "book" should be the four Evangelists, but the distinction is disregarded in practice. The objections to kissing the book are on sanitary grounds, and it is pointed out that the Scottish ceremony of swearing with the uplifted hand "by Almighty God, as I shall answer to God at the great day of judgment," is permissible. This form has now been introduced in Ontario by an enactment of the Legislature at its recent session.

The important case of *Regina v. Lillyman*, [1896] 2 Q. B. 167, has also been decided since the 8th edition of Best. It was held there by the Court of Criminal Appeal that upon the trial of an indictment for rape or other kindred offences against women, the particulars of a complaint made shortly after the alleged occurrence may be given in evidence, not of the facts complained of, but of the consistency of the story told by the woman in the witness-box, and as negating consent on her part. The old rule was that the fact that complaint *was* made, could be shewn, but not the particulars. Mr. Lely, in his "Collection of Leading Propositions," has noted the change.

There is also some new matter in the chapter on "Plurality of Witnesses." The negative rule that in general no particular number of instruments of evidence is necessary for proof or disproof, was in times past peculiar to the common law of England. *Ponderantur testes, non numerantur*; the editor suggests that "*testimonia*" or "*probationes*" would be better than "*testes*," as the rule is not confined to verbal evidence. The exceptions to the rule, common law and statutory, are noted, and the attempt in England to add to the list of exceptions, cases in which statements by a deceased person are in issue, is referred to. There is in England no rule of law precluding a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; but the Court will always regard such evidence with jealous suspicion, and, it is said, will in general receive such corroboration.

The whole work has been carefully revised, and occasion has been taken to write something new in regard to such old themes as the obligation of ministers of religion to testify;

those of the bearing of the Statute of Frauds on the promise to marry, and of the Wills Act on the irregular proof of a will; and that of the law of *commorientes*.

On the last-named subject it is stated that the law of England recognizes no *artificial* presumption, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight; *i.e.*, as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof. In the late case *Re Beynon*, [1901] P. 141, where a missionary and his wife, with all their children, were said to have perished in a massacre in China, administration was granted to the respective next of kin of the husband and wife, on affidavits that they were believed to have died intestate and uninsured on or since the 9th July, 1900, and that, after due inquiries, there was no reason to believe that either survived the other.

Although the American notes of Mr. Chamberlayne, which were a feature of the 8th edition, are omitted from the present one, the editor has retained Mr. David Paul Brown's "Golden Rules for the Examination of Witnesses," which may well be commended to the consideration of counsel, young and old.

The new edition of Best is most welcome as a satisfactory exposition of the principles of the law of evidence as it exists to-day.

Indermaur's Manual of Equity.]—A Manual of the Principles of Equity—A concise and explanatory treatise intended for the use of students and the profession. By John Indermaur, solicitor, author of "Principles of the Common Law," "Principles and Practice of Conveyancing," "Manual of Practice," "Epitomes of Leading Cases," etc., etc. 5th edition. London: George Barber, Furnival Press: 1902.

The author is most industrious and has a keen eye for what is useful in students' examinations. The 5th edition warrants his remark that it is especially suitable for students and is useful in a limited way to practitioners.

Bayly's Succession Duty in Canada:—Containing all the Acts in force in the various Provinces of the Dominion as amended to 1st June, 1901, with notes on the Ontario Act, and lists of Canadian, American, and English cases, Forms and Actuaries' Tables: by R. A. Bayly, LL.B., of Osgoode Hall, Barrister-at-Law (London, Ontario). Toronto: The Carswell Company, Limited: 1902.

This book of over 400 pages is a careful study of a statute which, originally complicated and perplexing, has now become still more so by reason of subsequent amendments. Originally the Act was modelled upon the Acts of the State of New York of 1887 and 1892, and the Pennsylvania Act of 1892, which statutes are based upon the theory not of taxing property, but of taxing the right of succession to property, whether under a will or under an intestacy. The amendments to the Ontario Act made in 1896, 1899, and 1901, have, on the other hand, been borrowed from the Imperial Finance Act, 1894, which statute is based upon the theory of taxing the estate as a whole. The author complains that the amendments borrowed from the English statutes in 1901 are not well grafted upon the American original, owing to the fact already suggested that the two classes of statutes are based upon different principles.

The book, in addition to all the Succession Duties Acts in all the Provinces of the Dominion, contains the Imperial Act and the New York and Pennsylvania Acts. It contains references to 108 American cases, 34 English cases, and 26 Canadian cases.

Where the Act or the practice thereunder is obscure the author does not hesitate to express his own opinions and to give his reasons therefor.

The index appears to be very complete.

The author appears to think that the Ontario Legislature was guilty of a sort of pious fraud when it prefaced the Act by a recital that it is expedient to provide, by means of a succession duty, a fund for defraying part of the Provincial expenditure upon certain specified charities.

We venture to think that the reason for this recital will be found to be that there was a doubt whether the duty

imposed by the Act was direct taxation, falling within the provisions of s. 92, s.-s. 2, of the British North America Act. There appears to be considerable reason for such a doubt (see 13 Harvard Law Review, 220). It has been suggested that the Provincial Legislatures have the power, under s. 92, s.-s. 7, of the British North America Act, to levy indirect taxation for the purpose of creating a special fund for the "Maintenance and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province;" and some countenance appears to have been given to this suggestion by the Judicial Committee of the Privy Council in *Attorney-General v. Reed*, 10 App. Cas. at pp. 144-5, where the question was raised whether the Provincial Legislatures have power under s. 92, s.-s. 14, to levy indirect taxation for the purpose of creating a special fund for the "Maintenance of the Administration of Justice in the Provincial Courts," and the Judicial Committee refused to determine the question, saying: "That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case." The question did not arise in that case, because the Stamp Act there in question did not purport to raise a special fund for the purposes of the administration of justice, but on the contrary provided for "the raising of a revenue for Provincial purposes."

It is evident that the recital now in question was inserted for the purpose of enabling the Provincial authorities to reply upon the suggestion above referred to in the event of an attack being made upon the Act as one levying indirect taxation.

A. H. M.

THE CANADIAN LAW TIMES.

MAY, 1902.

WAIVER OF BREACH OF CONDITION BY INSURANCE COMPANIES.

(Concluded.)

I HAVE already discussed the first two of the three elements of (II.) IMPLIED WAIVER, namely:—

1. *Knowledge on the part of the insurer of a breach of condition.*

2. *Conduct of the insurer inconsistent with the intention to take advantage of the forfeiture caused by such breach.*

It remains to discuss the following proposition:—

3. *The insured must have altered his position to his prejudice as a reasonable result of the conduct of the insurer.*

(1) The proposition that it is essential to a case of estoppel in pais that the person asserting the estoppel should have altered his position prejudicially by reason of the conduct of the person against whom the estoppel is sought to be enforced, is one which scarcely needs the support of authority, for "nobody ought to be estopped from averring the truth or asserting a just demand unless, by his acts, or words, or neglect, his now averring the truth, or asserting the demand, would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he had said or done or omitted to say or do:" per James, L.J., in *Ex p. Adamson* (1878), 8 Ch. D. 817, and cf. *Ewart on Estoppel*, c. xi.

Neither Judges nor text writers have always been unequivocal in their statement of the proposition at the head of this section as an essential element of implied waiver, but it is amply supported by decisions, and it is indeed hard to understand how conduct of one party which has no influence upon the conduct of the other party can work by implication a material change in the contract between them. If the alleged waiver does not amount to estoppel it cannot be enforced. As was said by Field, J., in the case of *Insurance Co. v. Wolff*, 95 U.S. at p. 333, the doctrine of waiver can be invoked only where the conduct of the company has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the condition.

(2) The cases on the subject of waiver of insufficiency of proofs of loss turn chiefly on this question, whether or not the insured has been prejudiced by the conduct of the insurer, and a comparison between the cases of *Accident Ins. Co. v. Young* (1892), 20 S. C. R. 280, and *Morrow v. Lancashire Ins. Co.* (1899), 29 O. R. 377, 26 A. R. 173, emphasizes this. In the former case it was held that by declining to pay on other grounds the company had not waived any objection which they might otherwise urge with regard to the lateness of the notice of death. In the latter case it was held that a similar repudiation of liability did preclude the company from objecting to the want of proofs of loss. The facts of the two cases shew that the essential distinction was that in one case the insured had not been prejudiced, and in the other he had been prejudiced, by the conduct of the insurers. In *Morrow v. Lancashire Ins. Co.* the insured gave notice of the loss to the company. The company replied by denying liability on the ground that the policy had been cancelled. The insured offered to supply full proof if required. The company again asserted the cancellation of the policy, and said nothing as to proofs of loss. The insured was thus led to believe that the furnishing of proofs would be a useless proceeding, and therefore delayed doing so until it was too late. The silence of

the company was held to imply that they did not desire further proofs, as they had other grounds for objecting to payment. But, that silence will not always be construed as waiver, is shewn by *Accident Ins. Co. v. Young*. There, likewise, the company received without objection the notice of death, and declined to pay on other grounds. It was held on appeal to the Supreme Court that the lateness of the notice was a good defence, and that there was no waiver because nothing had been done with the intention of influencing the conduct of the holder of the policy or by which he could be prejudiced. Nothing that the insured could do would cure the defect, the notice being already out of time. If, however, the objection to the proofs had been that they were not in proper *form*, their receipt and retention by the company without objection would give rise to an implied waiver, because, if notified of the defect, the insured could proceed to remedy it, and, if not notified, he would be led to believe that no objection would be taken and would allow the time for furnishing proofs to elapse without remedying it.

The case of *Whyte v. Western Assce. Co.* (1875), a decision of the Privy Council, reported 22 Lower Canada Jurist 215, is instructive as to the proposition now under discussion. A condition in the policy required the making and furnishing of proofs within 30 days after loss. The insured within the 30 days sent in a claim and a notary's certificate, and after the 30 days sent in a valuation of the property destroyed, with a letter "hoping proofs and vouchers satisfactory," to which the company made no answer. The insured wrote again, and the company replied denying liability. It was held that the not answering the letter was not a waiver of the neglect to send in proper proofs or to send them in time. The Committee point out that it might have been waiver if the proofs, or what professed to be proofs, had been sent in within the 30 days, and the company had made no answer, because in such case, if they had answered, possibly the insured might have sent in proper proofs in time. Even after the 30 days there might possibly be a waiver if anything was done to mislead the

insured or put him to expense. So if the second letter had been sent within the 30 days, or after the 30 days had been waived, and at a time when the insured could still make proper proofs, then the denial of liability might be equivalent to saying that they were not relying on the non-compliance with the condition requiring the sending in of proper proofs, but on some defence on the merits.

If the insurers neglect upon demand to furnish blank claim forms, they cannot take advantage of the failure of the insured to comply with a condition requiring any person sustaining loss "forthwith to give notice thereof to the company, and apply for its blank claim forms, which must be executed and filed within 15 days from occurrence of fire." *Hammond v. Citizens Ins. Co.* (1886), 26 N. B. Reps. 371, 8 Occ. N. 384.

And likewise it was held by the Supreme Court in the case of *Caldwell v. Stadacona Fire Ins. Co.* (discussed hereafter), that the wrongful detention by the insurers of a policy precluded them from insisting on the strict performance of the condition contained therein relating to the furnishing of proofs.

It has been laid down that if, when preliminary proofs of loss are given to an underwriter, he is told by the insured that further proofs will be furnished if required, it is the duty of the underwriter to notify the insured of any defect in the proofs within a reasonable time, and that if the underwriter does not do so, but retains the proofs supplied, there is evidence of a waiver of all defects: *Gerow v. Providence Washington Ins. Co.* (1889), 28 N. B. Reps. 435.

R. S. O. c. 203, s. 172 (1), provides that "where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with; or where after a statement or proof of loss has been given in good faith by or on behalf of the assured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon

other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or where, for any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into;” and see *Fair v. Niagara District Ins. Co.* (1876), 26 C. P. at p. 398, and *Bull v. North British Co.* (1888), 15 A. R. 421, and cf. *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.* (1870), 17 Gr. 418, a case decided before the original of s. 172 (1) above mentioned was passed.

(3) In *Cousineau v. City of London Fire Ins. Co.* (1888), 15 O. R. 329, the plaintiff set up a waiver of statutory condition 22, which requires an action to be brought within one year of the happening of the event insured against. The fire took place on the 28th March, 1886. After the plaintiff had put in proof papers, the defendants from time to time, up to the 11th May, 1887, requested the plaintiff to procure and furnish, and the plaintiff did so procure and furnish, additional particulars concerning the claim. The action was commenced on the 11th July, 1887, being more than 60 days after the completion of proofs of loss as required by a condition in the policy. The trial Judge gave judgment for the plaintiff, and on appeal to the Queen's Bench Division the appeal was dismissed, the Court being equally divided. *Armour, C.J.*, held the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble, and expense, to be a waiver of the condi-

tion. Street, J., held that there was nothing in the conduct of the defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition, and that they were therefore entitled to the benefit of it.

4. *Election.*

Another term sometimes used instead of implied waiver or estoppel is *election*.

The insurer, within a reasonable time after becoming aware of a breach of condition and consequent forfeiture of the policy, is bound to elect whether he will treat the policy as still subsisting, and if the insured alters his position for the worse upon the faith of an election made by the insured, or is prejudiced by the failure on the part of the insurer within a reasonable time to elect to disaffirm the policy, the insurer is no longer at liberty to withdraw the election so made or implied: *Morrison v. Universal Marine Ins. Co.* (1873), L. R. 8 Ex. 197.

5. *Condition requiring waiver to be in writing.*

The policy in *Morrow v. Lancashire Ins. Co.* was subject to the 20th statutory condition referred to at the beginning of this article, providing that no condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing, signed by an agent of the company, and the decision thus supports the opinion there expressed that this condition applies only to express waiver. It is to be noted that Burton, C.J.O., preferred to put the case on the ground of estoppel. If, as I submit, there is no essential distinction between implied waiver and estoppel, it is only an evasion of the question to use the word estoppel in those cases where a condition in the policy prohibits a waiver unless in writing. There are, on the other hand, dicta of high authority for the distinction in terms just referred to, although, as I have endeavoured to shew, it is an unnecessary distinction.

In *Caldwell v. Stadacona Ins. Co.* (1883), 11 S. C. R. 212, the 9th condition on the policy required all persons insured

by the company sustaining any loss or damage by fire immediately to give notice to the company or its agents, and within five days after such loss or damage to deliver as particular an account of their loss or damage as the nature of the case would admit of, and make proof of the same by their declaration or affirmation, etc., and further provided that until such declaration or affirmation, etc., should be produced, the amount of such loss or any part thereof should not be payable or recoverable. And the 12th condition was as follows:—"None of the foregoing conditions or stipulations either in whole or in part shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing, by an indorsement upon the policy signed by the manager of this company for Canada." The company, to whose agent the policy had been delivered for the purpose of putting the risk in another company, refused to return the same to the plaintiff on demand, and set up in an action on the policy that proper proofs of loss had not been given, and, in reply to a plea of waiver in regard to such proofs, that the waiver was not in writing as required by the 12th condition. It was held that the illegal withholding of the policy by the company must be presumed to have been the reason why proper proofs were not delivered, and the company was therefore estopped from setting up the want of proper proofs. Strong, J., at p. 242, points out that this is an entirely distinct ground from that of waiver under the 12th condition. The company had caused the non-compliance with the policy, and "to allow them thus to avail themselves of their own wrong, would be to assist them to commit a fraud, and whenever such is the case an estoppel arises." (Cf. Gwynne, J., at pp. 254-5). But, if the plaintiff had had the policy in his possession, or had known that he had only five days to put in proofs of loss, a mere statement by the agent of the company that the proofs might be delayed would have been nothing more than a dispensation with the terms of the condition by agreement which would have required indorsement on the policy within the terms of the condition excluding proof of waiver unless so evidenced.

It has been said in some American cases (see 1 Am. & Eng. Enc. of Law, 2nd ed., 325), that the condition requiring waiver to be in writing does not apply at all to a breach of those conditions which are to be performed after a loss occurs, such as those requiring the giving of notice and furnishing proofs of loss. This is clearly not the law here. The cases of *Atlas Ins. Co. v. Brownell* (1899), 29 S. C. R. 537, and *Commercial Union Assce. Co. v. Mergeson* (1899), 29 S. C. R. 601, shew that where an express waiver of such conditions is set up the insured must prove that it is evidenced by writing and according to the terms of the policy.

III. NON-PAYMENT OF PREMIUM.

I have considered it more convenient to reserve for a separate section the discussion of the waiver of breach of conditions requiring the payment of the premiums, both on account of the great variety which occurs in the form of such conditions, and also because the subject of the payment of the money consideration for the insurance contract is to some extent *sui generis* with respect to the authority of agents.

It was said by the present Chancellor of Ontario in the case of *Frazer v. Gore District Mutual Fire Ins. Co.* (1883), 2 O. R. at p. 421, that "the general rule is well settled that an agent instructed to receive payment for the principal cannot accept anything else than money. If payment is made out of the usual course, it lies on the person who sets up the exceptional mode of payment to shew the authority of the agent to bind his principal,"—and the learned Chancellor accordingly held that where, in consideration merely of a setting-off of debts as between the agent of the company and the policy holder, the former wrongfully delivered a renewal receipt to the latter, the receipt did not bind the company, and the policy lapsed. The insured was affected with notice of the general law as contained in the statute relating to mutual insurance companies (R. S. O. 1877 c. 161, s. 34), that "cash payments for renewal must be made at the end of the year for which the policy was

granted, otherwise the policy shall be null and void," as well as with notice of a special provision on the face of the renewal receipt in these words, "not valid unless dated and countersigned by the agent on the day on which the money is paid." The transaction in question between agent and policy holder was an isolated one: no course of dealing was proved which would tend to mislead the plaintiff or work an estoppel against the company. No evidence was offered that the company knew of their agent receiving anything else but money for the payment of premiums.

Frazer v. Gore District Co. was followed by the Queen's Bench Division in the case of *McCormick v. Temperance and General Life Assce. Co.* (1896), which was affirmed in the Court of Appeal; but the general application to insurance contracts of the rule above referred to, that it lies on the person who sets up payment otherwise than in cash to shew the authority of the agent to bind his principal, is rendered somewhat doubtful by the recent case of the *Manufacturers' Accident Ins. Co. v. Pudsey* (1897), 27 S. C. R. 374. A policy issued by the appellant company in favour of Pudsey contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. Pudsey having been killed in a railway accident, payment of the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shewn that the local agent of the company had requested Pudsey to renew and had received from him a promissory note for \$15 (the premium being \$16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave Pudsey a paper purporting to be a receipt, and secondary evidence of its contents was given. The agent's evidence was that while the note was taken for a portion of the premium,

it was agreed between him and Pudsey that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums, as had been the practice theretofore. The note was never paid, but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash, and the note given and accepted as payment of the balance of the premium, and that the paper given to Pudsey by the agent, as sworn to by Pudsey's father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company. Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the fair conclusion from the evidence was, that, as the agent had been employed to complete the contract, and had been intrusted with the renewal receipt, Pudsey might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it: and that, notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the Court according to the practice in Nova Scotia. Held, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium, and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference, though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to shew that such receipt had been obtained, and were not taken by surprise.

The case of *Moffatt v. Reliance Mutual Life Assce. Co.* (1881), 45 U. C. R. 561, has been already cited under the heading of express waiver to support the proposition that the general agent in Canada of a foreign company, or the general manager of a Canadian company, has authority, in the absence of express condition prohibiting it, to waive a breach of condition. There the terms of the policy provided that 30 days' grace were allowed for payment of premiums, and that a lapsed policy might be renewed within a year upon proof of health, payment of arrears, and a fine. The assured, being unable to pay a premium about to fall due, induced the resident secretary of the company to take a note at three months, and from this time the secretary accommodated the assured by taking notes, to which interest was added. The death occurred on the 29th October, 1879, at which time there were two notes outstanding, one (due 10th August, 1879) for the premium due 30th November, 1878, which was unpaid, and one for the premium due 30th May, 1879, dated 21st June, 1879, at six months, which was still current. After the death the amount of these two notes was tendered to the defendants and refused. The jury found that the notes were taken by the defendants' agent as cash payments; that the taking of them was within his authority; and that he had waived payment upon the dates the premiums were due; and a verdict was entered for the plaintiff. Held, by the Court of Queen's Bench, Hagarty, C.J., dissenting, that the evidence shewed that it was within the authority of the resident secretary to accept notes in payment of premiums, and that there was nothing shewing notice to the assured of any want of such authority; that the non-payment of the note in August, 1879, while the other note was still current, did not determine the policy; and the verdict ought not to be disturbed. Hagarty, C.J., held that, admitting that the secretary might accept payment after the proper time, he could not make a binding executory agreement to give further time, extending perhaps beyond the duration of the life.

When the policy contains a provision that if any premium or any note given therefor shall not be paid when due the policy shall be void, then in the event of non-payment of the premium or of the note (as the case may be) when due, and in the absence of evidence of waiver, the insurance lapses without any act of the insurers: *Neill v. Union Mutual Fire Ins. Co.* (1882), 7 A. R. 171.

In *London and Lancashire Ins. Co. v. Fleming*, [1897] A. C. 499, under a similar condition, the insurers' agent accepted notes in payment of a premium, discounted them, and in his return to the company treated the premiums as paid. The notes were not paid at maturity. It was held by the Privy Council, reversing the Court of Appeal (23 A. R. 666), that there was no presumption that the agent was to raise money thereon as an agent of the assured and pay the premium out of the proceeds, and that when the insurers accepted their agent's note in discharge of the account between them, in which the agent was debited with the amount of the premium, this gave rise to no presumption of an intention to treat their own agent as an agent of the assured, or the insurance as subsisting contrary to the terms of their contract with the policy-holder.

And, even in the absence of a provision that the policy should be void if the premiums were not paid, where the first premium was paid by two agreements in the form of promissory notes maturing at different dates, and each providing that the policy was to be void if it was not paid at maturity, and when the assured died the first agreement was overdue and unpaid and the second had not matured, the policy was held void: *Frank v. Sun Life Assce. Co.* (1894), 23 S. C. R. 152, affirming the decision of the Court of Appeal, 20 A. R. 564.

And an agent of an insurance company has no power to bind the company by giving a policy-holder a receipt for the amount of the first premium in consideration of services alleged to have been rendered by the policy-holder to the company, where the policy provides on its face that the payment of the premium must be made in advance to the

company at its head office: *Tiernan v. People's Life Ins. Co.* (1896), 23 A. R. 342.

And an agent to receive applications, deliver policies when signed, and receive and acknowledge receipt of premiums, has no authority to waive by the receipt of overdue premiums the forfeiture of a policy occasioned by default in payment of premiums: *British Industry Life Assee. Co. v. Ward* (1856), 17 C. B. N. S. 644.

If upon default in payment of the premium, the company choose to take a promissory note, they waive the forfeiture of the policy during the currency of the note. Upon the note becoming overdue, the policy again becomes forfeited, but again the company may not choose to exact the forfeiture, and may still intend to carry the risk and enforce payment of the premium, and by payment the policy will be again validated.

In *Manufacturers' Life Ins. Co. v. Gordon* (1893), 20 A. R. 309, the application contained a provision that if a note were given for a premium and were not paid at maturity, any insurance ceased, and the application should thereupon become null and void, but the note must nevertheless be paid. It was therefore held that, by demanding payment of the note, and suing, obtaining judgment, and issuing execution thereupon, the company were not estopped from setting up that the policy was forfeited by non-payment of the note at its maturity. To insist on one right is not to be deemed a waiver of another right. The company had carried the risk during the currency of the note, and the insured was liable on the note notwithstanding the forfeiture of the policy, just as the acceptance of or the suing for rent accrued due before a breach of covenant is not a waiver by the landlord of the forfeiture.

And in *McGeachie v. North American Life Assee. Co.* (1894), 23 S. C. R. 148, under a similar condition it was held that a mere demand for payment of the note after maturity, and a refusal during the currency of the note to accede to the insured's request for cancellation of the policy, are not sufficient evidence of an election to continue

the risk. Nor are equivocal acts such as carrying the policy in the books of the insurers as an existing policy and including the amount in their official returns of insurance in force, any evidence of waiver, these acts not being known to the insured or intended to influence his conduct: *Manufacturers' Life Ins. Co. v. Gordon*, *supra*.

A proviso in a policy that payment of premiums if made when overdue should not be considered as continuing the policy unless the insured was in good health at the time of payment, is intended to guard against frauds being committed on the company, and does not prevent the company, when in full possession of the facts so far as known, dealing with the insured so as to waive the forfeiture. And where, therefore, at the time of payment the insured had in fact received an injury which soon afterwards resulted in death, but it clearly appeared that no danger was anticipated by either the insured or his medical attendant, or by the company themselves, who had made inquiry, it was held that the payment was good and the forfeiture waived: *Campbell v. National Life Ins. Co.* (1874), 24 C. P. 133.

IV. MISCELLANEOUS.

(1) Waiver ought to be specially pleaded in reply: *Abrahams v. Agricultural Ins. Co.* (1876), 40 U. C. R. at p. 180; *Scott v. Niagara District Ins. Co.* (1865), 25 U. C. R. 119; *Mulvey v. Gore District Ins. Co.* (1866), 25 U. C. R. 424; *Knights of the Maccabees v. Hilliker* (1898), 29 S. C. R. 397.

(2) A contract of reinsurance does not prevent the re-insured company from assenting to any reasonable and proper waiver of conditions made in good faith, and not shewn to influence the loss or increase the burden of the reinsurers, and therefore an assent given by a reinsured company to a chattel mortgage on some of the insured goods, without the knowledge and consent of the reinsured, does not release the latter: *Fire Ins. Assn. v. Canada Fire, etc., Co.* (1883), 2 O. R. 481.

(3) If a policy is avoided on grounds of public policy, e.g., for absence of insurable interest, then the doctrine of

estoppel has no application, and a company cannot be deemed to have waived the invalidity: *Anctil v. Manufacturers' Life Ins. Co.*, 28 S. C. R. 103, at pp. 115-116; [1899] A. C. 604.

(4) With regard to the class of cases in which it has been held that insurers are estopped by a course of past dealing with the insured, it may be prefaced that a waiver of a breach of condition on one occasion does not operate to debar them from insisting on another occasion on the strict performance of the condition. An act of liberality as to one breach is not to be tortured into an estoppel as to a subsequent one, and *a fortiori* this is so when the insurers have given notice that they intend to insist upon the performance of the condition: *Redmond v. Canadian Mutual Aid Association* (1891), 18 A. R. 335.

The cases on this branch of the subject in the United States are very numerous and seem to go somewhat beyond the limits observed in our own Courts, particularly as to the non-payment of premiums. It was said in the case last cited, that if the conduct of the insurers in their dealings with the insured has been such as to induce a belief on his part that so much of the contract as provides for forfeiture in case, e.g., the premium be not paid at the day named, would not be enforced if payment were made within a reasonable time thereafter, the insurers ought not to be permitted to allege such forfeiture against one who has acted upon that belief and subsequently made or tendered the payment; and if the acts creating such belief were done by an agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums with full knowledge of the circumstances, the same consequences will follow.

JOHN D. FALCONBRIDGE.

Toronto, December, 1901.

SECTION 5 OF THE CRIMINAL CODE.

Section 5 of the Criminal Code is in the following terms: "5. No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is, by the express terms thereof, *or of some other Act of such Parliament*, made applicable to Canada or some portion thereof as part of Her Majesty's dominions or possessions." When carefully read it will be seen that it prohibits criminal proceedings being taken under any Imperial statute unless (a) the Act itself is expressly made applicable to Canada or some portion thereof, or (b) is so made applicable by some other Act of such Parliament, *i.e.*, the Imperial Parliament.

It is curious that the commentators on the Criminal Code have with one consent passed over this section as apparently needing no explanation, although it appears to be one requiring elucidation. In order to understand it, it seems to be necessary, as far as the Provinces of Ontario and Quebec are concerned, to go back a step in our constitutional history. By the Imperial statute of 1774 (14 Geo. III. c. 83) known as "The Quebec Act," s. 11, it was enacted that the criminal law of England "shall continue to be administered and shall be observed as law in the Province of Quebec, as well in the description and quality of the offence, as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted, to the exclusion of every other rule of criminal law, or mode of proceeding thereon which did or might prevail in the said Province before the year of our Lord 1764." Here, therefore, is an Act of the Imperial Parliament making applicable to the then Province of Quebec, which at that time

included the territory now known as the Province of Ontario, the criminal law (including statute law) of England. At the time of the division of Upper and Lower Canada that Act was still in force, and the criminal law of England as it stood in 1774 was therefore then in force in Upper Canada. By a subsequent Act of the Legislature of Upper Canada (49 Geo. III. c. 1), it was enacted that the English criminal law as it stood on the 17th September, 1792, was to be the law of Upper Canada. This section is now found consolidated in the R. S. C. as c. 144, s. 1; and a similar provision of the Legislature of British Columbia introducing into that Province the English criminal law as it stood on the 19th November, 1858, forms s. 2 of that chapter.

As regards s. 1, it is submitted that this enactment could not have the effect of in any way abrogating the Imperial Act of 1774; it did not purport to do so, it merely added to it by making the English criminal law as it stood at a later date the law of Upper Canada—and whereas the effect of s. 5 of the Criminal Code may be to abrogate R. S. C. c. 144 entirely, yet it does not abrogate, but, on the contrary, it appears expressly to save, the Imperial Act of 1774 from its operation. If this is the correct view of the matter, it follows that any Imperial statutes introduced into the old Province of Quebec by the Quebec Act, relating to criminal matters which are not expressly covered by the Code, may still be acted upon in Quebec and Ontario notwithstanding s. 5 of the Code. But criminal Acts introduced by the Provincial Legislatures cannot now be acted on.

We are led to these observations because a somewhat different view appears to have been taken by Falconbridge, C.J., and Street, J., in *Hopkins v. Smith*, 1 O. L. R. 659, the only reported case in which s. 5 appears to have been discussed. In that case, in which the question was how far the English criminal law relating to the offence of maintenance was in force, Street, J., said: "There is nothing in the Criminal Code which repeals the common law with regard to offences generally or to the offence of maintenance in particular, and the 5th section of the Code does not exclude

the operation of the English statutes against the offence, for those statutes, along with the common law upon the subject, have been expressly made applicable to Canada by R. S. C. 1886 c. 144, s. 1." With the conclusion we do not dissent, but it will be seen that the learned Judge bases it upon R. S. C. c. 144, which is a reproduction of a Provincial Act, and not an Imperial Act, and even though it were by its incorporation into the Revised Statutes of Canada to be deemed an Act of the Dominion, it would still fail to fulfil the condition of the Criminal Code, s. 5, because it is not an Imperial Act, and it is, as has been pointed out, only Imperial criminal statutes made applicable by Imperial statutes which that section exempts from its operation. English criminal statutes, whether made applicable before the Code either by Provincial or Dominion legislation, seem to be the class of statutes which come within s. 5. The Chief Justice of the King's Bench apparently adopted the same view as Mr. Justice Street as to the meaning of s. 5, and although, as we have already said, we think the correct result was reached, yet with great deference it seems to us the reasons assigned are at fault.

On such a subject it would be unsafe to be at all dogmatic, but we think we can give a crucial instance of the present unsatisfactory condition of our criminal law.

The Act 5 & 6 Edw. VI. c. 4, s. 3, enacts "That if any person . . . shall maliciously strike any person with any weapon in any church or church-yard, or . . . draw any weapon in any church or church-yard, to the intent to strike another with the same weapon, that then every person so offending, and thereof being convicted by verdict of twelve men, or by his own confession, or by two lawful witnesses, before the justices of assize, justices of oyer and determiner, or justices of peace in their sessions, by force of this Act, shall be adjudged by the same justices before whom such person shall be convicted *to have one of his ears cut off. And if the person or persons so offending have none ears* whereby they should receive such punishment as is before declared, *that then* he or they may be marked in the

cheek with a hot iron having the letter F therein, whereby they may be known and taken for Fray-makers and Fighters; and besides that every such person to be and stand ipso facto excommunicated, as is aforesaid."

This statute was in force in England in 1774. The section above quoted was not repealed in England until 1828 by 9 Geo. IV. c. 31, s. 1, but it never appears to have been expressly repealed in Canada, and the offence thereby dealt with does not appear to be covered by ss. 171, 172 and 173 of the Code? Is it still in force in Ontario? See *Reid v. Inglis*, 12 C. P. 191. If so, is it a creditable piece of legislation? We leave our readers to ponder these points. They seem to furnish a very conclusive argument for an exhaustive examination under the authority of the Dominion Government of the Imperial statute criminal law so far as it is in force in Canada, the selection of what should be retained, if any, and the formal repeal of all the legislative dead wood such as the above statute and any others of a similar character.

RECENT CASES FROM THE TIMES REPORTS.*

Building Contract.—It was held in *In re Ford and Bemrose*, 18 T. L. R. 443, that when in asking for tenders for a building in accordance with certain specifications and conditions a bill of quantities is prepared and submitted to the tenderers, there is not an implied warranty that the bill of quantities is correct; and an alleged custom in the building trade to vary the contract price if the quantities were greater or less than those mentioned in the bill was held to be inconsistent with the contract and not to be relied on.—*Cotton v. Sounes*, 18 T. L. R. 456, may also be noted as a case where a custom in the theatrical business was held to be established.

Compromise of Action.—*Neale v. Gordon-Lennox*, 18 T. L. R. 390, is an interesting case as to counsel's authority to compromise. The plaintiff's counsel there agreed to an order of reference without the performance by the defendant of what the plaintiff had insisted should be a condition precedent, the limitation of counsel's authority in this respect not being known to the other side. Before the order was drawn up application was made by the plaintiff to rescind it, and it was held that as the order was an interlocutory one this relief could be given. The Lord Chief Justice in a considered judgment deals with the authorities and thus defines the principles deducible from them: "I think it is now clearly established that counsel appearing for a party in an action is held out as having authority, and has full authority, as to all matters which relate to the conduct of the action and its settlement; and further that, notwithstanding a limit may have been placed upon the

* Including the cases in Number 19, Volume 18, week ending March 26th, 1902.

authority of counsel, the party for whom he appears is bound by such settlement unless the fact that the counsel's apparent authority had been limited was communicated to the other side. . . . It is equally well established that the authority of counsel does not extend to matters collateral to the action. Agreeing to a reference is not collateral to the action, and it is within the authority of counsel to consent to a reference. It is further clearly established that, if the counsel consenting to a compromise is mistaken as to the facts, the client may have the right to set aside the arrangement on the ground of mistake. . . . But there is a fundamental difference between interlocutory and final orders as well as between interlocutory and final judgments. Interlocutory orders and judgments are only intended to affect the rights of the parties in the litigation. They are always subject to review when fresh facts are brought to the consideration of the Court." See upon this subject article in 21 C. L. T. 389, where the cases are collected.

Contempt of Court.]—Phillips v. Hess, 18 T. L. R. 400, is a good deal like *In re Labouchere*, 18 T. L. R. 208, noted *ante* p. 93. The Court refused to commit the defendant for contempt because of comments made by him upon the plaintiff's character in a newspaper published by him, the comments not referring directly to the action, and being of the same character as comments made for some years before.

Costs.]—The defendant in *Sidebottom v. Hooton Park Club*, 18 T. L. R. 453, obtained leave after defence and shortly before trial to add a new plea, the plaintiff being given the costs "of and occasioned by the amendment." The plaintiff then discontinued, the new plea being fatal to the action. It was held that the defendants were entitled to the general costs of the action, including the costs after the original defence down to the date of the amended defence.—The right of the Crown to receive, and the liability of the Crown to pay, are dealt with in *The King v. Archbishop of Canterbury*, 18 T. L. R. 388, the decision in that case being

that the Crown was not entitled to the costs of opposing a rule nisi for the issue of a prerogative writ of mandamus.

Criminal Law.]—The Offences against the Person Act, 1861, under which justices of the peace have jurisdiction to deal with cases of common assault, provides (by s. 46; which is the same as s. 842, s.-s. 8, of the Criminal Code) that nothing in the Act contained shall authorize any justices to hear any case of assault “in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom.” In *The King v. French*, 18 T. L. R. 440, one of two persons who had rights of common over a piece of grass land assaulted the other, who was leading a horse and cart across the land in question. Upon a complaint against him for assault he claimed that he had the right to prevent the pasture from being injured and that this right came in question so as to oust the jurisdiction of the justices. But the Court held that the claim was a frivolous one, and had nothing to do with the title to the right of common, and affirmed a conviction. Jurisdiction is not ousted unless the justices would indirectly be determining some question of title between the parties. See also as to the analogous principle of claim of right in cases of trespass or damage to property, *Regina v. Davey*, 27 A. R. 508.

Damages.]—In *Bedwell v. Golding and Sons*, 18 T. L. R. 436, an action under Lord Campbell's Act by a father in respect of the death of his daughter, it was held that the plaintiff could recover, in addition to damages based upon the difference between the value of the daughter's services to him and the costs to him of her maintenance, the funeral expenses paid by him, *Dalton v. South Eastern R. W. Co.*, 4 C. B. N. S. 296, being distinguished on the ground that there was no liability on the plaintiff to bury the deceased. Travelling expenses incurred by the plaintiff at the time of the accident in question were held not to be recoverable. The possibility of special damage of the kind recovered in this case has perhaps scarcely been fully appreciated in *McHugh v. Grand Trunk R. W. Co.*, 2 O. L. R. 600. For a

discussion as to the pecuniary benefit which must be shewn, see *Green v. New York and Ottawa R. W. Co.*, 27 A. R. 32.

Domicil.]—In *In re Almeda*, 18 T. L. R. 414, it was decided that the evidence did not shew an abandonment of the domicile of origin, and the acquisition of a domicile of choice. In its non-legal aspect the case will be valuable to the ambitious man of means in that it shews that by way of the consular service of some petty republic it is easy to join the ranks of the titled aristocracy.

Evidence.]—Two points were decided in *In re London and Northern Bank*, 18 T. L. R. 403. The secretary of a company, who was being examined in winding up proceedings, was represented by a solicitor who was also acting as solicitor for the defendant in an action by the company for libel. It was held that, as the examination was, under the Act, a private one, the solicitor was properly required to undertake not to communicate any part of the evidence, or information obtained during the examination, to any other person, or to use it for any purpose other than the re-examination of the witness. It was also held that upon the examination of this solicitor himself he was entitled, on the ground of privilege, to refuse to state from whom he had received certain documents in his possession which belonged to the liquidator of the company.

False Representation.]—In *Walter v. Ashton*, 18 T. L. R. 445, the defendant, a vendor of bicycles, published advertisements in such words and form as to convey the impression that the bicycles were being offered for sale by the proprietors of *The Times*, in the way in which they had been in the habit of offering for sale on the instalment plan dictionaries, atlases, etc. An interim injunction was granted in an action by the proprietors of *The Times*, this relief being based upon the ground that there was a reasonable probability of injury to the property of the plaintiffs if the defendant's acts were allowed to continue, the chief danger suggested being the probability of litigation with disappointed purchasers of bicycles. It is pointed out that

in a case such as this, not of contract or between rival traders, mere probability of deception would not be enough to justify an interim order; there must be some exposure to risk and liability by the unauthorized use or imitation of the name.

Foreign Judgment.—In *Feyericks v. Hubbard*, 18 T. L. R. 381, a judgment obtained in Belgium on default of appearance against a British subject resident in England was held to be binding, the defendant's agreement in the contract out of which the original action arose that all disputes should be submitted to Belgian jurisdiction being treated as a submission by him to the jurisdiction of the Courts of that country.

Injunction.—In *Bickmore v. Dimmer*, 18 T. L. R. 416, while deciding that the erection of a large clock in front of a shop as a sign was a breach of a covenant by the lessee of the shop "not to make any alteration to the premises," is mainly of value upon the question of the right in such a case to a mandatory injunction to compel the removal of the thing complained of. That right, it is held, follows as of course in the absence of any countervailing equity arising from any act or default of the plaintiff. Absence of pecuniary damage is of no importance, and if there is a breach of a negative covenant, then by way of anticipatory injunction or of mandatory injunction the Court is bound to say that the thing shall not be done.

Innkeeper.—The result of *Browne v. Brandt*, 18 T. L. R. 399, seems to be that an innkeeper is entitled to set apart part of the inn for sitting rooms, etc., and that if the bedrooms are occupied he is not bound to provide sleeping accommodation for a traveller in a sitting room.

Insurance.—In *Jacob v. Gaviller*, 18 T. L. R. 402, a policy of insurance upon a dog against risks upon a voyage, provided that "walking was to be deemed a safe arrival." It was held that this meant that the dog was to be on arrival in a condition to use all four legs, and that walking on three

legs, with one leg injured, was not sufficient.—In *British Workman's Assurance Co. v. Cunliffe*, 18 T. L. R. 425, it was held that a person who had in good faith, relying on the representation—treated as being under the circumstances one of fact and not of law—of an agent of the company that the insurance would be valid, effected insurance on a life in which he had no insurable interest, was entitled, in a proceeding initiated by him, to rescission of the contract of insurance and to repayment of the premiums. In the to some extent similar case of *North American Life Assurance Co. v. Brophy*, 2 O. L. R. 559, the right to this relief was put upon the ground that as the company sought equity in the cancellation of the wager policy they were bound to do equity and repay the premiums. *Mowat v. Provident Savings Life Assurance Society*, 27 A. R. 675, is perhaps more like the *Cunliffe* case, in that repayment there was based upon the right of the misled applicant to rescind, but there was in that case no question of illegality. Both the Canadian cases are now before the Supreme Court of Canada.

International Law.]—The Crown is entitled to the personal property within the jurisdiction of an illegitimate intestate domiciled and dying abroad: In *re Barnett's Trusts*, 18 T. L. R. 454. The maxim *mobilia sequuntur personam* does not apply in such a case, as the Crown does not claim through the *persona*, but takes the property as *bona vacantia*.

Landlord and Tenant.]—Under the lease in question in *Foulger v. Arding*, 18 T. L. R. 422, the lessee covenanted to pay “all taxes, rates, including sewers, main drainage assessments, and impositions whatsoever, which now are or which may at any time be taxed, rated, assessed, charged, or imposed upon or in respect of the said premises or any part thereof, on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever.” It was held by the Court of Appeal, reversing the decision in [1901] 2 K. B. 151, that the lessee was bound to repay to the lessor the cost of removing a defective

privy and building a water-closet, the work having been done by the lessor pursuant to notice given him by the proper sanitary authority under the Public Health Act.

Lien.]—In *Whitehead v. Watt*, 18 T. L. R. 465, the principle of *Rose v. Watson*, 10 H. L. C. 672, was held to apply to a case of deposit paid by purchaser on account of purchase money. The contract provided that the purchaser might rescind if within a limited time a certain number of houses were not built on the surrounding property of the vendor. The property which was the subject of the contract and also the surrounding property became vested in the defendant with notice of the contract, and the houses not having been built the plaintiff elected to rescind, and he was held entitled to a lien for the amount of the deposit.

Master and Servant.]—The judgment in *Wright v. Glyn*, 17 T. L. R. 434, noted 21 C. L. T. 281, as to a coachman's authority to pledge his master's credit for the purchase of forage for the master's horses, was reversed by the Court of Appeal: 18 T. L. R. 404.—In *Warburton v. Taff Vale R. W. Co.*, 18 T. L. R. 420, it was held that when, under a rule allowing the company to punish a servant by dismissal, fine, or suspension from duty, they suspended a servant from duty for two weeks and then dismissed him, he was entitled to his wages during the two weeks.

Navigable Waters.]—*Land Securities Company v. Commercial Gas Company*, 18 T. L. R. 405, was the case of dispute as to right of access between adjoining wharfingers, being somewhat like *Warin v. London and Canadian Loan and Agency Co.*, 7 O. R. 706; 12 A. R. 327; 14 S. C. R. 232. It was held that a wharfinger in a navigable river is entitled to berth a vessel alongside his wharf even though it overlaps the frontage of an adjoining wharf, and to load or discharge the vessel; but that he cannot in so doing interfere with access to the adjoining wharf and must move the vessel to give access when required.

Negligence.]—In *Pritty v. Child*, 18 T. L. R. 460, the far-reaching principle is laid down that where there is a

reckless statement of fact, intended to be acted on, made to another by a person who owes a duty to that other to exercise reasonable care, there is a right to recover damages if loss results from the statement being acted on. The defendant having been employed by the plaintiff as a water-finder, told the plaintiff to dig a well to a certain depth at a particular point, but water was not found. The defendant admitted that he had no means of knowing whether water would be found at the named depth, and it was held, therefore, that he had made the statement recklessly though in good faith, and judgment was given against him for the expense incurred by the plaintiff.

Principal and Agent.]—Jacobs v. Morris, 18 T. L. R. 384, shews the care which should be exercised in dealing with an agent. The plaintiff, a tobacco merchant, gave a power of attorney to his brother to purchase goods for his business, and in connection with the purchases to make promissory notes, accept drafts, etc. The brother obtained from the defendants a loan of £4,000, representing to them that it was for the purposes of the plaintiff's business, and that under the power of attorney he had power to borrow the money. The defendants acted on his representation and did not read the instrument, and he accepted in the plaintiff's name and gave to the defendants four bills of exchange for £1,000 each. The £4,000 he deposited to the credit of the plaintiff's account and subsequently made cheques for the amount, which he used for his own purposes. It was held that the defendants were bound by the terms of the power of attorney; that that instrument did not authorize the brother to borrow money; that apart from it there was no holding out by the plaintiff of his brother as agent to borrow; and that the plaintiff was entitled therefore to the relief sought in the action, viz., an injunction to restrain the defendants from negotiating the drafts. A counter-claim against the plaintiff for the £4,000 as money had and received, was dismissed, the conclusion upon the evidence being that the plaintiff had received no benefit from the money, as for instance its being used in whole or in part to pay debts of, or make purchases for, the plaintiff's business.

Prohibition.]—The case of *The King v. Tristram*, 18 T. L. R. 406, while chiefly concerned with the nature of the jurisdiction of the Consistory Court, is to some extent useful upon the general question of when the right to prohibition to an inferior court may be lost by laches or acquiescence.

Sale of Goods.]—The judgment in *Frangopulo and Co. v. Lomas and Co.*, 17 T. L. R. 437, noted (sub nom. *Lomas and Co. v. Barff, Limited*) 21 C. L. T. 283, as to the right of purchasers to refuse to accept goods when more than the number contracted for are tendered, was reversed, 18 T. L. R. 461, not on the general principle but on the ground that the evidence shewed a waiver by the purchasers of the objection which they might otherwise have insisted on.

Solicitor and Client.]—In *re Haslam and Evans*, 18 T. L. R. 461, is a Court of Appeal decision which solicitors would do well to read carefully. Solicitors who had been promised by the holder of a patent a commission if they effected a sale, did effect a sale to another client, and, with his knowledge, received a commission from the vendor, who did not know they were acting for the purchaser. The purchaser died, and his executors, upon a bill being rendered by the solicitors of their costs in connection with the purchase, claimed payment of the commission or at the least its application in settlement of costs. The Court held that although the commission was wrongfully obtained by the solicitors from the vendor, they were entitled to keep it as against the purchaser's executors, the amount not being, as far as the purchaser was concerned, a secret profit, or even in effect as was argued an indirect gift from the purchaser.

Statute of Frauds.]—*Harburg India Rubber Comb Co. v. Martin*, 18 T. L. R. 428, is a case of practical importance under the Statute of Frauds, and turns upon the distinction between a contract of indemnity and a contract of guarantee. The defendant, in order to avoid execution being levied against a company in which he was a shareholder, promised to give the plaintiffs his own bills for the debt. The Court of Appeal held that this was a promise to answer

for the debt of another and not enforceable because not in writing.

Striking out Pleading.]—In *Worthington and Co. v. Belton*, 18 T. L. R. 438, the Court of Appeal act on the by this time fairly well settled rule that a pleading will be struck out only in plain and obvious cases—not unless it is demurrable and something worse than demurrable. The action was founded on alleged oral representations as to credit, and it was contended that Lord Tenterden's Act was so clearly an answer that the pleading ought to be struck out, but the Court thought that there was at least some doubt whether the Act applied, and refused the motion. Lord Justice Mathew said he "could not imagine a more objectionable mode of procedure in such a case as the present. It had all the vices of the old demurrer. The proper course in such a controversy as the present was to raise the question in a proper way and not by what amounted to a special demurrer." For a recent example of successful termination of a frivolous action by a motion to strike out the statement of claim, see *Lawry v. Tuckett-Lawry*, 2 O. L. R. 162.

Tort.]—The question whether an action is one in tort or on contract may sometimes be of importance in deciding as to jurisdiction, or as to costs. In *Sachs v. Henderson*, 18 T. L. R. 382, a question of this kind arose. The claim was that the defendant had agreed to lease a house to the plaintiff, and had after the agreement had been entered into removed from the house some fixtures, and damages were asked. It was held that the action was founded on tort, the plaintiff being bound to refer to the contract only to shew the relationship between the parties, and the foundation of the action being an act of misdoing in connection with what had to be done under the relationship so established.

Trade-Mark.]—In *Lambert v. Goodbody*, 18 T. L. R. 394, an action for infringement of a trade-mark, the principle was held to be that where the mark complained of is not an actual copy of the plaintiff's mark, the plaintiff must prove actual deception or probability of deception.

Trust.]—In *In re Smith, Smith v. Thompson*, 18 T. L. R. 432, a trustee who had committed a breach of trust was relieved from liability because, as was found, she had acted honestly and reasonably. The loss in question had been caused by the fraud of a clerk of the solicitors to the trust. They carried on business in London, and the trustee lived at some distance from that place. In the administration of the trust the practice had been to have cheques for any necessary payments prepared by the solicitors, who had the custody of the cheque book of the trust, and then sent with an explanatory letter to the trustee for signature. The solicitors' clerk, whom the trustee knew, delivered to the trustee a letter purporting to be signed by the solicitors asking the trustee to sign and return three enclosed cheques, first initialling in two of them the alteration of the word "order" to "bearer," and the clerk gave to the trustee what was held to be a plausible reason for the special form of the two cheques. The clerk cashed the cheques and absconded, and it was held that the trustee was not liable. It may not be amiss to refer once more on this subject to *Stewart v. Snyder*, 27 A. R. 423, and *Clark v. Bellamy*, 27 A. R. 435, although attention has already in this series of notes been called to these cases.

Undue Influence.]—*Radcliffe v. Price*, 18 T. L. R. 463, shews the length to which the Court will go in setting aside a gift where there is a confidential relationship between donee and donor—in this case doctor and patient. Such a gift cannot be supported unless the donor has independent advice. The doctrine is not confined to cases where the donee has been in the habit of aiding the donor in matters of business, but applies wherever there is the confidential relationship. In the case in hand the donor was an old woman, in feeble health, of little education, and living by herself with a servant. There was no suggestion of misrepresentation or pressure or of mental incapacity. See also as to spiritual adviser, *Collins v. Kilroy*, 1 O. L. R. 503; as to agent, *Trusts and Guarantee Co. v. Hart*, 2 O. L. R. 251; and as to wife, *Hopkins v. Hopkins*, 27 A. R. 658.

EDITORIAL REVIEW.

Swearing-in of Mr. Justice Garrow.

The new Judge of the Court of Appeal, the Hon. James Thompson Garrow, took the oaths of allegiance and office at Osgoode Hall on the 14th April. The oaths were administered by the Chief Justice of Ontario in the presence of the other members of the Court and of a large Bar.

Mr. Justice Garrow having taken his seat, Mr. Æmilius Irving, K.C., rose and said:

"The Bar of Ontario desires that your Lordships give me leave to congratulate the newly sworn-in Judge of the highest Provincial Court upon the honourable position to which he has been appointed. The Bar with whom I have come in contact since the appointment was announced have unanimously spoken in terms of general gratification that the present appointment has fallen to one who has a remarkable knowledge of the general requirements of the country, and, in addition to a recognized position at the Bar, has spent many years in co-operation with members of the Legislature in a public position. If the newly appointed Judge, through your Lordships, will accept these remarks in the cordial spirit in which they are tendered, I think all that is necessary has been said."

Mr. Justice Garrow said:—"It gives me great pleasure to hear from you, sir, voicing, as you have said, the feeling of the Bar, that my appointment has been received with favour. I come to this high office with some diffidence, conscious of many short-comings. I feel, however, a greater degree of assurance in view of the kind expressions of the Bar. I am surrounded by those eminent in their profession, and have very little doubt that, even if inclined to go astray, I shall be kept within reasonably close lines. I will endeavour to live up to the high standard I fear you have marked out for me."

New King's Counsel.

Herbert Eliot Ormerod, Samuel Hill Smith Lofthouse, William Percival Gratwicke Boxall, Sir John Rahere Paget, John Gilbert Kotzé, Arthur Powell, Ernest Moon, Charles Montague Lush, Robert Arthur Germaine, Frank Gore-Brown, Stanley Owen Buckmaster, Dudley Stewart-Smith, and Frederick Low, have been appointed of His Majesty's counsel in England.

Donationes Mortis Causa.

The recent decision of Mr. Justice Byrne in *In re Weston*, that a post office savings bank book is a good subject of a *donatio mortis causa*, and that scrip for building society shares is not, is the text for an article on the subject in the *English Law Times* (29th March). In supporting the gift of the savings bank book, Byrne, J., relied on *In re Dillon*, 44 Ch. D. 76, where the Court of Appeal decided that a banker's deposit note indorsed was a good subject-matter, on the ground that it contained within it all the terms of the contract between the parties in regard to interest and so forth. So Mr. Justice Byrne declared that a post office savings bank book also sets forth all its terms, the sums entered and withdrawn, and is something more than a mere piece of evidence as to the identity of its holder. There is direct authority that an ordinary banker's pass-book will not be so regarded: *In re Beak's Estate*, L. R. 13 Eq. 489. The decision as regards the building society shares was not surprising, for the certificates bore nothing on their face which could induce the belief that the investment changed hands with the documents itself, like a bond payable to bearer. The ruling as to the post office savings bank book is remarkable, not only for the length it goes in regard to what may be the subject of a *donatio mortis causa*, but also because the evidence in support of the gift was unsatisfactory, the donee herself having deposed that the donor's direction was to "keep" the documents—an ambiguous term—and the testimony being by affidavit; and, again, because nine weeks elapsed between the gift and the death. "It is truly remarkable," says the *Law Times*, "that the Legislature, on grounds of public policy, has not made a clean sweep of

these ancient doctrines of the civil law, when compelled as a measure of general policy to safeguard with such jealous provisions the general subject of testamentary dispositions. Yet they remain in excellent vitality to-day, and apparently are not even now incapable of further development."

Attachment of Moneys in Hands of Police.

The broad question which was referred to, but was not decided, in *Re Field v. Rice*, 20 O. R. 309, viz., whether money taken by the police from a person under arrest is garnishable by that person's creditors, came up recently in New South Wales, in *North v. Kerry*, 18 N. S. W. W. N. 250, where an attaching order was granted, but subsequently dissolved, the Judge saying that he did not know any legal principle which would justify the police in taking and keeping the money. The judgment debtor would have to choose his remedy, and sue in tort for the wrongful detention of his money, or else waive that right and sue in contract, as for a debt. Until he did the latter it could not be said that there was such a debt as might be attached.

Selected Bar Anecdotes.

A pupil in a barrister's chambers was instructed to draw a statement of defence in an action for personal injuries, and strictly enjoined to "deny everything." The conscientious youth denied, first, that the plaintiff was a gentleman, and, secondly, that the injured leg in question was the leg of the plaintiff.

Mr. Gully, now Speaker of the House of Commons, in a case tried before Coleridge, L.C.J., asked for a stay of execution "in order to consider more at leisure some of your Lordship's observations." Lord Coleridge described this as the most courteous complaint of misdirection that he had ever heard.

Recent American Decisions.

Bills and Notes.—A payee of a promissory note, who sells it to an innocent third person, and afterwards repurchases it for value, is held, in *Andrews v. Robertson* (Wis.), 54 L. R. A. 673, to have no better right as against the maker

than he possessed in the first instance. The rights of the payee of a note after repurchasing it from a bona fide holder are considered in a note to this case.

- Carriers—Liabilities of.*—An assault by a street car conductor on a passenger because the latter, after being carried past his station, in order to stop the car, pulled the bell rope so hard that he broke it, and jerked the conductor several feet along the car floor, is held, in *Birmingham R. & E. Co. v. Baird* (Ala.), 54 L. R. A. 752, to render the company liable.

The duty of a railway company to one as a passenger is held, in *Chicago & E. I. R. Co. v. Jennings* (Ill.), 54 L. R. A. 827, not to have arisen when, with a ticket in his pocket, he is crossing the tracks on a public highway for the purpose of boarding a train standing on the further track, and when he has not yet reached the platform provided for passengers.

The ejection from a train of one who, without right and while in a drunken and helpless condition, has boarded at night a train standing in a cut, by trainmen who know that a passenger train will soon pass through the cut, is held in *Waldron v. Louisville & N. R. Co.* (Ky.), 54 L. R. A. 919, to render the company liable for injuries by the latter train.

A carrier who, having engaged to transport imported goods in bond, pays the duties and takes the goods out of bond without authority, is held, in *Smith Bros. Co. v. New Orleans & N. R. Co.* (La.), 54 L. R. A. 923, to be liable for the damages caused thereby.

Permitting a drunken passenger who has been removed from a street car for turbulence and assault upon a fellow passenger, to return to and remain upon the car although his turbulence continues, is held, in *United Railways & E. Co. v. Deane* (Md.), 54 L. R. A. 942, to render the street car company liable for injuries inflicted by him upon a passenger.

A railway company which permits a drunken passenger to dance and stagger near the door of a baggage car is held, in *Wheeler v. Grand Trunk R. Co.* (N. H.), 54 L. R. A. 955, to be liable for injuries caused by his falling from the car.

Escrow.—Delivery of a deed in escrow, sufficient to pass title, is held, in *Munro v. Bowles* (Ill.), 54 L. R. A. 865, to be made where the grantor turns the deed over to his house-keeper, with instructions to deliver it to the grantee on his death, with no subsequent attempt to control or take possession of it, although for safe keeping she places it in the grantor's trunk, which is locked, and the key to which he retains until his death.

Gift.—A gift of personalty placed in the possession of a third person for delivery to the donee is held, in *King v. Smith* (C. C. A. 9th C.), 54 L. R. A. 708, not to be defeated by the fact that the delivery is not effected until the donor has become finally unconscious in his last illness.

Insurance.—The recovery for loss of prospective earnings, awarded because of injury to a vessel by collision, is held, in *Mason v. Marine Ins. Co.* (C. C. A. 6th C.), 54 L. R. A. 700, to be within the rule entitling an insurer who has received an abandonment of the vessel to the fund recovered on account of the collision from the vessel in fault; and the fact that the insurance did not cover the full value of the injured vessel will not require the insurer to share such recovery with the owner.

Liability for loss resulting from destruction, by fire, of a building insured by a policy exempting the insurer from liability for loss caused by explosions of any kind, unless fire ensues, and in that event for the damage by fire only, and providing that if the building, or any part thereof, falls except as the result of fire, the insurance shall immediately cease, is held in *Leonard v. Orient Ins. Co.* (C. C. A. 7th C.), 54 L. R. A. 706, to attach under the former clause, and not to be defeated by the latter, where one corner of the building is knocked down by an explosion in a neighbouring building, and fire immediately appears in the exposed part, caused either by the flame of the explosion or by fires liberated thereby in the building insured.

CORRESPONDENCE.

Oaths and Affidavits—Before Whom Taken.

To the Editor of the CANADIAN LAW TIMES.

Sir,—A few years ago the Legislature of this Province extended the facilities for taking affidavits, when required by law to be taken, by conferring the like powers on notaries as were and are possessed by commissioners for taking affidavits: R. S. O. c. 175; and by justices of the peace: R. S. O. c. 1, s. 8, s.-ss. 18, 19. The advantage and convenience of this has become manifest, and is felt and admitted by all whose business includes a formality or ceremony of that nature.

Under Dominion statutes and departmental regulations, however, the old system of swearing before a justice of the peace only is, to a large extent, still in vogue. For example, in a land surveyor's bond to the Government, the oaths of justification by the sureties are to be sworn before a justice of the peace; and the form is so printed; and so with custom house forms, and many other civil matters. That system is rather antiquated, and frequently causes much inconvenience and delay. Except in criminal matters there would seem to be no good reason for limiting the public to justices of the peace when it becomes necessary to make affidavits in matters within federal jurisdiction, any more than in matters within Provincial jurisdiction.

Yours, etc.,

BARRISTER.

April 21, 1902.

BOOK REVIEWS.

The Law Relating to Cheques: By Eric R. Watson, LL.B., of the Inner Temple, Barrister-at-law. London: Sweet and Maxwell, Limited: 1902.

The law is well set forth in a series of concise propositions, with references to decisions and the provisions of the Bills of Exchange Act, 1882. In the sub-division of subjects which is always going on, cheques may well have a book all to themselves, and this, though only a very little one (120 pages), is well arranged and convenient for purposes of reference.

Chitty's Forms of Civil Proceedings in the King's Bench Division of the High Court of Justice, and on Appeal therefrom to the Court of Appeal and the House of Lords: 13th edition: by Thomas Willes Chitty, of the Inner Temple, Barrister-at-law, a Master of the Supreme Court; Herbert Chitty, of the Inner Temple, Barrister-at-law; and P. E. Vizard, of the Central Office of the Supreme Court. London: Sweet and Maxwell, Ltd.: Stevens and Sons, Ltd.: 1902.

The first edition of this book was published in 1834. The author, Mr. Thomas Chitty, special pleader of the Inner Temple, saw ten editions through the press before his death in 1878. One of the present editors was responsible for the 11th and 12th editions. In view of the 14th edition of Archbold's Practice and of the periodic issue of the Annual Practice, the original design of this book has now been restored, and it appears as a collection of forms with notes explaining their use. The forms have been completely revised, and the notes re-written. Under each form such Rules or statutes as are applicable to it are either set out or referred to.

The book is a bulky one, of over 900 pages. There is an excellent analytical index, but, a rather surprising omission,

no table of the cases cited in the notes. It may be a question whether the table of cases in any text book is sufficiently useful to justify the expenditure of labour and space necessary for its compilation and incorporation in the book, but we have become accustomed to it and shall miss it if it is to be omitted in modern books of this kind.

It is impossible to assume in regard to this book the reviewer's usual easy tone of familiarity with the contents. When we have said that they seem to comprise every conceivable variety of common law form, and that the notes are clear and concise, we have told all that we can assure ourselves of, except indeed that the printing is remarkably good. Notwithstanding the many points in which the Courts of the various Canadian Provinces differ in practice from each other, and from the English Courts, we believe that these forms will be of great assistance to lawyers in each and every Province.

The Comprehensive Criminal Digest, containing Chartered and Non-chartered High Court Reports, 1862-1899, Privy Council Reports, 1836-1899, and Selections from Sudder Fouzdaree Adawlut and Nizanant Adawlut Reports, 1802-1862, with an Exhaustive Table of Cases Judicially Noticed in these Reports, and a Nominal Index: by Chunilal Harilal Vakil, B.A., LL.B., Subordinate-Judge, Dholka, First Class Magistrate, Ahmedabad. Bombay: Education Society's Steam Press: Surat: Irish Presbyterian Mission Press: 1900.

We are now constantly meeting with evidences of the drawing together of distant parts of the Empire. Judge Vakil, who has sent us his digest, informs us that the CANADIAN LAW TIMES is read and liked in Bombay. It is a pleasure to see that, although many of the criminal offences mentioned in the digest now before us are unfamiliar, the general lines followed in entitling and classifying the cases are those which are followed here. Judge Vakil's work would, we are sure, be regarded in any part of the Empire as an excellent one.

The Magistrates' Manual. Founded on the Criminal Code, 1892, and Amendments, and the Various Acts relating to the Rights, Powers, and Duties of Justices of the Peace, with a Summary of the Criminal Law. Fourth edition—Revised, Largely Rewritten, and Improved by S. R. Clarke, of Osgoode Hall, Barrister-at-law. Toronto: The Carswell Company, Limited: 1902.

Mr. Clarke has aptly chosen as his motto, which appears on the title page of his works, the words: "Labor omnia vincit." This book bears evidence of great industry in collecting and collating authorities on the various points discussed. It is primarily intended for the information and guidance of justices of the peace. It is well fitted for this purpose, and no magistrate can afford to be without it. Counsel going on circuit for criminal business will find the Manual a useful "vade mecum." The latest cases seem to be noted and referred to with accuracy, while all necessary forms are included. The introductory chapter deals with the appointment, qualifications, jurisdiction, and duties of justices of the peace, and gives a general sketch of the proceedings in entertaining and dealing with criminal charges.

Pages 26-38 give a very useful summary of the law in regard to "Interested Justices;" this should be carefully studied by every justice of the peace. The disqualification of magistrates under certain circumstances does not seem to be as well understood as it should be. The methods of compelling the appearance of the accused and the preliminary inquiries are next dealt with. In this, as in other chapters, the sections of the Criminal Code applicable are given at length. Under this topic offences committed upon the sea are noticed, and the "Territorial Waters Jurisdiction Act, 1878," together with other Imperial Acts in *pari materia* are referred to. Next come sections dealing with Speedy Trials of Indictable Offences, Summary Trial of Indictable Offences, and Trial of Juvenile Offenders for Indictable Offences. Under the latter heading reference is made to the Ontario legislation dealing with offences by young persons. The important subject of Summary Convictions is next taken up; this includes a discussion of the law and practice relating to *certiorari*, with forms.

The second part of the Manual contains a useful summary of the Criminal Law of Canada (including rules as to evidence), arranged under alphabetical heads. It is to be regretted that the learned author has here made use of terms which are not found in the Code. "Larceny" and "Embezzlement" should be superseded by the Code name "Theft." These terms have been designedly dropped by Parliament, and now that the Code has been in force for nine years, they should be left in oblivion. There seems no necessity to refer in a treatise of this sort to cases such as *R. v. Collins* (v. p. 595), *R. v. Hollingsworth* (p. 592), *R. v. Carter* (p. 663), and others which are no longer authorities.

Such a book as this should be positive and dogmatic; unnecessary cases, dealing with state of the law no longer existing, only tend to confuse those for whose use the book is primarily intended, and should be rigorously excluded.

In dealing with the law as to riot (pp. 703, 704) and provocation by words (p. 665), the difference made in the common law by the Code, if not overlooked, has not been pointed out, as it should have been.

These blemishes, however, though regrettable, do not interfere with the real value and utility of the work.

The publishers have done their part well; the printing and make-up of the volume are all that can be desired.

N. W. HOYLES.

THE CANADIAN LAW TIMES.

JUNE, 1902.

SIR GEORGE BURTON'S LIFE AND WORK.

GEORGE WILLIAM BURTON'S active professional life was passed in Hamilton.

It is difficult, in this age of immediate communication by rail, telegraph, and telephone, to realize the complete change these agencies have brought about in professional matters. When the late Sir George Burton began practice, travelling was slow and difficult, and one result was that instead of professional ability being concentrated in the capital, the county towns were important points.

More especially, places like Cornwall, Kingston, and London had strong Bars; the leaders of the circuits resided there and were necessarily well-read men and experienced advocates, quite the equals, especially in the then universal jury cases, of the members of the Toronto Bar. Hamilton was such a centre, and unusually important both on account of its industries, the rich neighbouring country, and its proximity to Toronto. Mr. Burton's career had been a long and successful one, and at the time he was appointed a Judge of the newly created Court of Appeal in 1874, he enjoyed in a very eminent degree the confidence of the inhabitants of Hamilton and the neighbouring counties, and of the Bar of the Province. The Court, as originally constituted, consisted of Chief Justice Draper and Justices Strong, Patterson, and Burton. The decisions of the Court thus constituted are to be found in the then current volumes of Grant's Reports. The Supreme Court of Canada was created in 1875, and Mr.

Justice Strong was appointed one of the Judges of that Court, the vacancy being filled by the appointment of Mr. Thomas Moss, whose success both at the Bar and in political life had been singularly great. This Court of Appeal was well chosen, and the Bar and the people of the Province had confidence in it. When first organized the Judges of the Court took their turn of circuit duty, and this arrangement continued up to 1884. Mr. Thomas Moss soon succeeded to the Chief Justiceship, and during his brief, too brief, career, he found it necessary that as Chief he should give up circuit work. During these years the Court settled down into a well understood routine. With the exception of the inevitable disagreement as to the weight of evidence, as a rule the judgments of the Court of Appeal of this period were delivered by one Judge, generally the Chief Justice. These judgments are generally long, covering the whole ground, and probably embodying the opinions and even the language of more than one Judge.

Early in the history of the Court, constitutional questions began to come before it. The British North America Act provided a new constitution, and questions as to the limitations of the general and Provincial Governments had to be authoritatively settled. This could only be done through actions raised in one Province and gradually passing from Court to Court until finally brought before the Privy Council. Ontario litigants were eager to take the lead, and the other Provinces allowed them to do so. It mattered not who was the Minister of Justice at Ottawa or who the Attorney-General at Toronto, Quebec, Halifax, or Fredericton, the rights conferred had to be claimed or defended by the respective judicial officers, and so a series of judicial opinions required to be obtained in regular gradation, and, fortified with these and the arguments of counsel, the Judicial Committee of the Privy Council advised Her Majesty.

Mr. Justice Burton approaches the consideration of these questions with strong convictions. In one of his latest judgments, that in *Re Queen's Counsel*, 23 A. R. p. 802, he quotes, and again with approval, his opinion expressed in

Attorney-General for Canada v. Attorney-General of Ontario, 19 A. R. 31, at p. 38: "I do not agree with the construction placed on the Confederation Act by the learned counsel for the appellant, as I have always been of opinion that the legislative and executive powers granted to the Provinces were intended to be co-extensive, and that the Lieutenant-Governor became entitled, *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which Provincial Legislatures have jurisdiction; that he had in fact delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the Provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion." And he adds: "This opinion seems to have been fully sustained and confirmed by the subsequent decision of the Judicial Committee," [1892] A. C. 437, in *Liquidators of the Maritime Bank v. Receiver-General of New Brunswick*, as delivered by Lord Watson, which he summarized as follows: "Lord Watson refers to the Confederation Act as nowhere professing to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the Sovereign and the Provinces; the object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest—each Province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the Provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces, so that the Dominion should be vested with such of these powers, properties, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of Provincial Government. And in a subsequent part of the judgment, he adds: "And a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of Provincial Government

as the Governor-General himself is for all purposes of Dominion Government.”

Reading this language reminds one of how often the best laid schemes ‘gang agley.’ Confederation was the outcome of the civil war to the south. That conflict necessitated the union of the Province of Canada with the Maritime Provinces, and the experience of our neighbours showed that one rock to be avoided was ‘State rights,’ which had caused that war. A father of Confederation, one of the delegates to England, and one who took a very active part in framing the Act, told me shortly afterwards that one way adopted of avoiding this rock was by the surrender of all Provincial rights and the creation of the Dominion of Canada. Their excellent parliamentary draftsman, Mr. Fitzgerald, remonstrated with the delegates as to the adoption of the names “Legislature” and “Lieutenant-Governor,” for the Provinces. He begged that some others should be taken, so as to shew that the central was the only Government, and that provincial administrative powers were delegated from it and might be abridged or extended as experience should develop.

The delegates from the Province of Canada were quite willing; the country was indifferent; a generation had grown up since Upper and Lower Canada had been united. But the Maritime Provinces were giving up their autonomy for the first time, and to soothe their supposed susceptibilities, the names then used were continued.

We in the Upper Province hoped that the Maritime Provinces would unite as Acadia, as they intended doing in 1864, and that their local law would be assimilated with ours, so that the Provincial Bars would interchange. That has failed as to provincial limitations. Mr. Edward Blake delivered one of his best speeches in the local House on first going into supply, in pointing out that the address should not be to Her Majesty, but to the Governor-General. He was not answered, but he was overruled, and the constitution has been developed until the late Lord Watson’s theories are treated as history.

The first case, or rather class of cases, which had a far-reaching constitutional effect were *Parsons v. Queen Ins.*

Co., 4 A. R. 103, and *Parsons v. Citizens Ins. Co.*, 4 A. R. 96, in which judgments were given in March, 1879, arising out of the Provincial statute prescribing uniform conditions in fire insurance policies, R. S. O. 1877 c. 162.

This sharply defined the limits of provincial and general jurisdiction in matters regarding trade and commerce. It was the first of the long series of enactments characterized as provincial class legislation, and has had many successors. They reverse the old theory of freedom of contract and sanctity of private rights. The Court of Error and Appeal had in the *Goodhue* case (1872), 19 Gr. 366, in the early days of Confederation, held that 34 V. c. 99 (O.), by which a disposition of an estate by will was altered by an Act of the local Legislature, was *intra vires*, and that an Act of the local Legislature, if within its powers as defined by the B. N. A. Act, was supreme as to the courts and people of the Province, and could not be objected to as contrary to reason or justice.

Mr. Justice Burton gave effect to the law without comment. In delivering the judgment of the Court in *Parsons v. Citizens Ins. Co.*, he said: "The Dominion Parliament has no more authority to interfere with, or regulate, contracts of this nature within any of the Provinces, than has the Legislature of the Province to regulate promissory notes or bills of exchange. The terms upon which insurance business is to be carried on within the Province is a matter coming exclusively within the powers of the local Legislature, and any legislation on the subject by the Dominion would be *ultra vires*. All that the Legislature has done in the case of the present company is to enable it, in its corporate capacity, to carry on the business of insurance; but the local Legislature has the exclusive discretion as to the restrictions under which it shall be carried on within the confines of the Province."

This view and this language were adopted by the Privy Council.

Chief Justice Moss delivered the judgment in *Parsons v. Queen Ins. Co.* He felt compelled to defend and to excuse the legislation on the ground of the necessity to defend assured from the insurance companies' conditions. But he

was chiefly impelled to do so from the strong judgment of Mr. Justice Gwynne in the case of *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321, in which that very learned Judge held that once statutory conditions were read into a policy of insurance, whether for the assurer or assured, they were there for both parties.

Perhaps the greatest triumph of Mr. Justice Burton as an authority on the constitution was his judgment in *The Queen v. Hodge* (1883), 7 A. R. 272, in which his conclusion, and the reasons for it which he adduced, were confirmed by the Court of final appeal. In the case of *The Queen v. Frawley*, decided at the same time, Mr. Justice Burton said (*ib.*, at p. 281): "I was somewhat surprised that we were again pressed with the argument that the Liquor License Act was *ultra vires* as dealing with trade and commerce, an argument which, if pressed to its logical conclusion, would effectually preclude the local Legislatures from dealing with any particular trade or business within the Province; and the Privy Council have decided that the words are not to be regarded in any such contracted sense, but to refer to political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and possibly general regulations of trade affecting the whole Dominion."

To complete this branch I would refer to the *Wason* case (1890), 17 A. R. 221, which raised the question of the validity of penalties imposed by the Province for breaches of the regulations in butter and cheese factories. Mr. Justice Burton said (p. 236): "The words used in ss. 91 and 92, B. N. A. Act, are necessarily very general, but those in 91 were intended to apply to subjects of national and general concern. We are all aware that for many years after Confederation discussions were constantly arising as to the scope of the words 'regulation of trade and commerce,' it being frequently contended that they were sufficiently general to include even minute rules for regulating a particular trade or business . . . but it has long since been authoritatively decided that, read in connection with other portions of the Act, those words must be held to refer to regulations relating to trade and commerce in their general

and quasi-national sense, and not to the contracts or conduct of particular trades."

Of all his experience in practice, probably no part conduced so much to his successful grasp of the B. N. A. Act as his thorough knowledge of municipal law. Before Confederation had introduced a local Government, county councils were relatively much more important bodies than they are now; they had gradually developed since the union of the upper and lower Provinces, and Mr. Justice Burton, judging from the judgments found in the various volumes of the Appeal Reports, had been thoroughly familiar with the growth of municipalities and their law. He was, I believe, the framer of many of the clauses. The first time I remember seeing the late Sir George was in a train from Toronto to Hamilton. At the station he was met by an admiring crowd of solid men, and I found had returned triumphant from a hardly fought battle on some municipal point in the Court of Error and Appeal.

It would be impossible to select for special notice Mr. Justice Burton's judgments, and probably serve little purpose, as the learning and historical knowledge displayed in judgments like *Derochie v. Cornwall*, 21 A. R. 279, as to municipal liability to keep in repair, etc., have served their purpose; or as *Toronto Street R. W. Co. v. Dollery*, 12 A. R. 679, which was a dissenting judgment as to the liability of an owner for damages, whose contractor interfered with a statutory right; or *Scott v. Tilsonburg*, 13 A. R. 233, where a by-law exempting a factory was held to be an evasion of the statutes; and the many cases where his strong common sense compelled him to take the weaker side and give a dissenting judgment. The following language is characteristic (p. 240): "If I were in a position to express my individual opinion, I should denounce such legislation as unjust and tyrannical in the extreme, placing it in the power of parties interested in corner lots, or whose particular property may be benefited by the proposed exemption, to enhance the value of their property at the expense of the rest of the community. To my mind it is class legislation of the most pernicious kind, and is, I have no doubt, open to very great abuse. But it is the law." *Pratt v. City of Stratford*, 16

A. R. 22, is another dissenting judgment on municipal authority. In fact the volumes of the Appeal Reports teem with his knowledge of this subject, a branch of legislation and of law which is continually changing as new conditions develop. But for one who has occasion to study any question I could recommend the reading of what Mr. Justice Burton has to say on the subject. In these opinions will be found the reason of the original enactment, the changes, the reasons of such changes, and a history of the various legal battles through which it has passed. As an illustration take the case of *Young v. Midland R. W. Co.*, 19 A. R. 265, in which he gives an interesting account of the varying enactments in England and Canada as to payment by railway companies for expropriated lands, the reasons which influenced our Legislatures, and those which governed the practice of the railway companies, in paying over the compensation to the tenant for life in this Province.

A very general impression exists that the late Sir George Burton was a Judge who disagreed with his colleagues. I do not mean personally; he was one of the kindest, most considerate, and genial of men; but that his idiosyncrasy compelled him to examine most minutely the weaker side and often to take it. This is the way he begins his judgment in *Toronto Street R. W. Co. v. Dollery* (1885), 12 A. R. 679, at p. 692: "As my learned brothers have arrived at a different conclusion, I suppose I must be wrong, but, after giving the fullest consideration to their reasons, I retain the opinion I formed upon the argument, that upon the facts in evidence, and the findings of the learned Judge in this case, the action is not maintainable against the appellant who employed an independent contractor to remove a building for him from one portion of the city to another. As the authorities appear to bear this out, and I find it impossible to concur, I feel that I ought to state my reasons for disagreeing." On another occasion, *Haubner v. Martin*, 22 A. R. 468, he ends a long and elaborate judgment: "Much as I regret the conclusion, I am compelled to hold that the defendant is not liable, unless we are prepared to repeal the Statute of Frauds." An examination of the reported cases, which are by no means all the judgments delivered, do not altogether bear out this

impression. In fact some of the volumes shew that, instead of Mr. Justice Burton, some other Judges found that their convictions left them in a minority of one. This feature is by no means one to be regretted. In the case of the late Sir George, it must be remembered that he was assiduous in his discharge of duty; his name appears, with few exceptions, in all reported cases. Then he was a master of the old practice and pleading, one result being the use of clear and accurate expression. Sir George was not an admirer of the present system by which a pleader's meaning may be a matter of inference, not of precise and lucid statement.

In *McKenzie v. Dancey*, 12 A. R. at p. 318, as to pleading he said: "In such an action, in the old days of pleading, it would have been necessary for the plaintiff suing for non-performance to have averred and proved an offer, at least at the same time, to perform his part of the contract, or a readiness and willingness of which the other had notice. A declaration omitting such an averment would have been bad on demurrer, or even in arrest of judgment."

"It is a habit with me, which I have frequently found very useful, to consider how the defendant would have formulated his defence on the old system of pleading:" *Bonisteel v. Saylor* (1890), 17 A. R. at p. 522.

To that branch of modern practice which is the result of the introduction of modern machinery, the compensation for injuries to workmen, he brought a well-informed mind. See his judgment in *O'Connor v. Hamilton Bridge Co.* (1894), 21 A. R. 596. His care led him often to take the side of the employer, and we find passages in many judgments similar to his ending in this one: "He did it of his own motion and at his own risk. To this the injury was attributable, and much as I sympathize with the plaintiff, I cannot see how the defendants are responsible. I trust that the defendants will deal generously with him."

There was a case in which I have always felt that the result, though unavoidable, was contrary to abstract justice. An agent of a loan company, desiring to obtain funds to make a fresh start in the United States, hit upon an ingenious scheme. He forged applications from the owners of good farms, and, when the loans were accepted and titles passed,

forged the mortgages and orders to transmit the moneys to himself. When the cheques arrived, to prevent suspicion, he forged the indorsements in the same signatures that he had adopted for the mortgages, and thus received the proceeds from the Federal Bank. In delivering judgment against the bank on its appeal from being obliged to repay this money, *Agricultural Savings and Loan Assn. v. Federal Bank* (1881), 6 A. R. 192, Mr. Justice Burton said: "I am old enough to remember the time when, in Canada, a cheque payable to order was the exception, although, without any legislation similar to that in England, it has now become a very common custom to make cheques payable to order. . . . Under the English Act, if the cheque purports to be indorsed by the person to whom it is made payable, the banker is relieved from inquiring into the authority to make the indorsement, or the identity of the parties making it with those named as payees, and his liability remains as it stood before in the case of cheques payable to bearer; but we have no such enactment here." And he elsewhere advocates the use of crossed cheques. Parliament refused to enact the English law as to indorsement, but legalized crossed cheques, which have never obtained public favour.

It is impossible to read the reports of the judgments of the late Sir George Burton without seeing his kindness of heart and his humour, which twinkles through almost every page. During the time that the late Sir John Hagarty was Chief Justice, the judgments of the Court are alert with life, the stern and tragic, and also the bright and comic sides.

As a last characteristic specimen of Sir George Burton's style of mind and expression, I copy what he says on Sunday travel in *Attorney-General v. Niagara Falls, etc., Tramway Co.* (1892), 18 A. R. 459: "The information reads more like an ordinary bill of complaint than an information at the suit of the Attorney-General, and would, in my judgment, have been bad on demurrer, and was properly dismissed on the hearing. There was not only no evidence of any injury to the public, but, on the contrary, of its being a very great convenience in enabling many people to attend a place of divine worship, which otherwise they could not

have done. Human nature does not seem to have changed much in 1,800 years; but it is really painful to find in this nineteenth century any one, and especially a person assuming to be a teacher of religion, grudging the enjoyment of a number of poor people and their families who avail themselves of perhaps the only day open to them to visit and enjoy one of nature's grandest works, because, in order to do so, they have to travel a few miles by train or other vehicle. It would seem almost incredible had we not the witness's admission in his evidence."

With the exception of Sir Henry Strong, Sir George Burton was the last of the original Court of Appeal. Chief Justice Draper, the oldest, and Chief Justice Moss, the youngest, chiefs, were the first to go. Mr. Justice Patterson, his pleasant colleague, was, after some years of friendly intercourse, called to the Supreme Court at Ottawa, leaving the good works he delighted in and the charities which sadly missed him. At last Sir George, then the Chief Justice of his Court, finding the inevitable effect of time, retired full of years and honours on the 1st July, 1900, and a year later passed away, on the 22nd August, 1901.

In a sketch, a most inadequate one, of this character, I have endeavoured to shew the patient, punctual, accurate character of the Judge, whose kindly nature compelled his anxious consideration of every point, and to give to every side, and especially the weaker one, the full value of the evidence and the law applicable to it. It is a great thing for the Province of Ontario to have had such a Judge as George William Burton.

GEORGE MARTIN RAE.

Toronto.

RECENT CASES FROM THE TIMES REPORTS.*

Adulteration of Food.]—Several cases under the Sale of Food and Drugs Act, 1875, may be referred to. In *Hayes v. Rule and Law*, 18 T. L. R. 535, a conspicuous printed notice in the shop, and on the wrapper, as to the quality of the article sold, was held to protect the vendors. See *ante* p. 133.—In *Joseph Burton and Sons v. Mattinson*, 18 T. L. R. 545, an analyst's evidence as to the proper standard of purity was held, in a prosecution under the Act, sufficient to justify a conviction.—In *Bayley v. Pearks Gunston and Tee*, 18 T. L. R. 567, the article frequently attacked—butter blended with milk—was held not to be margarine, and properly saleable as "butter."—*Irving v. Callow Park Dairy Co., Bacon v. Callow Park Dairy Co.*, 18 T. L. R. 573, and *Smithies v. Bridge*, 18 T. L. R. 575, deal with the sale of milk; while in *Pearks Gunston and Tee v. Ward*, 18 T. L. R. 538, there is the important ruling by a Divisional Court that a corporation can be guilty of an offence under the Act, *mens rea* not being an element of the offence. Compare on this point *Attorney-General v. Hamilton Street Railway Co.*, 24 A. R. 170, and *Re Lord's Day Act of Ontario*, 1 O. W. R. 312.

Bicycle.]—In *Smith v. Kynnersley*, 18 T. L. R. 568, a bicycle was held not to be a "sledge, drag, or such-like carriage," and therefore not within the purview of a somewhat too specifically expressed toll Act. See *ante* p. 21.

Company.]—The contest in *Foerster v. Newlands Diamond Mines*, 18 T. L. R. 497, was upon the narrow question of the proper form of voting by proxy at a meeting of a company. The articles of association provided that votes might be given either personally or by proxy, and contained a provision as to the form of the instrument appointing a proxy, with a direction that the instrument should be filed at the company's office a certain time before being acted upon. There was no provision as to the form of giving the

* Including the cases in No. 23, vol. 18, week ending 7th May, 1902.

vote. It was held that the signature of a voting paper by the plaintiff, who held a large number of proxies, in his own name, adding "for self and proxies," was valid and sufficient, the objection that each shareholder's name, per the plaintiff as proxy, should have been signed, being overruled.—That a winding-up order should not be granted if there are no assets for distribution, is a well-settled principle (see for example, *In re Georgian Bay Ship Canal Co.*, 29 O. R. 358); and in *In re Winding-up Petitions*, 18 T. L. R. 503, Buckley, J., held that the petitioner for a winding-up order must allege in his petition (and consequently prove *prima facie*) that the company has assets available for distribution in a winding-up.—The judgment in *In re London and Northern Bank*, 18 T. L. R. 403, *ante* p. 177, as to the right to require an undertaking from a presumably hostile solicitor not to use information to be obtained at an examination in winding-up proceedings, was affirmed: 18 T. L. R. 536.

Compromise of Action.]—The judgment of Lord Alverstone, L. C. J., in *Neale v. Gordon-Lennox*, 18 T. L. R. 390, noted *ante* p. 174, was reversed by the Court of Appeal: 18 T. L. R. 494. That Court approved of the general principle that a compromise by counsel is binding upon the client, even though made contrary to the client's instructions, the limitation of authority being unknown to the other side, but differed from the Lord Chief Justice's view that the principle did not apply in the case of an interlocutory order. The case has been taken to the House of Lords.

Contract.]—In *Morell v. New London Discount Co.*, 18 T. L. R. 507, an agreement entered into between the plaintiffs and the defendants contained a recital that the defendants had purchased certain land and intended to erect a theatre thereon, and then provided for the employment of the plaintiffs as managers of the theatre, they agreeing to contribute towards the cost of the building. After a large sum had been expended in building operations, the defendants failed and the theatre was not completed. It was held that the recital was not equivalent to an undertaking to build, that a contract to build was not to be implied, and consequently that the plaintiffs were not entitled to damages,

but on the contrary were bound to pay the amount which they had agreed to pay.—*Lawford v. Billericay Rural District Council*, 18 T. L. R. 507, is another case as to the necessity of a corporate body contracting under their common seal. The plaintiff, by agreement under seal, was employed by the defendants as engineer to prepare plans and do other work in connection with a drainage scheme. Subsequently, by agreement not under seal, the plaintiff was employed to do similar work in connection with the extension of the scheme to another area. It was held that he could not enforce payment, the distinction contended for between an executed contract and an executory contract not being given effect to. A number of the English authorities are referred to.—In *Loftus v. Roberts*, 18, T. L. R. 532, the defendant wrote to the plaintiff agreeing to engage her to play a certain part “at a salary to be mutually arranged between us.” It was held that there was no contract. See *Boston v. Toronto Fruit Vinegar Company*, 1 O. W. R. 301.—*Hardie v. Balmain*, 18 T. L. R. 539, is another theatrical contract case, the disputants being respectively the manager of a company and the manager of a theatre. An agreement by the plaintiff to produce a certain play at the defendant’s theatre contained a clause that in the event of the theatre being closed through fire, death in the Royal Family, “or any other cause whatsoever,” the engagement was to be null and void or terminated, as the case might be. At the time of the agreement extensive alterations were in progress, which were not completed in time to enable the play to be produced. The Court of Appeal held that the defendant was liable in damages, “any cause whatsoever” not in their opinion including a cause brought about by the defendant himself.

Copyright.]—In *Britain v. Hanks Brothers and Co.*, 18 T. L. R. 525, metal models of soldiers were held, upon the evidence, to be artistic productions, and therefore the subject of copyright under the Sculpture Copyright Act, 1814. This Act is wider in its terms than the Canadian Act, R. S. C. c. 62, s. 4, but the decision goes far enough to apply to the Canadian Act. A further point in the case as to the mode of giving notice of the copyright does not apply under

the Canadian Act.—The judgment of Kekewich, J., in *Moffatt and Paige v. George Gill and Sons*, 17 T. L. R. 414, noted 21 C. L. T. 228, as to copyright in an annotated edition of *As You Like It*, was reversed by the Court of Appeal, 18 T. L. R. 547, that Court holding that the plaintiffs' book, though not in the highest sphere of literary work, shewed a large amount of ingenuity, skill, and industry, and was therefore entitled to protection, and that the defendants' book was an infringement containing wholesale copying, and not merely occasional or casual imitation.

Criminal Law.]—In *Rex v. Hadwen and Ingham*, 18 T. L. R. 555, it was held that when, under the Criminal Evidence Act, 1898, s. 1—which in this respect the Canada Evidence Act, 1893 (56 V. c. 31, s. 4) much resembles—one of two prisoners tried together gives evidence which is favourable to him and unfavourable to his fellow-prisoner, he is subject to cross-examination by the latter's counsel, the right of cross-examination not being limited to the Crown.—*Rex v. Kennedy*, 18 T. L. R. 557, is an interesting case as to the right of a magistrate to refuse to issue a summons, the fine point of distinction being that the magistrate must, if there be jurisdiction, consider the application, but may then in good faith refuse to proceed further—a distinction the importance of which well appears by the case of *In re Rex v. Meehan*, 1 O. W. R. 248, 22 Occ. N. 179.—*Mackenzie v. Hawke and Hawke v. Mackenzie*, 18 T. L. R. 550, deal with the newspaper coupon betting system, already dealt with in *Stoddart v. Hawke*, 18 T. L. R. 22, noted *ante* p. 27.

Discovery.]—The defendant in the action for slander of *Elliott v. Garrett*, 18 T. L. R. 498, pleaded that the words complained of were spoken in good faith to persons having a common interest upon a privileged occasion. It was held that the following interrogatory: "What information, if any, had you that induced you to believe that the said words were true, or what steps, if any, had you taken before speaking the said words to ascertain whether they were true or not?" was proper, it being relevant upon the issue of privilege.

General Average.]—In *Montgomery and Co. v. Indemnity Mutual Marine Ins. Co.*, 18 T.L.R. 479, the Court of Ap-

peal, affirming a decision of Mathew, J., lay down the important principle that the doctrine of general average applies where the ship and cargo belong to the same owner. The defendants were, therefore, held liable on a policy covering a general average loss due to perils of the sea on a cargo belonging to the plaintiffs, on board the plaintiffs' own ship, the mast of the ship having been cut away in such circumstances as to amount to a general average sacrifice.

Heirlooms.]—The judgment in *In re Hill*, 18 T. L. R. 267, *ante* p. 96, was affirmed by the Court of Appeal: 18 T. L. R. 487.

Insurance.]—The judgment in *British Workman's Assurance Co. v. Cunliffe*, 18 T. L. R. 425, noted *ante* p. 179, as to the right to recover premiums paid under a wager policy, was affirmed: 18 T. L. R. 502. It may be well to mention that the two Canadian cases referred to in the note at p. 179 have, upon the question of repayment of premiums, been reversed by the Supreme Court of Canada.—*Stuart v. Freeman*, 18 T. L. R. 511, emphasizes the danger of deferring the payment of life insurance premiums. The policy in question (in effect) allowed thirty days' grace for the payment of premiums. On the thirty-first day the premium was paid, the person on whose life the insurance had been effected having died on that day about an hour before the time of payment, neither the payer nor the receiver of the premium knowing this. On several previous occasions the premium had been accepted by the company on the thirty-first day, and it was proved that a clerk of the company had stated that the premium would be accepted on the thirty-first day. It was held, however, that though this might have estopped the company if the insured had been alive at the time of payment, his death completely changed the rights of the parties, and the policy was declared to have lapsed. The question whether a policy lapses in the event of death after the due date and before the expiration of the days of grace, caused much difference of opinion in *Manufacturers Life Ins. Co. v. Gordon*, 20 A. R. 309. In dealing with such a point now the provisions of the Ontario Insurance Act, R. S. O. 1897 c. 203, s. 148, must, of course, be kept in mind.

Judgment.]—The judgment in *Birch v. Birch*, 18 T. L. R. 151, noted *ante* p. 70, in which it was held, upon a motion to stay the action as frivolous, that an action would lie to set aside on the grounds of fraud and perjury a judgment in a probate action upholding a will, was reversed by the Court of Appeal: 18 T. L. R. 485. The right to bring such an action was affirmed, but the Court of Appeal held that the facts did not shew a reasonable possibility of the alleged fraud being established.

Jury.]—The salutary rule that a juror cannot be heard to say that he did not really intend to join in the verdict rendered was enforced in *Nesbitt v. Parrett*, 18 T. L. R. 510. The action was for libel; damages £1,100. The allegation was that the juror was so astonished when he heard the verdict announced in Court by the foreman that he was unable to protest, and, therefore, that his proposed evidence was as to what took place in Court and not as to what took place in the jury-room, but the Court of Appeal held that this was too fine a distinction.

Landlord and Tenant.]—A point of some practical value in *School Board for London v. Peters*, 18 T. L. R. 509, is the holding that a notice to quit had been properly served by being left with a servant at the lessee's house. Upon the facts of the case it was held that there had been a holding-over for a year by consent, the benefit of the notice to quit being preserved.

Malicious Prosecution.]—In *Palmer v. Birmingham Manufacturing Co.*, 18 T. L. R. 552, Jelf, J., held, at the trial, following *Reed v. Taylor*, 4 Taunt. 616, that an action for malicious prosecution would lie where the plaintiff had been charged with stealing a number of articles, and as to some want of reasonable and probable cause had been made out.

Master and Servant.]—The principle of *Cuckson v. Stones*, 1 E. & B. 248, was held in *Warren v. Whittingham*, 18 T. L. R. 508, to apply in the case of an agreement by the defendant to employ the plaintiff for five years at a yearly salary and to teach him the business of a piano manufacturer,

the plaintiff on his part paying a premium and agreeing to devote the whole of his time to the defendant's business. The plaintiff was, therefore, held entitled to his salary during a period of illness when he was unable to work.

Mortgage.]—*Rimmer v. Webster*, 18 T. L. R. 548, is an interesting case as to an unauthorized mortgage of a bond by a broker, to whom it had been intrusted by the plaintiff for the purpose of sale. It was held that, as the plaintiff had executed an absolute transfer to the broker, he was bound by the mortgage to the defendant, taken in good faith to secure an actual advance. The general question of the effect of intrusting another with the indicia of title is a good deal considered.

Negligence.]—In *Rattee v. Norwich Electric Tramway Co.*, 18 T. L. R. 562, the Court of Appeal recognize as applicable to a tramway company, having statutory power to run cars along a highway and so to commit what without that authority would be a nuisance, the general principle that all reasonable care must be exercised to avoid injury to persons lawfully using the highway; in other words, that the statutory authority does not confer the privilege of ignoring the rights of others. The plaintiff's horse became frightened at the approach of a car, and, the driver of the car having refused to stop or slacken speed, although requested to do so, swerved so as to throw the trap in front of the car, and the plaintiff was injured. It was held that, as the driver must have seen that there was imminent danger of injury, he should have stopped, or at least slackened speed, and that the defendants were liable. The absence of apparent danger is the distinguishing feature of *Myers v. Brantford Street Railway Co.*, 27 A. R. 513, where, under in other respects very similar circumstances, the defendants escaped liability.

Nuisance.]—*Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*, 18 T. L. R. 523, is an important case as to the liabilities and rights of persons using electricity. The Judicial Committee held that the doctrine of *Rylands v. Fletcher*, L. R. 3 H. L. 330, applies where electricity is generated and stored in large quantities, so as to

impose liability *prima facie* for its escape. But in this case the resultant injury—interference with the working of the plaintiffs' cables—was held to be due to the extraordinary and peculiar nature of the business interfered with, and, therefore, not to be of such a character as to impose upon the defendants a liability for damages. In the absence of special statutory provision, persons carrying on a business of a specially sensitive nature can claim no higher protection than is required for the ordinary enjoyment of property. Compare with this *Ottawa Electric Co. v. Consumers Electric Co.*, 1 O. W. R. 154, 22 Occ. N. 140.

Restraint of Trade.]—The defendant in *Gophir Diamond Company v. Wood*, 18 T. L. R. 492, had upon entering the employment of the plaintiffs as manager of one of several shops in Regent street, covenanted that he would not "after the termination by notice or otherwise of his engagement, either alone or jointly with or as agent or otherwise for any other person or persons, directly or indirectly solicit the custom of any of the customers of the (plaintiffs), or set up or become interested in either directly or indirectly a similar trade or business to that carried on by the (plaintiffs) within a distance of twenty miles from Regent street aforesaid, nor in anywise set up or become interested in either directly or indirectly any trade or business in opposition to nor in any way interfere with, the trade or business of the (plaintiffs) during the term of three years from the date of the determination of his engagement." The defendant entered the employment of rival traders as a salesman at a fixed salary, without commission, and this was held not to be a breach of the covenant.

Service out of Jurisdiction.]—In *Holland v. Bennett*, 18 T. L. R. 510, the question again comes up as to the place of the breach of a contract of employment. The plaintiff was the London correspondent of the *New York Herald*, and was dismissed by letter written and posted at Naples. It was held by the Court of Appeal that the breach took place there and not at the place of receipt. In the converse case of *Lovell v. Coles*, 3 O. L. R. 291—an action by the employers against the defaulting employé—the same principle was applied, but

jurisdiction was upheld because on one branch of the case a breach within the jurisdiction was made out.

Settlement.]—The judgment of Farwell, J., in *In re Holland, Gregg v. Holland*, 17 T. L. R. 370, noted 21 C. L. T. 233, was reversed by the Court of Appeal, 18 T. L. R. 563, who held, first, that the antenuptial agreement was an answer to the contention that the settlement was voluntary, and therefore void as against creditors, and, secondly, that the recital in the settlement of the antenuptial agreement was a sufficient compliance with the Statute of Frauds.

Solicitor.]—Prima facie the solicitor of a mortgagee has, as such, no authority to receive, and to give valid discharges for, principal money. In *Jared v. Walke*, 18 T. L. R. 569, a mortgagee's solicitor, who had acted for him in the taking of the loan, had since then with his authority kept possession of the mortgage and received payment of the interest, and had, moreover, acted as his solicitor generally in making investments and purchases, gave to the mortgagor notice requiring payment of the principal money, and obtained and misappropriated it, forging the mortgagee's name to a deed of reconveyance. It was held that even from this course of dealing authority to receive the principal was not to be inferred, and that the payment did not avail the mortgagor. In *re Tracey, Scully v. Tracey*, 21 A. R. 454, is a comparatively recent case of the same kind in this Province.

Trade Union.]—*Giblan v. National Amalgamated Labourers' Union*, 18 T. L. R. 500, is an interesting case as to the liability of a trade union in damages where, by pressure brought to bear upon probable employers, a labourer expelled from the union is prevented from obtaining employment. The principle is that a refusal to work with an individual under the ban of the union, and thereby in effect to prevent him from obtaining employment, is not an actionable wrong if done in good faith for the purpose of protecting or advancing the interests of the union, but is an actionable wrong if done to injure or punish the individual in question: *Mogul S. S. Co. v. McGregor*, [1892] A. C. 38; *Allen v. Flood*, [1898] A. C. 108; *Quinn v. Leathem*, [1901] A. C. 495. In the case in hand the union escaped liability

on the ground that the acts complained of were those of the secretary. done without authority, but judgment was given against the secretary personally.

Trial.]—*Ryland v. Jackson*, 18 T. L. R. 574, was an action for libel against two defendants. At the trial one defendant called witnesses who gave evidence material to the case of both defendants. It was held that counsel for the other defendant, on whose behalf no witnesses had been called, had the right to address the jury last.

Trust.]—The question of what is reasonable conduct on the part of a trustee so as to enable him to obtain relief in respect of a breach of trust, is further considered in *Chapman v. Browne*, 18 T. L. R. 482. The trustee there made an investment of trust funds on the security of a derivative mortgage, the land in question being subject to two prior mortgages for a considerable sum. This was held to be such an unreasonable thing to do that, although the absolute good faith of the trustee was clear, he was held by the Court of Appeal to be liable for the loss in question. It was held to be no answer that the loss had in fact resulted from unforeseen depreciation in the value of the land, and not because of any adverse action by the prior mortgagees. See the note *ante* p. 72.

Undue Influence.]—In *Samuel v. Nichols*, 18 T. L. R. 513, and *Turnbull and Co. v. Duval*, 18 T. L. R. 521, transactions were set aside on the ground of undue influence and oppression. The first was a money lender's case, where exorbitant interest was charged on a loan to an expectant heir. In the second case the security in question had been given by a wife to secure payment of her husband's debt, the creditor's agent in the transaction being the wife's trustee of the funds assigned by her as security. It was held by the Judicial Committee that the transaction was open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband, and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. See *ante* p. 184.

Will.]—In *re Greenwood*, *Goodhart v. Woodhead*, 18 T. L. R. 530, is an interesting case as to a condition in a will. The testator devised real estate to his sister for life and in remainder to his cousin on condition that he should take and use the testator's name. The cousin died in the lifetime of the tenant for life, about fifteen months after the testator, having been insane for six months before his death, and not having assumed the testator's name. It was held that the assumption of the name was a condition precedent, personal performance of which by the devisee was essential; that the mental incapacity and death of the devisee formed no excuse; and that the devise failed.—In *Anderson v. Berkeley*, 18 T. L. R. 531, a legacy by a testator to his son's "wife Letitia" was upheld, the legatee not being in fact married to the son, but living with him and reputed to be his wife. The test is whether the gift is to a person actually sustaining a certain character, or whether the reference to the supposed character is merely part of an otherwise definite and accurate description.

EDITORIAL REVIEW.

The Ontario Statutes, 1902.

The session of the Ontario Legislature which closed on the 17th March last was perhaps even more than ordinarily fruitful. At all events there is a large crop of statutes, including many amending Acts. The volume containing them was in the hands of the members of the legal profession about the end of April or beginning of May—a fairly prompt publication when the labour of printing so large a volume is considered. Next month we shall publish a critical review of the new legislation.

The Origins of the French Canadian Law.

In the *Law Quarterly Review* (London) for April there is an interesting review by Mr. George S. Holmsted, senior Registrar of the High Court of Justice for Ontario, of *Les Origines du Droit Franco-Canadien*, the recent work of Dr. Rodolphe Lemieux, C.R., M.P., Law Professor in Laval University at Montreal. Mr. Holmsted describes the book as instructive and amusing, as well as erudite, and heartily commends it to all who desire information on the subject. The review, if not the work itself, should, we think, be read with interest in all parts of the Empire, and we are glad that the *Quarterly* has given it the benefit of its wide circulation. Canadians have become accustomed to the continued existence in the midst of their country of a foreign system, but it is certainly hard, as Mr. Holmsted remarks, "to understand how the great body of the Canadian people could ever have voluntarily desired to maintain the French-Canadian feudal system in force after the cession of Canada to Great Britain." It was the old story of the classes versus the masses. "The ruling classes, the seigneurs and the ecclesiastics, those who profited by the grievous exactions of the seigniorial tenures, were those who strenuously stipulated for the continuance of these laws"—which were not abolished for ninety years, and then only upon a compensation of \$10,000,000 being paid to the seigneurs. Though these

tenures are abolished, the Province of Quebec still has the French-Canadian law, founded principally on the *Coutume de Paris*, with divers amendments and modifications suited to the necessities of the country.

Selected Bar Anecdotes.

Lord Ashbourne (Lord Chancellor of Ireland), when presiding at a recent dinner of the Law Students' Debating Society, told a couple of good stories. He was emphasizing the necessity for a speaker knowing when it is time to sit down, and, as an illustration, said there was an American advocate who, in pleading his case, seemed likely to go on forever. At length he said perfunctorily, "I am afraid I am taking up a great deal of time." "Oh, never mind time," sighed the weary Judge, "but, for goodness' sake, don't trench upon eternity." The other story was of an Irish advocate who was defending a prisoner in a speech of interminable length. He had attained to an unenviable notoriety for his never-ending speeches, and was in the habit of saying to the Court, "I am afraid I am very tedious." The Judge, as a rule, politely evaded the remark, but on this occasion a different Judge was upon the Bench, who said, "Not very, not very."

Recent American Decisions.

Agents' Commission.—A commission for procuring a person willing to take a lease of property on terms fixed by the owner is held, in *Cadigan v. Crabtree* (Mass.), 55 L. R. A. 77, not to be recoverable on proof of procuring an offer of a lease on terms which were subsequently accepted and the contract executed through another broker.

Carriers.—Under a contract for transportation of property by a transportation agency, by means of which certain carriers contract for the carriage of freight over their connecting lines, which provides that no carrier shall be liable after the property is ready for delivery to the next carrier, a railway company is held, in *Courteen v. Kanawha Dispatch* (Wis.), 55 L. R. A. 182, not to be liable if the property is accidentally destroyed by fire in its warehouse on a pier where it is awaiting the arrival of the vessel of an ocean carrier by

which it is to be taken to its destination, and which has no place of storage of its own.

Evidence.—Evidence of the conduct of a bloodhound in baying the accused is held, in *State v. Moore* (N. C.), 55 L. R. A. 96, to be admissible upon trial of an indictment for larceny, in corroboration of a confession of the accomplice.

Execution.—A legal levy on personal property of a writ of execution valid on its face, issued on a judgment voidable only, and not void, and taking possession of the property levied upon by the officer serving the writ, are held, in *Pitkin & Brooks v. Burnham H. M. Co.* (Neb.), 55 L. R. A. 280, to place the property in *custodia legis*. With this case is a note collating the authorities on effect of levy under void or voidable judgment.

Insurance—Accident.—A person who suffered a fall by accident, resulting in concussion of the brain, which deranged and crazed his mind so that he could not intelligently give the notice and required information regarding the accident within the time stipulated in an accident insurance policy, is held, in *Woodmen Accident Assn. v. Byers* (Neb.), 55 L. R. A. 291, to be excused in law from compliance with the condition of the policy in that regard, during the time of the existence of the disability.

Insurance—Fire.—Under a policy on mortgaged property, which provides that loss, if any, is payable to the mortgagee, and which is delivered by the insurer to the mortgagee, it is held, in *Boyd v. Thuringia Ins. Co.* (Wash.), 55 L. R. A. 165, that the mortgagee is the party insured, so that the question of forfeiture will not be determined by provisions relating to acts of the mortgagor.

A provision in a Lloyd's policy of fire insurance, where the attorneys in fact for the underwriters are also underwriters, that "no action shall be brought by the assured . . . except against the attorneys in fact as representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought as fixing his individual responsibility thereunder," is held, in *Enterprise Lumber Co. v. Mundy* (N. J. Sup.), 55 L. R. A. 193, to be

valid and binding on all the underwriters, and not contrary to public policy. A note to this case collates the authorities as to actions on Lloyd's policies of insurance.

A total loss within the meaning of a statute making the insurer liable for the whole estimated value of the insured building as fixed on the face of the policy, is held, in *Thuringia Ins. Co. v. Malott* (Ky.), 55 L. R. A. 277, to be such injury as destroys the identity of the building and its specific character as such, or such injury to its parts and materials as to render them unsafe, as they remained after the fire, for the purpose of reconstructing the building.

The temporary absence of a competent watchman regularly employed for a mill, during which the mill is destroyed by fire, is held in *McGannon v. Michigan Millers' Mut. F. Ins. Co.* (Mich.), 54 L. R. A. 739, not to avoid a policy of insurance on the property, which stipulates that statements in the application shall be a part of the contract, although in the application the insured agrees to keep a watchman on the premises at such times as that when the fire occurs.

Insurance—Life.—The refusal of an applicant for insurance to furnish a sample of urine to the medical examiners, because of which the application is rejected, is held, in *Security Mut. L. Ins. Co. v. Webb* (C. C. A. 8th C.), 55 L. R. A. 122, not to annul the negotiations so as to justify a statement in an application to another company that no proposal or application for insurance has ever been made upon which a policy has not been issued. With this case there is a note as to forfeiture of life insurance by false representations with respect to previous application for insurance.

Recovery on a policy insuring against sickness, which limits liability to the period when insured is continuously confined to his house and subject to the personal calls of a registered physician in good standing, is held, in *Hoffman v. Michigan Home and H. Assn.* (Mich.), 54 L. R. A. 746, not to be defeated by the fact that the insured went out by direction of his physician for an occasional and necessary airing, if, by reason of his illness, he was continuously confined to the house for a large portion of the time.

An illegitimate child is held, in *Lavigne v. Ligue Des Patriotes* (Mass.), 54 L. R. A. 814, not to be a child or relative of her father, as those words are used in a statute designating the persons who may be beneficiaries in certificates of mutual benefit associations.

An agent who secures an application for insurance at a time when he has not complied with the statute prohibiting, under penalty, the soliciting of insurance without a license, is held, in *Black v. Security Mut. L. Assn.* (Me.), 54 L. R. A. 939, not to be entitled to recover commissions thereon, although the policies are not issued until after the license is procured, and the statute does not expressly prevent recovery of the commissions.

Landlord and Tenant.—Removing a tenant and his family from the leased premises under a judgment of forcible entry and detainer, on a cold day, at a time when his child is visibly broken out with measles, is held, in *Bradshaw v. Frazier* (Iowa), 55 L. R. A. 258, to be an abuse of legal process, which will render the landlord liable for the injurious consequences to the child. With this case there is a note reviewing the authorities on liability for ejecting sick tenant, lodgers, or other occupants from building when right of occupancy has terminated.

Libel.—Libellous words in a pleading, which are entirely foreign to the issues, and not pertinent to the subject of the controversy, are held, in *Grant v. Hayne* (La.), 54 L. R. A. 930, not to be within the rule protecting averments in judicial proceedings as privileged.

Limitation of Actions.—A part payment of a debt barred by the Statute of Limitations, under an agreement to pay the whole debt in instalments, is held, in *Gillingham v. Brown* (Mass.), 55 L. R. A. 320, not to sustain an action for the whole debt at once, but only for the instalments which have become due when the action is commenced. The effect of payments on condition to take a debt out of the Statute of Limitations is considered in a note to this case.

Sale of Goods.—When time is made of the essence of a contract for the shipment of oranges under a contract of

sale, acceptance of them when shipped after the stipulated time, is held, in *Redlands Orange Growers' Assn. v. Gorman* (Mo.), 54 L. R. A. 718, not to waive a right to damages caused by the delay. With this case is a note reviewing the authorities as to effect of acceptance of goods as a waiver of damages for delay in delivery.

Survival of Action.—A child is held, in *Gorman v. Budlong* (R. I.), 55 L. R. A. 118, to have no right of action for injuries to his mother, which caused its premature birth, so that, in case death results, a cause of action will survive, under a statute giving a right of action for wrongful death caused by negligence where it is such as would, had death not resulted, have entitled the person injured to maintain an action.

Telephone.—A telephone company, although having a monopoly of the business in a particular city, is held, in *Gardner v. Providence Telephone Co.* (R.I.), 55 L. R. A. 113, to have a right to deprive a customer of service upon his refusal to discontinue the use, in connection with its wires on his premises, of extension instruments not furnished by it, where it is able and willing to furnish such instruments upon reasonable terms.

A telephone company is held, in *State ex rel. Gwynn v. Citizens' Telephone Co.* (S. C.), 55 L. R. A. 139, to have no right to impose, as a condition of extending its facilities to one desirous of obtaining them, an agreement not to use a rival system.

BOOK REVIEWS.

The Law of Interpleader.—As administered by the English, Irish, American, Canadian, and Australian Courts, with an Appendix of Statutes, by Roderick James Maclellan, of Osgoode Hall, Barrister-at-Law, Toronto, Canada. Toronto: The Carswell Company, Limited, Law Publishers. Stevens & Sons, Limited, London, England. Boston Book Co., Boston, U. S. A. 1901.

This is a work of about 500 pages, and we are told in the preface that "the author has spared neither time nor pains, and it has been his ambition to give his subject form and completeness, by working all the material into a book which he hopes may be of some use in all Courts where English-speaking Judges preside."

This is, indeed, a vaulting ambition, but an examination of the book appears to justify the author's hope.

Our author first gives us a general treatise upon the law of interpleader, covering both the equitable and the statutory jurisdiction of the Courts, and including the law and practice of interpleader, as well in actions as upon summary applications. Sheriff's interpleader is, of course, exhaustively dealt with, and so also is interpleader by private citizens, such as stakeholders, tenants, agents, bailees, common carriers, debtors, etc.

About 800 American cases are cited and about 1,000 other cases from the reports of nearly every country where English law is administered.

Next comes an appendix containing all the existing statutory provisions and Rules of Court touching the subject of interpleader in England, Ireland, Scotland, Ontario, the various States and Territories of the American Union, the Bermuda Islands, British Columbia, the Hawaiian Islands, India, Japan, Manitoba, New Brunswick, Newfoundland, New South Wales, New Zealand, the North-West Territories

of Canada, Nova Scotia, Prince Edward Island, Queensland, South Australia, and Victoria.

Along with these statutes and Rules of Court illustrative reported cases are cited, and in those countries where there are no statutory provisions local decisions are cited shewing the nature of the relief which may be obtained under the equitable jurisdiction of the local Courts.

The book is far and away the most complete treatise upon this subject which is now in existence in any country.

A. H. M.

An Analysis of Taswell-Langmead's English Constitutional History.—By A. M. Wilshire, Law Exhibitioner of the University of London. London: Stevens and Haynes: 1902.

A useful book for a "grind."

Smith's Law of Master and Servant.—A Treatise on the Law of Master and Servant, including therein Masters and Workmen in every description of Trade and Occupation; with an Appendix of Statutes. By Charles Manley Smith, of the Inner Temple, Barrister-at-Law, formerly one of the Masters of the Supreme Court of Judicature. The Fifth Edition: By Ernest Manley Smith, of the Inner Temple and Midland Circuit, Barrister-at-Law. London: Sweet and Maxwell, Limited: 1902.

We observe that in the preface to the first (1852) edition, the elder Mr. Smith apologized for his temerity in devoting a whole volume to a subject which had theretofore been treated, so far as it had any separate treatment, only as a sub-division of works on Contracts, Agency, or Criminal Law. Certainly no apology is now needed, for we have become accustomed to a further sub-division by the publication of books dealing with special branches of Master and Servant law, such, e.g., as the Workmen's Compensation Acts. Nor can it be said that there is no need of a new edition, for the 4th edition was as long ago as 1885.

In the Appendix of Statutes to this 5th edition we find: The Frauds by Workmen Acts, 1748 and 1777; The Truck Act, 1831; The Hosiery Acts, 1843 and 1845; The Silk Weavers Act, 1854; The Poor Law (Apprentices, etc.) Act, 1851; Offences against the Person Act, 1861; The Misappropriation by Servants Act, 1863; The Agricultural Gangs Act, 1867; The Revenue Act (Tax on Male Servants), 1869; The Wages Attachment Abolition Act, 1870; The Trade Union Act, 1871; The Steam Whistles Act, 1872; The Metalliferous Mines Regulation Act, 1872 and 1875; The Conspiracy and Protection of Property Act, 1875; The Employers and Workmen Act, 1875; The Trade Union Amendment Act, 1876; The Children's Dangerous Performances Act, 1879; The Employers' Liability Act, 1880; The Slate Mines Gunpowder Act, 1882; The Payment of Wages in Public Houses Prohibition Act, 1883; The Truck Amendment Act, 1887; The Coal Mines Regulation Act, 1887; The Shop Hours Acts, 1892 and 1893; Notice of Accidents Act, 1894; The Prevention of Cruelty to Children Act, 1894; The Quarries Act, 1894; The Coal Mines (Check Weigher) Act, 1894; The Shop Hours Act, 1895; The Conciliation Act, 1896; The Coal Mines Regulation Act, 1896; The Truck Act, 1896; The Workmen's Compensation Act, 1897; The Dangerous Performances Act, 1897; The Chaff-Cutting Machines (Accidents) Act, 1897; The Seats for Shop Assistants Act, 1899; The Mines (Prohibition of Child Labour Underground) Act, 1900; The Workmen's Compensation Act, 1900; Factory and Workshop Act, 1901.

Of these 43 statutes, only 7 were in existence when the 1st edition of Smith appeared; and 19 have been enacted since the 4th edition.

The descriptive titles of these various Acts form an interesting record of the beneficial labour legislation of the Imperial Parliament, which has been pretty closely followed by the Colonial and Provincial Legislatures throughout the Empire.

The division of the book into chapters, dealing with the contract of hiring and service, the duties of the servant to the master, the duties of the master to the servant, the liability of the master to third persons for the acts of his

servant, the liability of the servant to third persons for acts done on behalf of his master, the servant's character, offences by servants against their masters, combinations amongst masters and workmen, and legacies to servants, commends itself as thoroughly scientific, and is well adapted to the exposition of the law as found in the statutes and the judicial authorities, a very large number of which are recent.

Legislation in the United States in 1901.]—Comparative Summary and Index of Legislation in 1901; Review of Legislation in 1901. Albany: University of the State of New York: 1901-2.

These are publications of the New York State Library, of which Mr. Melvil Dewey is director, and Mr. Robert H. Whitten, Ph. D., sociology librarian, is editor. The two bulletins now before us are contributions to the work of digesting and organizing the enormous annual output of legislation, so as to enable legislators with a minimum of labour to make use of the most recent experience of other States.

THE CANADIAN LAW TIMES.

JULY, 1902.

THE STATUTES OF ONTARIO, 1902, 2 EDW. VII.

“**N**O MAN’S life, liberty, or property is safe while the Legislature is in session.”

The session having come to an end, we may now begin to take account of the efforts of our Provincial legislators during the last weeks of the life of the Legislature.

It is a matter for congratulation that the statutes have been issued, in a bound volume, in a little more than a month from the date on which they were assented to. It is to be hoped that this commendable promptness will be the rule, not the exception, in future.

The task of reviewing the legislation of the past session is made more than usually difficult by the variety of changes made in the law preparatory to the issue of the third volume of the Revised Statutes of Ontario. The reviewer finds much reason to repeat the remarks of a profound jurist and writer: “No person can be much engaged in the practice of the law without being surprised (if the author may speak from his own experience) both at his own ignorance on subjects with which he thought he was acquainted, and also at the ignorance of others, who are generally supposed to know.” Without in any way disparaging the labours of the eminent members of the commission which has been engaged in preparing this volume (R. S. O., III.), we think the satisfactory result is largely due to the wide and accurate legal knowledge and the painstaking industry of Mr. George S. Holmsted, K.C., the secretary of the commission.

Chapter 1, The Statute Law Revision Act, 1902, is preparatory to the issue of vol. iii., and contains a schedule of Imperial statutes which are repealed as far as this is within the legislative authority of the Province, some because they have by lapse of time or otherwise become unnecessary, some because it is desirable that they should be repealed, others because they are specifically incorporated into our own statute law.

Sections 3-6 will be considered under the chapter on Devolution of Estates (c. 17), to which they properly belong, and where they should logically have been placed in the first instance. It is very undesirable to separate amendments to an Act.

To the chapter to "further amend the Devolution of Estates Act," one would naturally turn for the legislation of this session on the subject; but several important amendments are not even referred to there, and are to be found in the first "omnibus" Act. Care should be taken to avoid this in the future; all amendments *in pari materia* should be grouped together.

Section 7, dealing with the long-since obsolete doctrine of warranties, needs no comment.

Those who desire to refresh their memories as to what has been "emphatically denominated a curious and cunning learning," will find it discussed in the Touchstone (ed. 1826), p. 181, in Tomlin's Law Dictionary, *sub voc.* Warranty, and in Preston on Abstracts of Title, I., 410.

For the benefit of intending students, it may be useful to add that Mr. Preston recommends that this subject "should be read first in Comyn's Digest; secondly, in Shepard's Touchstone; thirdly, in Coke on Litt., ch. Warranty, with Mr. Butler's Annotations."

The effect of ss. 8 and 9 will be dealt with in a later article.

Section 10. Mandamus. This section merely sets out in detail the law already in force under former Rule 1085, and thereby renders it unnecessary to refer to the statute of Anne in order to understand what the law is.

"The statute of Anne, under the present Rule (i.e., 1085) regulates (1) the return to orders of mandamus, (2) the proceedings on such returns, and (3) the recovery of damages and costs:" Holmsted & Langton (p. 1210), where the effect of the statute of Anne is dealt with.

This effect is now set out specifically in the shape of rules of court; the statute is, therefore, unnecessary, and is repealed.

Sections 11-16 apply to *quo warranto* proceedings, and introduce legislation to take the place of 9 Anne c. 15, by which such proceedings, other than those relating to municipal and school offices, have heretofore been regulated in this Province. In regard to municipal and school offices, the Legislature has provided summary proceedings as "a substitute for the ordinary proceeding by *quo warranto*, the object being to give an expeditious, convenient, and less expensive remedy." (Regina ex rel. White v. Roach, 18 U. C. R. 226.) And these must be resorted to in cases to which the municipal and school laws apply. (See ss. 15 and 16.)

Under the statute of Anne, proceedings in ordinary cases were, by means of information, filed by the Attorney-General, *ex officio*, on behalf of the Crown, or exhibited by the Master of the Crown Office, by leave of the court, on the relation of some private individual: Regina ex rel. Moore v. Nagle, 24 O. R. 507; Regina ex rel. Stewart v. Standish, 6 O. R. 408. (See Shortt's Informations, &c., p. 113.) Mr. Shortt (p. 119) makes reference to some "famous historic instances of *quo warranto* informations filed *ex officio* by the Attorney-General, in the reign of Charles II., against various corporations of the country which were obnoxious to the Crown. The notorious Jeffreys, in particular, 'made all the charters, like the walls of Jericho, fall down before him, and returned laden with surrenders, the spoils of towns.'"

The object of the present statute is to simplify and cheapen procedure in cases of *quo warranto*. An information is no longer necessary; where the proceeding is by the Attorney-General *ex officio* it is begun by notice of motion; where it is at the instance of a relator, by order *nisi*, in the name of His Majesty, and in such case security for costs is required.

The court may direct an issue to be tried, and may grant an injunction or mandatory order; the practice and procedure is to be that of the High Court.

Section 17. The maxim at common law was *nullum tempus occurrit regi*—time is not counted against the Crown. But by the Act called the Nullum Tempus Act (9 Geo. III. c. 16), which has been held to be in force here, the Crown may, after the lapse of sixty years, under the circumstances mentioned therein, be debarred from asserting its title to lands or the rents, etc., thereof. (Armour, 432.)

The material provisions of that Act are referred to by Mr. Armour in his book on Real Property (p. 433.) See also Hewitt on Limitations (p. 260). The above and following sections propose to repeal the Nullum Tempus Act, (see schedule), and to substitute a revised version, embodying the effect of the Act.

The wording chosen does not seem very happy in legislation dealing with the rights of the Crown.

Under s. 18 (1) time will only begin to run against the Crown, in regard to land and rent, "if His Majesty shall have been in possession or in receipt of such land or rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt."

Now, dispossession or disseisin means a forcible ouster by a trespasser, and it is difficult to see how this can happen to "His Majesty."

The Crown cannot be disseised; "such a thing as a disseisin of the Crown is, and always has been, unknown in law. A person entering on the possession of the Crown is a mere intruder, having a possession which can no more be said to be a disseisin than can that of an overholding tenant." (Per Strong, C.J., in *Webb v. Marsh*, 22 S. C. R. p. 441.)

So, discontinuance is a voluntary abandonment of land, followed by the entry and occupation of a trespasser. "It is not enough that the land should be left vacant; for, in contemplation of law, the owner is still constructively seised." (Armour, p. 440.)

"The difference between dispossession and the discontinuance of possession might be expressed in this way: the one is where a person comes in and drives out the other from possession, the other case is where the person in possession goes out and is followed into possession by other persons." (Per Fry, J., in *Raines v. Buxton*, 14 Ch. D. 539, 540).

If the strict technical meaning of the new Act is to be followed, a starting point for the statute to run may not easily be obtained.

Sub-sections (ii.), (iii.), and (iv.) present the same difficulty, and seem to be based on the theory that the King is in the same position as a subject.

For instance, in (iv.) there would seem to be difficulty as to an acknowledgment being given to the King or his agent. Who can be his agent, and how can such an acknowledgment be given to the King?

Section 19 enacts that ss. 17 and 18 shall not apply to any waste lands of the Crown. This was the decision in *Regina v. McCormick* (18 U. C. R. 131). This case would seem to have been overruled by Attorney-General for New South Wales *v. Love* ([1898] A. C. 679), in which the Judicial Committee of the Privy Council held that where a defendant claimed waste lands of the Crown by possession only for more than the sixty years mentioned by the *Nullum Tempus* Act, the right of the Crown to recover them was barred.

But the Ontario Legislature seem to have followed *Regina v. McCormick* in preference to the case in the Privy Council.

Section 21 abolishes writs of extent and other special process for the recovery of debts due to the Crown or to Crown debtors, and makes the ordinary writs of execution the only method of recovery in such cases.

The writ of extent was a writ of execution against the lands and goods of a Crown debtor, by means of which the payment of all debts of record due to the Crown could be enforced. Its phraseology is worth noting, as an instance of quiet humour in legal process, stating: "Now we (i.e.

the King) *being willing to be satisfied* of the said sum of £—, so due to us, with all the speed we can, as is just, do command," &c. (West on Extent, p. 19.)

The reference in s. 21 to extents for the recovery of debts due to Crown "debtors" is at first sight puzzling. It has its origin in what Mr. West tells us (p. 251) is a most interesting and useful topic of legal history, namely, the "constant endeavour on the part of the subject to avail himself of the Crown-process for the recovery of private debts."

An extent in aid of the Crown debtor was an instance of this: it was issued upon the debtor's statement that he was a debtor to the King, and that the defendant was indebted to him, whereby he was the less able to pay His Majesty the debt he owed him.

The process of an extent in aid was discovered by Crown debtors to be a convenient means of collecting their own private debts, and much larger sums than were due to the Crown were at one time recovered by Crown debtors in this ingenious manner. There is no longer any distinction between debts due from the subject to the Crown and debts due from subject to subject, and now that the writ of *fi. fa.* covers both goods and lands, these special writs have no peculiar advantages, and are in practice obsolete. They may well, therefore, be formally consigned to the "law's lumber-room," where they belong.

Section 22. Previously to the statute 2 William and Mary, sess. 1, c. 5, goods seized by way of distress could only be detained by the landlord as a pledge; since that statute they may either be sold, or kept as a pledge until they are replevied or the arrears of rent with expenses are paid. The section under review re-enacts the first section of the statute of William and Mary, with some slight alteration of language.

By the present law in England, no oath is now necessary for the appraisers, and appraisement itself is no longer necessary, unless the tenant or owner of the chattels makes a requisition for it in writing; but in Ontario, under this

section, it will still be required. Under the statute of William and Mary, the surplus proceeds of sale, if any, were to be left in the hands of the sheriff, &c., for the owner's use. This section goes further, and orders payment over to the owner on demand.

Chapter 2, "The Mortmain and Charitable Uses Act, 1902," is based on the Imperial Acts 51 & 52 V. c. 42, and 54 & 55 V. c. 73, and, together with R. S. O. c. 112, is a re-enactment of the Imperial legislation contained in those Acts, and embodies and consolidates the law on the subject of (what is popularly called) mortmain, in a comprehensive shape.

The Imperial Act of 1891 was said to have effected "a revolution in the law relating to charitable gifts;" the most important of its provisions are embodied in R. S. O. c. 112, and are now too familiar to need comment.

The definition of land contained in c. 112, and in the statute under consideration, makes it include "tenements and hereditaments, corporeal and incorporeal, of whatever tenure, but not money secured on land or other personal estate arising from or connected with land."

The effect of this change is summarized by Mr. Bristowe in his excellent manual on these Acts, as removing "the distinction between personal property which is an interest in land, and pure personalty. The meaning of the expressions 'impure personalty' and 'personalty savouring of realty,' will in a short time have an historical interest only."

The old rule that assets will not be marshalled in favour of charity will no longer be applicable in the case of wills coming under these statutes; no such will can ever be void as offending against the rules as to mortmain.

"From the date of Magna Charta restrictions have been placed upon the acquisition of land by corporations. This is technically called the law of mortmain." Part I. of the statute (ss. 3-5) contains the restrictions imposed by the old Mortmain Acts; to these restrictions even charitable corporations have always been subject. Where no provision is made by either special or general

Acts (e.g., R. S. O. cc. 211, 307), a license in mortmain will still be required to enable a corporation to hold land.

R. S. O. c. 112, with the exception of part of s. 8, deals exclusively with gifts by will, and removes restrictions upon the devising of lands to charitable uses; it does not touch gifts of land to be made by deed or transfer to such uses.

This subject is dealt with in Parts II. and III. of the present statute.

Section 6 of Part II. contains the definition of charitable uses given in the preamble to 43 Eliz. c. 4; the quaintly phrased original of which may be seen on p. 110 of Bristowe.

Section 7 enumerates certain conditions under which assurances may be validly made to charitable uses; they must take effect in possession immediately; except as provided by the section, they must be irrevocable; and, unless made in good faith and for full and valuable consideration, must be made at least six months before the death of the assurer. "Full and valuable consideration" is defined in s. 2 (4).

In the interpretation clause (s. 2) the word "assurance" includes "devise, bequest, and every other assurance by will," and at first sight it might be thought that the conditions in s. 7 limit the power to devise already given by R. S. O. c. 112. This, however, is probably not correct; the interpretation above given does not apply where "the context otherwise requires;" and clauses (2) and (3) of s. 7, requiring that the assurance must take effect immediately, and must be without any power of revocation, &c., point conclusively towards the exclusion of wills from the effect of this section.

Part III. contains very beneficial exemptions in favour of assurances of land, or personal estate to be laid out in lands, for the purpose of parks, public museums, and schools or school-houses, from the restrictions contained in Parts I. and II. If the assurance is by deed, in good faith, and for full and valuable consideration, it is free from any restriction imposed by the Act. In other cases, the assurance must be made at least six months before the death of the assessor, but in the case of a will it is sufficient if it be a reproduction in substance of a devise made in a previous

will in force at the time of such reproduction, and executed not less than six months before the death of the assurator.

Section 9 excepts from the restrictions in Part II. assurances for incorporated universities, colleges, or schools in Ontario, and assurances other than by will to trustees on behalf of any society or body of persons associated together for religious, scientific, and similar purposes.

Section 10 provides for the adaptation of the law introduced by this statute to assurances coming under the provisions of the Land Titles Act.

Provision is made by ss. 12 and 13 for summary remedy by petition to the High Court for breach of any charitable trust.

Chapter 4 deals with the representation of New Ontario.

Chapters 5 and 6 contain many small amendments to The Voters' List Act (R. S. O. c. 7), and The Manhood Suffrage Registration Act (R. S. O. c. 8), respectively calling for no special notice here.

Section 52 of the latter Act (R. S. O. c. 8) provides that when an election is to be held copies of that Act and of R. S. O. c. 10 are to be transmitted to returning officers; such copies to contain all amendments to the Acts in question, and also "full indexes thereto."

By s. 5 of c. 6 of statutes of 1902, the Law Clerk of the Legislative Assembly is authorized to consolidate the Revised Statutes and the amending Acts for the purposes of s. 52.

Would that it were possible to extend a similar provision to all amendments to important Acts; it would indeed be a boon to solicitors.

Chapter 7 contains unimportant amendments to The Ontario Election Act (R. S. O. c. 9).

Chapter 10, "The Agriculture and Arts Amendment Act," calls for notice as to one interesting point only. Section 7 amends s. 46 of "The Agriculture and Arts Act" (R. S. O. c. 43) by permitting, in addition to the Farmers' Institutes, the "formation of Women's Institutes for the purpose of improving rural home life, and of imparting information

in regard to women's work upon the farm," and by authorizing the adoption of rules, upon the recommendation of the Minister of Agriculture, for the guidance and direction of such institutes, and as to grants of money to them, etc. The beneficent efforts made in the past, unofficially we believe, to brighten and improve the somewhat dull lives of women living on Ontario farms, will now be officially regulated, and, we hope, liberally assisted. That no more important work can be done than this will, we are sure, be the opinion of all who take an interest in the agricultural prosperity of the Province.

Chapter 12 is the usual "omnibus" Act for the amendment of the statute law.

By s. 1, an amendment is made in the definition of holidays given by the Interpretation Act, the principal change being to place Victoria Day among the Ontario holidays. But why is the spelling of "Labour Day" in the Revised Statute changed to "Labor Day" in this statute? Is this an official recognition and adoption of the objectionable mode of spelling English words practised in the States?

Section 2 suspends for three years Part III. of The Ontario Voters' Lists Act (R. S. O. c. 7), which deals with the preparation of voters' lists in unorganized territories. This preparation is only necessary when a general election is approaching, and, as lists were prepared in the year 1901, which will be used for the coming election, it is obviously unnecessary to prepare at much expense new lists until some election is near at hand.

Section 4 amends s. 102 of "The Ontario Controverted Elections Act" by providing that the costs, charges, and expenses of and incidental to the preparation of a petition under the Act and of the proceedings consequent thereon shall be a charge on the moneys deposited as security. Sec. 5 gives relief to sheriffs, and provides that in case the income of any sheriff who is not paid wholly or in part by salary, falls short of \$1,000, the deficiency may be made up to him by direction of the Lieutenant-Governor in Council. This is an eminently just provision.

Section 6 would seem to point the moral that legislation is sometimes crude and ill-considered, even in Ontario, or that "Parliament is now sometimes too ready to adopt the crude suggestions of well-meaning reformers," for it strikes out of s. 1 of s. 4 of The Succession Duty Act (R. S. O. c. 24) an amendment only made in the previous session.

For so speedily reversing its past action the Legislature may well plead the example of Lord Hardwicke, who, when reversing a decision of his own given a twelvemonth before, manfully said: "I am not ashamed of doing it; for I always thought it a much greater reproach to a Judge to continue in his error, than to retract it." (*Galton v. Handcock*, 2 Atk. p. 439).

This deleted amendment, somewhat anomalous on its face, but now not worth discussing, was the subject of much consideration in the case of *Attorney-General v. Stuart*, 2 O. L. R. 403, to which the curious as to its effect are referred.

Section 6 (2) seems to be an amendment *ex abundanti cautela* in order to give as wide a sweep as possible to The Succession Duty Act.

In consequence, no doubt, of *Attorney-General v. Newman* (1 O. L. R. 511) that Act was amended (see 1 Edw. VII. c. 8, s. 6 (1)), by including within its scope "all moveable property locally situated out of this Province and any interest therein where the owner was domiciled in this Province at the time of his death, whether such moveable property passes by will or intestacy." The word "moveable" was perhaps not very aptly chosen for the purpose; it is at least doubtful whether it comprises everything that would be included in the more commonly used term "personal;" see discussion in *Stroud's Judicial Dictionary*, sub voc. "moveable."

In order, as it would seem, to make assurance doubly sure, s. 6 (2) adds the words "or personal" to the word "moveable" where it first occurs in the amending clause of the Act of the previous session (1901), and strikes out the then unnecessary word "moveable" in the last line of that clause.

Section 7 covers the case of the absence or illness of the President of the High Court, and provides that any duty

which he is required to perform under any statute or any Rule of Court may be performed by the President of any Division.

Section 8 was occasioned by the lamented death of Mr. Justice Lister, which occurred at a time when many cases were standing for judgment in the Court of Appeal. As the law then stood, unless the surviving Judges were unanimous, all these cases would have to be re-argued. This section provides that in case of a vacancy in the Court by reason of the promotion, resignation, illness, or death of a Judge by whom an appeal was heard, if there is a difference of opinion among the remaining Judges, the majority of them may give judgment, and this provision is made applicable to cases already heard and standing for judgment.

Section 9. This amendment makes the payment of \$1,000 to Ontario Judges coming under R. S. O. c. 52, s. 1, entirely independent of any increase which may be made in their salaries by the Dominion Parliament.

Section 11. In *Murdy v. Burr* (2 O. L. R. 310) it was decided that the Judge of a Surrogate Court had no authority to pass the accounts of the guardian of an infant appointed by such Court, and that such guardian was not a trustee within the meaning of s. 18 of 63 V. c. 17 (O.)

This section amends The Surrogate Courts Act (R. S. O. c. 59) by making express provision for the passing of their accounts by such guardians, and the enactment is made retrospective.

Sections 72 and 73 of the Revised Statute are amended accordingly.

Section 18, amending s. 39 of The Trustee Act (R. S. O. c. 129), puts a guardian in the same position as trustees, etc., in regard to applications to the Court for advice.

Section 12 very properly restricts the power to commit under a judgment summons in the Division Court. As the law stood (s. 248, R. S. O. c. 60) a debtor might be committed merely because he had "failed to attend after being summoned." The amendment strikes out this provision, which was open to grave abuse, and allows a commitment

only upon the Judge being "satisfied that such non-attendance is wilful."

Section 13 gives the Government power to appoint a second police magistrate for any city containing not less than 200,000 inhabitants.

This provision has already been acted upon in the case of the city of Toronto.

Section 14, a beneficial provision, is designed to check indiscriminate appeals to the High Court under "The Ontario Summary Convictions Act," and prohibits any removal into the High Court by certiorari, "except upon the ground that an appeal to the Court of General Sessions would not afford an adequate remedy."

Such a special case can rarely happen. There is now a complete right of appeal to the Sessions, both as to facts and law, and a right of appeal from the Sessions, in proper cases, to the Court of Appeal, at the instance of either party, upon the certificate of the Attorney-General. In an ordinary case there can be no necessity for bringing the matter into the High Court by certiorari, the proceedings in which are costly and troublesome. This section, the first portion of the recent legislation to come before the Courts, has had the traditional "coach and four" driven through it; a Divisional Court having decided (*Rex v. St. Pierre*, 15th May, 1902, 22 Occ. N. 233), that the section does not apply where the magistrate has convicted without jurisdiction, and that where the offence charged is found not to have come within the statute under which the conviction purports to be made, the conviction is made without jurisdiction.

Section 15 makes all the provisions of the Criminal Code with respect to amendment of convictions and orders, either on appeal or when removed by certiorari, apply to convictions or orders made under Provincial statutes; that is, no doubt, for the purpose of securing uniformity of procedure in all matters of a criminal character, whether under Provincial or Dominion statutes. In addition, as the law stood before this amendment, there was no satisfactory power to amend convictions or orders made under the Ontario Summary

Convictions Act; they had generally either to be quashed or allowed to stand, no *via media* being open.

The amendment removes this difficulty, and makes the beneficial clauses of the Code, ss. 883 and 889, applicable to the Ontario Act.

Section 21 deals with voting at elections under The Ontario Medical Act, a subject which has been discussed *ad nauseam* in the daily papers, and is of interest only to medical men.

Section 22. This section bears testimony to the vigilance of the Inspector of Insurance for the Province, and to his constant efforts to place the whole business of insurance in this Province upon a firm basis.

By s.-s. 1, the consent of the Minister is required before any new mutual fire insurance company can be formed in any locality. Formerly there was no restraint upon the formation of such companies; in consequence, too many were started for the needs of the business, often with disastrous results, by reason of which the system of mutual fire insurance was discredited. Some necessity for the formation of a new company must now be shewn before permission to form it can be obtained.

The amount of pledged insurance required in such case is raised from \$150,000 to \$200,000, which gives a larger working capital, and diminishes the danger of loss by the dispersion of the risks over a larger area.

The amount of shares is raised to \$100 each; where the shares are of small value, the expense of winding-up becomes, necessarily, unduly great. While it has been found very beneficial to prohibit unregistered foreign companies, which were often untrustworthy, from operating in the Province, yet, in practice, cases have arisen where manufacturers carrying very large amounts of insurance, have found it difficult to insure up to the required amount in registered companies, which usually limit their risks to about \$5,000. An amendment is made (s.-s. 5) by which, where such a difficulty arises, the Registrar may, on proof being given of the necessity therefor, permit an insurance of a temporary character, which is renewable, in some foreign unregistered corporation.

Sub-section 6 permits Provincial insurance companies to resort for the purpose of winding-up to the machinery of the Ontario Winding-up Act (R. S. O. c. 222) instead of being limited to the winding-up clauses of the Insurance Act itself.

Section 23 permits the investment by trust companies of trust moneys "in securities which are a first charge on lands held in fee simple in the Province of Manitoba," in addition to the other modes of investment permitted by s. 11 of R. S. O. c. 206. This will be a boon in view of the increasing difficulties in the way of the profitable investment of trust funds. The principle of this statute has been adopted in regard to the investment of funds held by the High Court, which, under a recent Rule, may now be invested in first mortgages in the Province of Manitoba.

Section 25 repeals s. 105 of The Liquor License Act (R. S. O. c. 245). The repealed section dealt with convictions under the Act, and warrants enforcing the same, and made special provisions as to curing defects, amendments, etc. By its repeal liquor license convictions come under the general provisions of the Ontario Summary Convictions Act, and are not differentiated from other summary convictions in regard to procedure in any case of defect or irregularity of a technical character.

Section 29 will be a welcome relief to fastidious witnesses who hesitate to touch with their lips the uninviting and possibly germ-infected testaments that are in use in courts of justice. It provides for the taking of oaths in the Scotch form, that is, with uplifted hand, without kissing the book, where the witness desires to do so.

The uncleanly custom of "kissing the book," when being sworn as a witness in court, has many times been condemned by British medical authorities. It is, we are told by *The Lancet* (London, May 3), peculiar to England and Ireland, and its origin is doubtful, although possibly connected with the old custom of kissing relics. *The Lancet* calls attention to the fact, which appears not to be generally known, that this manner of taking the oath is not now required by law in England, the so-called "Scotch" method of raising the hand being permissible as an alternative.

In England notices have recently been posted in some courts notifying witnesses that this course is permitted, and a contemporary suggests that a "notice of a similar character might be ordered to be posted in the various Courts of this Province, and the irreverent practice of pretending to kiss the book might in a measurable time be abolished."

Chapter 13 deals with the Imperial statutes relating to property and civil rights incorporated into the law of Ontario; and provides for their interpretation and effect, and for their consolidation with statutes of the session of 1902, passed in substitution for or amendment of these Imperial statutes.

This Act is substantially the same as the Acts ordinarily passed before the decennial revisions of the Ontario statutes, and repeats with some few differences 60 V. c. 3, to be found in the preface to the present revised statutes.

Chapter 14 is evidently an Act for the relief of that deserving class, jurors. Section 1 permits the holding of the General Sessions immediately after the sessions of the High Court in each year for the trial of jury cases, and provides that the jurors for both Courts shall be the same, and shall be summoned at the same time; twelve days' notice at least, instead of eight days as formerly, must be given to each juror of the time for his attendance.

Where there is no business at any court, either criminal or civil, requiring the presence of a jury, the jurors summoned, whether grand or petit, are to be notified that their presence is unnecessary; in such case a juror attending shall not be entitled to fees or mileage, unless he attended in good faith owing to non-receipt of notice.

In the case of sittings of the High Court for the trial of criminal prosecutions, or in the case of a sitting of the General Sessions, the sheriff, before giving a notice to jurors, must be satisfied that there are no prisoners in the common gaol awaiting trial at such sittings.

The Act does not apply to any county in which a city is situate.

Chapter 15. The subject of expert testimony is one much discussed at the present day.

Few Judges have a good word to say for it, and one counsel is said to have commenced his closing address to a jury as follows: "Gentlemen of the jury, there are three kinds of liars,—the common liar, the d——d liar, and the scientific expert:" and it is said that this characterization is echoed, in politer language, by eminent members of the legal profession, as well as by the general public. Various schemes have been suggested for dealing with this subject. (See XI Harv. L. R., p. 169, 32 Am. L. Rev. 851.)

The present statute cuts the Gordian knot by allowing only three expert witnesses on either side in cases within the jurisdiction of the Ontario Legislature, except by leave of the Court or arbitrator or other person presiding, to be applied for before examining any witness beyond the specified number. A recent notorious murder trial has drawn public attention to this subject in criminal cases, and a bill dealing with such cases, and similar to the Ontario Act, except that the number of witnesses is fixed at five, has been passed by the Dominion Parliament at its recent session.

Amendments to Devolution of Estates Act (R. S. O. c. 127) under c. 1, ss. 3-6, and c. 17.

Some very far-reaching amendments have been made in this puzzling branch of the law, to which the words of Mr. Joshua Williams might perhaps not unfairly be applied: "Between the Legislature and the lawyers, what is its present state? A matted heap of complications. Can it not be simplified?"

A careful revision and consolidation of this perplexing statute, with its numerous amendments, by a very small committee of experts, would be a real boon to the profession and to the public, who are the ultimate sufferers from the uncertainty of the law.

Clause 3 of c. 1 removes an anomaly pointed out by Mr. Armour at p. 274 of his book on Real Property. By the Act as it stood before this amendment estates *pur autre vie*, where there is a special occupant, passed to the personal representative in case of intestacy, but an estate for the life of another simply, where there is no special occupant, passed upon an intestacy to the heirs-at-law direct.

In both cases in future the estates will pass to the personal representative. This clause should be noted on the page of Mr. Armour's book above referred to.

Clause 4 is intended to provide for cases not covered by s. 20 of the principal Act. By that section bona fide purchasers who have obtained conveyances either from devisees whose devises have been assented to by the personal representatives, by deed or writing, or from heirs to whom conveyances have been made by these representatives during the year (now three years) after the death of the deceased owner, or during the currency of a caution, are protected from the claims of creditors of the deceased.

Clauses 4 and 5 provide for the case of a shifting of the estate under s. 13 of the Devolution of Estates Act, and render land liable for debts of the deceased in the hands of the heir or devisee in whom it has become vested under that section.

In order to appreciate the effect produced on section 20 of the principal Act by the repeal of 3 William and Mary c. 14 (see schedule to c. i.), it is necessary to briefly sketch the history of the law in regard to the liability of heirs and devisees for the debts of the deceased owner.

This is very fully dealt with by Mr. Joshua Williams in his treatise on Real Assets.

In early times, before land was generally devisable, the heir could be bound to pay the debt of his ancestor only by the deed of the ancestor under seal, in which he was expressly named. He was then liable to pay the debt thus secured, to the extent of the value of the land descended to him.

In process of time all freehold lands became devisable by will, greatly to the disadvantage of creditors; for a man might then, by devising an estate, defeat the heir himself, and the title of the devisee was held to prevail against all creditors whomsoever, unless they were secured by some mortgage or lien on the lands.

The hardship of this was the cause of the statute of 3 William and Mary c. 14, an Act for the relief of creditors from fraudulent devises. By this Act it is enacted that

all wills and testamentary appointments of any lands whereof any person shall be seised or have power to dispose by will, shall be void as against creditors by bond or specialty in which the heirs have been bound, and an action of debt is given to every such creditor against the heirs and devisees jointly. It is further provided, that every devisee made liable by the Act shall be chargeable in the same manner as the heir-at-law by force of the Act, notwithstanding the lands devised to him should be aliened before action brought.

Under this statute the devisee was liable only in cases where an action of debt was maintainable against the heir.

Debts were not made a charge upon the land by this statute, but the lands while in the hands of the heir or devisee might be reached by execution against them in an action of debt at the suit of any unpaid creditor. And heirs and devisees might be made personally liable, where lands had been aliened by them, in an action of debt.

By a later statute, now embodied in The Execution Act (R. S. O. c. 77, s. 35), an additional remedy was given to creditors by means of an action against the personal representatives. In this action the lands of the deceased owner might be reached by execution (*Willis v. Willis*, 19 Gr. 575.)

The Devolution of Estates Act has probably made no difference in regard to this latter remedy; where land has passed to the heir or devisee before debts have been paid, a creditor may still sue the personal representative and obtain execution under which the land can be sold. But when the land has been conveyed to an heir or devisee (under s. 20) he is probably now free from any action at the suit of creditors.

That remedy rested entirely upon the Fraudulent Devises Act, which was in force in this Province until repealed by the present statute.

Section 4 of this statute makes land liable for debts in the hands of the heir or devisee when it has shifted into them under s. 13 of the principal Act, but there is now no enactment which makes heirs or devisees liable if they

receive the land by conveyance from executors or administrators. The saving clause at the conclusion of s. 20 can clearly not do so, in view of the repeal of the Act upon which the remedy rested.

In cases coming under s. 4 the heir or devisee may be sued by a creditor of the deceased, so as to reach the lands which have become vested in him, and which are by the section made "liable to answer," or, in other words, are charged with, the debts of the deceased.

The frame of this action would, probably, be to realize a charge upon the land, and not for personal relief against the heir or devisee, with execution against his property generally, as under the statute of William and Mary.

If the heir or devisee has parted with the lands to a bona fide purchaser for value, he will be personally liable to an action for the debt to the extent of the proceeds of the land, or of the actual value, if the sale has not been bona fide.

The bona fide purchaser for value of such lands, "without notice of claims of any unpaid creditors of the deceased person," is protected (s. 5). It is difficult to see why the qualification as to want of notice is put in. Unless the purchaser had notice of some fraudulent design on the part of his vendor, why should he not be entitled to presume, as in the case of a sale of personalty, that the sale was being made to pay debts of which he had notice?

The rule is well settled that even where land is charged with debts generally, a purchaser is under no obligation to see that these debts are paid. Unless he is distinctly made aware, or must reasonably assume from the circumstances, that no part of his purchase money is to be applied in payment of these debts, he is entitled to assume that this will be done. (*Corser v. Cartwright*, L. R. 7 H. L. 731.)

The clause is not free from difficulties by reason of this condition. When the scope of all legislation on this subject seems to aim at assimilating the position of realty and personalty, it does not seem wise to make unnecessary distinctions such as the present.

But, supposing that a purchaser who has bought lands bona fide for value, has, in fact, knowledge of debts of the deceased, is the land liable in his hands for these debts? There is nothing in the statute to make it so; and as it would not have been liable apart from the statute, the purchaser will probably get a good title, free from these debts, even if he knew of them, unless he were party to a scheme to defeat creditors.

Section 6 purports to be a substitute for the statute of William and Mary which has already been discussed, but which, as has been seen, covers much more ground than the section which is to take its place.

That statute, it will be remembered, expressly dealt with testamentary appointments of any lands whereof any person was seised or had power to dispose by will, and declared them utterly void and frustrate against creditors by specialty binding the heirs.

It was afterwards repealed in England, and was re-enacted in a consolidating Act (11 Geo. IV. & 1 Will. IV. c. 47), in which no reference was made to the subject of appointments.

Personal property over which a testator had merely a general power of appointment which he had exercised, had long been held liable to the payment of his debts, after his own personal estate should have been exhausted. The case of *Fleming v. Buchanan* (3 DeG. McN. & G. 976) was decided as to the effect upon the rights of creditors of the exercise of a power of appointment by will over certain freehold estates. The statute applicable (3 & 4 William IV. c. 104) spoke only of any estate or interest in real estate of or to which any person should die seised or entitled, without any reference to appointments, but the Court held "by one of those judicial stretches of unelastic words on which the bystander looks with approbation, out of respect to the good which may come," that the lands in question were assets applicable to the payment of all the debts of the testator, but only after all the testator's own property had been previously so applied. This latter restriction was in analogy to the rule as to personal estate above referred to, a rule

which, Mr. Joshua Williams points out (Williams on Real Assets, p. 12), can hardly be defended upon principle.

This section (6) combines part of the second clause of the statute of William and Mary, with the rule laid down in the above case, and adopts as law the rule disapproved of by Mr. Williams.

But, except for the purpose of introducing this questionable rule, the legislation seems unnecessary, and only calculated to produce complications. By s. 3 of the principal Act, all real and personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment, is in the same position as any other property of the deceased.

Section 1 of c. 17 is intended to prevent any misconception as to the effect of the provision in s. 13 of the principal Act, by which realty undisposed of by the personal representative at the end of twelve months from the death of the owner, vests in those beneficially entitled.

The words in s. 13 might be construed as overriding the provisions of a will devising the lands; this section (similar to s. 16 (2)) enacts that nothing in s. 13 shall be held to have this effect or to derogate from the rights of the personal representative "under a will or under The Trustee Act, or from any right possessed by a trustee under a will."

By s. 2 the preceding section is made operative as from 4th May, 1891, the date on which the said s. 13 took effect.

An important change is made by s. 3, by which three years is substituted in s. 13 for "twelve months," at the end of which time the undisposed of real estate is to vest in those entitled.

The period of one year had been found in practice to be often inadequate for the purpose of closing up the affairs of an estate.

Section 4 was passed in consequence of objections taken to a title in the case of a sale under the Act. The owner of land had died more than a year before administration was granted. After letters were obtained, a caution was registered by the administrator, assuming to act under the power

given in s. 14 of the principal Act. But the purchaser objected that an administrator who did not come into existence until more than twelve months after the death, could not be said to have "through oversight or otherwise, omitted to register a caution within twelve months after the death."

The opinion had been expressed by the Court in *Re Martin* (26 O. R. 465) that the "scope and language of the Act" was sufficient to apply to such cases.

Section 4, somewhat unnecessarily, confirms this opinion, and permits a caution to be validly registered under s. 14 of the Revised Statute, even though probate or letters of administration have not been obtained until after twelve months from the death; it is made to date from 27th May, 1893.

No doubt this section will be subject to s. 15 of the Revised Statute.

Section 5 gives the executors and administrators, acting under the Devolution of Estates Act, the somewhat unusual power to lease and mortgage lands for the purpose of paying debts; this was doubtful before, but it was argued that a power to sell for this purpose must include a power to mortgage; the section in question gives this power expressly.

Where infants are concerned, the lease may not extend beyond the coming of age of the eldest, and the written consent of the official guardian is required for every lease or mortgage, as in the case of a sale.

Nothing is said as to the consent of adults beneficially entitled. Is the clause intended to apply only to lands in which infants alone are interested? If not, the adult beneficiaries ought surely to have some voice in regard to this mode of dealing with the land. Can a good title be made without their concurrence?

Section 6 confirms all sales and leases and mortgages heretofore made in cases to which the doubts cured by ss. 4 and 5 apply, unless such sales are questioned by action within one year from the passing of this Act, except in cases where

the required consent of the official guardian had not been obtained.

Section 7 is one of the many curative provisions in the Act. It re-enacts, for all cases dealt with by the new statute, the provisions of s. 18 of the principal Act. The acceptance by a beneficiary of his share, or supposed share, of purchase money under a sale, is to operate as a confirmation by him of such sale.

It is remarkable that no mention is made of lunatics in this section or in s. 5; in other sections they are expressly mentioned. This omission may sometimes cause embarrassment.

Why should not provision be made in some of these curative sections for the case of sales made where all the purchase money has been applied properly in payment of debts?

These sales might well be confirmed, even though made without the necessary consents or approval; they should certainly stand in just as favourable a position as sales made where there has been a surplus which has been distributed.

Section 8 illustrates the far-reaching scope of the proceedings under the Revised Statute.

It permits a division, instead of a sale, of any estate, by the executors or administrators, with the concurrence of persons beneficially entitled thereto, or with the approval of the official guardian where there are persons who are not *sui juris* or who do not concur.

Under the original section (16), the personal representatives had power to sell and convey realty for the purpose not only of paying debts, but also of distributing the estate among the parties entitled. The amending clause gives them power to partition the realty, whether adults desire this or not, so long as the official guardian consents on behalf of persons not *sui juris* or non-concurring.

Section 9 makes an obviously necessary amendment in s. 9 of the principal Act.

Sections 10 and 11 make amendments so that the sections affected may conform to the changes made by this Act; these amendments should be carefully noted up.

Section 12. By s. 13 of the Revised Statute it was enacted that the real estate of persons dying on or after the 4th day of May, 1891, and not disposed of or conveyed by the personal representatives within twelve months after the death of the owner, should vest directly in the devisees or heirs, without any conveyance from the personal representatives, unless a caution had been previously registered.

This section makes a similar provision for cases happening between 1st July, 1886, when the Devolution of Estates Act came into effect (R. S. O. c. 127, s. 2), and the 4th May, 1891, the date above referred to.

Real estate of persons who have died between those dates which has not yet been disposed of, &c., is to vest in those beneficially entitled within one year from the passing of this Act, unless within the year a caution has been registered.

Chapter 18. An Act respecting Wills of Personal Estate. This very salutary Act has amended the Ontario law as to wills in two important respects, and has adopted legislation which has been in force in England for over forty years, since what is commonly known as Lord Kingsdown's Act (24 & 25 V. c. 114) was passed.

Before this Act was passed, while the law of European countries allowed an option to a testator to adopt either (a) the form required by the *lex loci actus*, or (b) the form required by the *lex domicilii*, England used, "unwisely, arbitrarily, and unphilosophically, to adopt the form prescribed by the *lex domicilii* alone."

This meant the law of the place of domicile as it existed at the time of the testator's death, so that change of domicile between the execution of the will and the death, or a change of the law of the domicile, sometimes had the effect of invalidating a will which, in point of form, was perfectly valid, according to the law of the country, where and when it was executed, but which at the time of death did not comply with the provisions of the then existing law of the domicile. This was the law in Ontario until the present statute was passed.

By s. 3, for the purpose of probate within Ontario, the will of a British subject executed out of Ontario, whatever may be his domicile at the time of his death, shall as regards personal estate be held to be well executed if it complies with the forms required by (1) the law of the place where the same was made, or (2) the law of the place where such person was domiciled when the same was made, or (3) by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin. This statute does not affect the former rule of law, which may still be resorted to in the event of the will not complying with any of the forms specified in the section.

There are thus four laws which may be resorted to when the validity in point of form of a will of personal estate, executed out of Ontario by a British subject, is in question: (1) the *lex domicilii*—at death, as formerly; (2) the *lex loci actus*; (3) the *lex domicilii*—at the time of its execution; (4) the *lex domicilii originis* of the testator.

It must be noticed that the Act only applies to wills (a) of British subjects, (b) dealing with personal estate, (c) made out of Ontario, and further, that only one test of validity can be adopted in each case. (*Pechell v. Hildersley*, L. R. 1 P. & D. 673.)

The other beneficial change made is in regard to the effect upon the validity or construction of a will of any subsequent change of domicile by the person making the same. Under the former law, a change of domicile might often have the effect of invalidating a will, or of completely changing the construction of it.

This "doctrine fraught with obvious and many inconveniences, and with the great evil of rendering difficult and uncertain that which it is one great object of civilization to render easy and certain—the validity of testaments," is changed by s. 4.

Hereafter "no will shall be held to be revoked, or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."

All questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicile.

This section would seem to cover all wills, those of aliens as well as of British subjects. (Dicey, p. 696.) Reference may usefully be made to Dicey on Conflict of Laws, pp. 696-701, for illustrations of the effect of this legislation.

This statute might have been made more complete had it embodied s. 2 of Lord Kingsdown's Act, in regard to the form of wills of personal estate. That section, dealing with the wills of British subjects made within the United Kingdom, provided that whatever the domicile of the testator at the time of death, the will should be held to be well executed for the purpose of probate if it complied with the forms required by the laws for the time being in force in that part of the United Kingdom where it was made.

That is to say, in cases to which the Act applies, the *lex loci actus* is added to the *lex domicilii*, as an alternative, to support the validity of the will. It is not easy to understand why this beneficial provision was omitted from the recent Act. It might well have been made applicable to wills of British subjects made within Ontario.

Chapter 19 amends the Land Titles Act (R. S. O. c. 138) in some respects.

Section 1 enacts that where two or more joint owners are described as trustees, the property is to be held to be vested in them as joint tenants, unless the contrary is expressly stated. This is to bring such persons clearly under the general principles applicable to trustees.

Executors and trustees are excluded from the operation of R. S. O. c. 119, s. 11, "because it is more convenient for the purposes of a trust that the holders of land subject thereto should be joint tenants." (Armour, p. 240.) The Land Titles Act (s. 103) provides that the mere description of an owner as trustee shall not be deemed notice of a trust. The amendment puts such a person in the position of a trustee, so far at any rate as dealing with the estate is concerned.

Section 2 provides for a case where, by inadvertence or otherwise, in registering a title under the Act, covenants or conditions have been omitted, and allows the rights of all parties to be equitably dealt with by compensation or otherwise on restoring the covenants or conditions to the register.

Chapter 21 amends s. 22 of "The Mechanics' and Wages-Earners' Lien Act" (R. S. O. c. 153), by providing that where a contract requires the production of the certificate of an architect, &c., before payments can be made, a contractor's lien may be registered, either within the time mentioned in s. 22 (1), or within seven days after the architect, &c., has given, or, upon application therefor by the contractor, has refused to give, a final certificate.

Chapter 22 is an attempt to improve the working of The Trades Dispute Act (R. S. O. c. 158) by providing for prevention rather than cure.

The Registrar is to proceed to the locality where a strike or lock-out is threatened, or has resulted, at the request either of five employees or of the employer, or of the mayor or reeve, and "diligently seek to mediate between such employer and employees."

He is to endeavour to "allay distrust, to remove causes of friction, to promote good feeling, to restore confidence," &c.

Chapter 23. An Act to Amend The Marriage Act.

The commentator will do well to pass this Act by in judicious silence, remembering the battle of giants on the subject some time ago in the columns of legal periodicals and of the daily press. The Act, with the dogmatic positiveness of a general council, formulates the "degrees of affinity and consanguinity within which, if persons are related, they are prohibited by God's law from contracting marriage with each other." It prescribes a memorandum (schedule F.), specifying the degrees which "under the statutes in that behalf bar" a marriage. This is to be printed at the back or at the foot of the affidavits required by s. 19

of The Marriage Act (R. S. O. c. 162). Provision is thoughtfully made for any changes which may hereafter "be made in the law" (? God's law, and by whom). Schedule F. is to be changed in such case so as to make it "conformable to the law for the time being."

It is not clear as to whether the somewhat unsavoury schedule G. to this Act is also to be printed on the affidavits required under the principal statute; decency would seem to forbid it.

Chapter 24. An Act to Amend the Ontario Companies Act (R. S. O. c. 191), forbids directors of companies from voting on any contract with the company in which they hold office, in which contract they have a personal interest, and also requires them, when personally interested in any proposed contract or arrangement with such company, to disclose the nature of their interest to the other directors, either at the meeting when the contract is determined on, or at the first meeting thereafter. Where these two conditions, disclosure of interest and abstention from voting, are satisfied, a director is not to be accountable for any profits which he may realize from such contract or arrangement.

So far, the amendment would seem to embody the general equitable rule applicable to dealings between trustee and *cestui que trust*. No man can be allowed to put himself in a position in which his interest and duty will conflict. Directors are not only agents, but to a certain extent trustees, and in any case where a director enters into a contract in which he is interested, with the company, and conceals his interest, the transaction may be set aside at the option of the company, (see Masten's Company Law, p. 152 White's Canadian Company Law, p. 299,) no matter how fair it may be. As a general rule, provision is made by by-law for dealing with such cases.

In the case of Costa Rica Railway Company v. Forwood ([1901] 1 Ch. 746) a question of great practical interest and importance in these days of numerous companies was discussed, namely, how far this equitable rule applied to a person who, being a director in one company and a shareholder and manager of another, received profits from

contracts entered into between these companies. The Court of Appeal, while affirming with much clearness the general rule, held that under the articles of association of the plaintiff company, there was no liability on the part of the estate of the defendant Forwood, who had been a director of the plaintiff company, to account for any profits made by him as a shareholder and manager of the other company out of contracts of that company with the plaintiff company.

But the judgments in that case, which deserve careful study, would seem to shew that but for the wording of the articles there would have been this liability.

The concluding clause of s. 1 of the Act under consideration alters this state of the law, and enacts that "no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting, or be held liable to account to the company, by reason of his holding shares or being a director in any other company with which a contract or arrangement is made or contemplated."

This goes further, it should be noticed, than the English Act, which, while providing that the office of a director shall be vacated if he is concerned in or participates in the profits of any contract with the company, makes an exception in the case of a director who is also the member of any company which has entered into contracts with or done any work for the company of which he is director, but prohibits him from voting in respect of such contract or work. (Rawlins & Macnaghten's Company Law, p. 505.) The Ontario Act gives to the director the right, which is denied by English law, to vote as director in both companies, without liability to account to either for profits received by him, and is an infringement, perhaps not unreasonable, on the general equitable doctrine.

Section 2 appears objectionable, as making an unnecessary change in the general law, for the purpose, it would seem, of meeting some particular case. It provides that deeds signed and sealed by a lawfully empowered agent, on behalf of a company and as its attorney, but under the agent's own seal instead of that of the company, shall be as valid as if under the seal of the company.

Section 3 would seem to be legislation for the benefit of directors rather than of shareholders, and enables the former to keep an indebtedness alive, although the object for which the debt was originally sanctioned by the company, has long since passed.

Chapter 27 creates a Railway Committee, consisting of the Commissioner of Public Works and two appointed members of the Executive Council of Ontario.

Their jurisdiction is to extend over railways, electric railways, and street railways subject to the legislative jurisdiction of the Province.

Their powers are, generally, to determine all disputes arising from time to time between companies, or between companies or municipalities, and to settle all questions as to rates of speed, compensation for use of highways, and similar matters.

Provision is also made as to the mode of construction of electric railways; a greater speed than fifteen miles an hour on the travelled portion of a highway is forbidden, unless authorized by the Railway Committee.

Section 19 requires the construction of vestibules on motor cars for the protection of the motorman, and where there are no rear-end vestibules, conductors are to be allowed to stand inside the cars for protection from the weather.

Chapter 28. Strange to say, a creditor has heretofore been unable to invoke the assistance of the Courts under s. 23 of the Ontario Winding-Up Act; this anomaly is cured by the amendment made by s. 1 of this chapter.

By s. 2 the practice as to payment of money into Court, applicable in the case of trustees, is to be followed in proceedings under the Winding-Up Act.

Where a creditor is dead and has no personal representative, or the creditor's residence is unknown, or any creditor or shareholder is an infant or insane, and there is no person entitled to receive moneys on his behalf, these moneys may now be paid into Court, with the like result as in the case of trustees.

Chapter 29. The Municipal Amendment Act, 1902.

The Municipal Act, as usual, comes in for a large share of attention; thirteen pages of amendments are to be found in this chapter. Not many of them call for notice. Power is given by s. 4 to cities coming under the general law to reduce the number of aldermen for each ward to two.

In cities having a population of 100,000 or over, by-laws may be passed to allow of the nominations of mayor and aldermen being held on the Monday preceding the last Monday in December, and the nominations of public school trustees on the last Monday in that month.

Penalties are provided for voting for aldermen or councillors more than once where they are elected by a general vote.

Lands may be taken, under by-law, by cities and towns for sites for drill-sheds or armouries; by-laws may be passed in cities and towns for the establishment of a general scavenging system, also for the transmission of electricity over and of steam under the streets of the municipality.

A much-needed reform is facilitated by s. 26, by which the posting and distribution of indecent posters, pictures, or handbills may be prohibited by by-law; the hoardings will now, doubtless, be free from the disgusting exhibitions that have for so long shocked decency and good taste. The Presbyterian Synod has recently emphatically denounced such posters as being "suggestive of evil, and often positively immoral," and has appealed to "those in authority to suppress these hideous and promiscuous representations, and protect the public from their pernicious influences."

Bonus-hunting industries are discouraged by s. 28, under which no bonus may be granted by any municipality to any industry already established elsewhere in the Province, or which has been removed to the municipality in question from another municipality in the Province. (See *In re Markham and Aurora*, 22 C. L. T. Occ. N. p. 205.)

Chapter 31. The Assessment Amendment Act, 1902, is another interesting contribution to what is popularly known as the "scrap iron" controversy.

The amendments made by 1 Edw. VII. c. 29, s. 2, were intended to alter the law as laid down by the Court of Appeal, and to change the basis of assessment of rails, poles, wires, etc., and were supposed to have made such property subject to taxation, not merely as so much old iron, but "at the full value of these fixtures to the company, at what it is worth to the debtor, being solvent, as a part of the whole, so that he, being solvent, would be willing to let it go at that value in payment of a debt."

Boards of County Judges held, however, that the Act of 1 Edw. VII. had in fact made no difference whatever in the basis of valuation or assessment of such articles; that they must still be appraised only as material to be removed or taken away by a purchaser, without regard to any adventitious value it might possess to the possessors or owners only, and apart from the consideration of any special value due to franchise or income producing qualities, and that such articles are not to be treated as parts of a going concern. (See the interesting judgment of McDougall, Co. J., reported in 37 C. L. J. p. 851.)

This judgment was affirmed by the Court of Appeal (*Re City of Toronto Assessment Appeal*, 1 O. W. R. 261, 22 Occ. N. 206), where it was held that the 1 Edw. VII. had only removed one difficulty in the matter of assessment, and merely enabled the assessor either to assess the property all in one word or to apportion the assessment among two or more wards, as he should deem it convenient, but that the principles laid down in previous cases were unaffected; that the property was still to be valued without reference to its connection with a franchise or its use as the property of a going concern. (See also *In re Queenston Heights Bridge Association*, 1 O. L. R. 114.)

Mr. Justice MacLennan, in a judgment full of ingenious argument, dissented from the majority of the Court.

The present statute aims at overruling these decisions. It provides that all such articles shall be "land" within the meaning of The Assessment Act (but for the purposes of that Act only), and shall "when and so long as in actual

use, be appraised at their actual cash value as the same would be appraised upon a sale to another company possessing similar rights and franchises in and from the municipality,' etc. It remains to be seen whether the Courts will hold this section to have accomplished the object aimed at, and to have abolished the scrap-iron valuation doctrine, the application of which has been called "a rule of thumb." It would seem to have done so.

The decision of the Court of Appeal in regard to the assessment of the Queenston Heights bridge was, that a similar basis of assessment must be applied to determine the assessable value of the Canadian half of that bridge, the whole of which was the property of one company. The so called "scrap iron valuation" was applied, and the assessment value of the half of the bridge on Canadian soil was placed at the value of the material to a purchaser who would have to remove and take the same away.

By s. 1 (5) of the recent Act this decision also is overruled, and a basis of valuation similar to that provided for rails, ties, etc., is applied to bridges, whether of an international character or situate between two municipalities in the Province.

It is to be hoped that we have now reached an end of a matter in regard to which there has been so much "popular clamour" against the Courts, as if they were responsible for the failure of the Legislature to use apt words to carry out its will.

"Judges ought to remember" (says Bacon) "that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law."

Popular opinion often reverses this wholesome rule, and blames the Courts for their wise adherence to interpretation in preference to intruding by legislation into the domain of Parliament.

The Liquor License Act, c. 33, has been so much discussed from every point of view that no special comment can be profitably made upon it.

The popular terror of tuberculosis may be seen reflected in the provisions of c. 34, by which hospitals for consump-

tives may not be established without permission, and penalties are provided for any infringement of the Act.

The spirit of the age is shewn in the provisions of c. 40 for the carrying on of classes for manual training and domestic science in connection with High, Public, and Separate schools, and in those of c. 43 allowing grants of money to be made by High School trustees for the encouragement of athletics and the expenses of school games.

In attempting to review the most noteworthy features of the Ontario legislation in the year 1902, the writer has been impressed with the number and importance of the subjects that come before the local Legislature for consideration.

The complexity of many of the matters dealt with makes one realize the great importance of selecting for this duty men of broad views, of sound business instincts, and of culture and vision more than falls to the lot of the ordinary "man in the street." But of even greater importance is the task of reducing to shape and harmony the results of the deliberations of the legislators. It would not be right or just to apply to Ontario legislation the verdict pronounced by an English writer upon the laws of England: "The clumsiest pieces of workmanship which the unskilled labour of man ever made" (*Mechanics of Law-making*, Preface IV.), but certainly there is a want of method; "our laws are written on different methods by different persons," and we are still far from the time when Acts of Parliament have "the peculiar merit of being at once intelligible to unlettered persons." It may not be possible to adopt the elaborate machinery advocated by Mr. Symonds in the above treatise, but his suggestions as to "the making of a law" are worthy of consideration.

Mr. Bryce, in his essay on Roman and English Legislation (*Studies in Jurisprudence*, ii. 331), considers this subject and makes some suggestions, which, however, do not seem very practicable.

Governor Griggs (of New Jersey, and more recently Attorney-General of the United States), in an admirable paper on *Law-making*, read before the American Bar Association in 1897, stated that in his opinion, as a result of extended

experience, "there is no one thing in all the various departments of government or business that is carried on with less scientific or orderly method than the making of laws." (31 Am. L. Rev. 701).

"Generally speaking, statutes are the products of unascertainable authors—children of nobody—unable to boast of definite parentage. No one certifies to their completeness or accuracy." (Ib. p. 705.)

"Many of these bills, drawn with only one purpose in view, by men lacking correctness of legal expression and unlearned as to the whole body of enactments relating to the subject, are unintentionally dangerous and disturbing unless carefully revised and pruned before their passage." (Ib. 708.)

This weighty article, with its suggestions for reforms tending to remove admitted defects in the system of law-making, might well be read by legislators, and especially by such of them as are members of the legal profession.

N. W. HOYLES.

Toronto, May 1902.

RECENT CASES FROM THE TIMES REPORTS.*

Contract.]—*Read v. Friendly Society of Operative Stonemasons*, 18 T. L. R. 577, was an action against a trades union for inducing employers to break a contract with the plaintiff to teach him the trade of stonemason. Acting in good faith and without malice, but on a wrong understanding of one's rights, is not a justification to a person who induces another to break a contract. See the note as to the trades union cases, 21 C. L. T. p. 451.—It is stated by the Judicial Committee in *Spurrier v. La Cloche*, 18 T. L. R. 606, to be too clear for controversy that the intention to the parties to a contract is the true criterion by which to determine by what law it is to be governed. In the case in hand—an action on an insurance policy—it was held that judged by this criterion English law was to govern, though the contract was entered into in Jersey in respect of articles in that island, and a provision making the ascertainment by arbitration of the amount of the loss a condition precedent was given effect to.

Gaming.]—In *Lennox v. Stoddart* and *Davis v. Stoddart*, 18 T. L. R. 585, the newspaper coupon betting system was further dealt with. See *Stoddart v. Hawke*, 18 T. L. R. 23, *ante* p. 27.

Husband and Wife.]—The extent of the wife's authority to pledge the husband's credit for necessities for the use of the household and for dresses, ornaments, etc., for herself, is very fully considered in *Morel Brothers v. Westmorland*, 18 T. L. R. 599, and it is held that a tradesman supplying necessities for household use is not bound to prove the actual agency of the wife. A private arrangement between the husband and wife that the wife was not to spend more than a certain allowance—sufficient for the purpose—for household expenses, was held not to affect a tradesman who

* Including the cases in No. 25, vol. 18; week ending June 4th, 1902.

had no notice of it. It was also held that a judgment against the wife was no bar to the subsequent action against the husband for the same debt, the husband and wife being joint contractors.

Landlord and Tenant.]—*Ewart v. Fryer*, 18 T. L. R. 590, was a case arising under s. 4 of the Conveyancing Act, 1892. A lease was declared forfeited for breach of a condition by the lessee, and the underlessee, in whom the property had been vested for the unexpired residue of the term of the underlease, was ordered to pay the costs. Compare R. S. O. 1897 c. 170, s. 13.

Master and Servant.]—The plaintiff in *Lloyd v. Woolland Brothers*, 18 T. L. R. 578, a lad of sixteen years of age, was employed by the defendants to work the lift in their premises. Under their instructions he had to keep the floor of the lift oiled. After setting the lift in motion on the occasion in question the plaintiff slipped on the oiled floor and his leg was caught between the lift and the shaft and so crushed that it had to be amputated. The jury found that the lift was defective because it had no inner gate and that the cleaning with oil caused it to be dangerous, and upon these findings judgment was entered for the plaintiff, the principle applied being that there is a duty imposed upon the master to take reasonable precautions to see that the condition of the machinery upon which his servant is employed to work is reasonably safe. There was no direct evidence as to the first finding, but a plan of the lift was submitted to the jury, and it was held that they were entitled upon this to form their own opinion as to the condition of the lift.

Negotiable Instruments.]—The question of what are at the present day negotiable instruments is carefully considered in the interesting case of *Edelstein v. Schuler*, 18 T. L. R. 597. Bonds payable to bearer were held to be negotiable instruments, to which purchasers in good faith from a person who had stolen them were held to have acquired a good title as against the true owner.

Partner.]—*Hamlyn v. John Houston and Co.*, 18 T. L. R. 631, though decided under the Partnership Act, 1890, s. 10, is of interest upon the general question of a firm's liability for a partner's act. A partner, without the knowledge of his co-partners, obtained, by bribing a clerk in the plaintiff's employ, and acted upon in connection with the firm business, information as to the plaintiff's business and contracts. It was held that in obtaining information in this way he "was illegitimately doing that which was legitimately in the course of his business," and that the firm was liable in damages for his wrongful act.

Service Out of Jurisdiction.]—It was held by the Court of Appeal in *Anger v. Vasnier*, 18 T. L. R. 596, that to an agreement to compromise French litigation, entered into in France between the plaintiff, a naturalized British subject domiciled in London, and the defendant, a Frenchman, whereby the defendant agreed to pay to the plaintiff a certain sum, the principle of English law that the debtor must seek the creditor could not be applied, so as to make the agreement by implication one to be performed in London.

Settled Estates.]—The judgment in *In re William Adam's Settlement*, 18 T. L. R. 83, referred to *ante* p. 36, was reversed by the Court of Appeal: 18 T. L. R. 579.

Solicitor and Client.]—In *In re Kingdom and Wilson*, 18 T. L. R. 588, the Court of Appeal held, overruling *In re Lamb*, 23 Q. B. D. 5, that a payment of estate duty should not appear in a solicitors' bill as a disbursement, but should be treated as a payment in the cash account. The result of striking out the payment from the disbursements was to make the amount taxed off the solicitors' bill more than one-sixth.—In *Willis v. Barron*, 18 T. L. R. 602, the House of Lords, in affirming the judgment of the Court of Appeal by which certain deeds of surrender were set aside as having been executed without independent advice (16 T. L. R. 371, [1900] 2 Ch. 121), emphasize the necessity of a solicitor advising a client fully as to the legal position before allowing rights to be surrendered.

Specific Performance.]—In *Van Praagh v. Everidge*, 18 T. L. R. 593, judgment for specific performance was granted against a man who had by mistake bid at auction for, and been declared the purchaser of, a different lot than the one he had desired to buy. The vendor and the auctioneer had not in any way conduced to the mistake, and the price was not unreasonable, and the Court held, on the evidence, that there was no hardship on the purchaser amounting to injustice. The governing principle was held to be that expressed in *Fry on Specific Performance*, that “one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to (its) real meaning and effect. To permit such a defence would be to open the door to perjury and to destroy the security of contracts.”

Trade Name.]—*Randall v. British and American Shoe Co.*, 18 T. L. R. 611, sums up thus the law as to conflicting trade names:—“No person has the right to represent his goods as the goods of somebody else. No person is entitled to adopt a trade name so nearly resembling the trade name of another person as to lead to the belief that the business carried on by him is the business of that other or connected therewith.” The principle applies even where the trade name consists of common English words, and indeed goes far enough to make it illegal for a man to use his own name, if he use it for the purpose of deception and imitation. The defendants were restrained from using the names “London American Shoe Company,” or “British and American Shoe Company,” as conflicting with the plaintiffs’ trade name of “American Shoe Company.” The objection that the plaintiffs had, by not complying with the provision of the Companies’ Act as to the use of their registered name on their shops and business paper, disentitled themselves to relief, was overruled. The failure to comply with the provision might make them liable to penalties, but did not entail a forfeiture of their right to protect themselves from fraud. See *ante*, pp. 139, 102.

EDITORIAL REVIEW.

New King's Counsel.

The following barristers-at-law were on the 10th June appointed King's counsel by the Lieutenant-Governor of Ontario in council:—Verschoyle Cronyn, London; John W. Kerr, Cobourg; D. W. Dumble, Peterborough; E. G. Malloch, Perth; J. H. Burritt, Pembroke; J. A. Paterson, Toronto; W. H. McFadden, Brampton; A. S. Ball, Woodstock; E. P. Clement, Berlin; George Edmison, Peterborough; Hamilton Cassels, Toronto; I. F. Hellmuth, Toronto; T. G. Meredith, London; J. C. Hegler, Ingersoll; T. R. Slaght, Simcoe; W. B. Northrup, Belleville; John Cowan, Sarnia; James Haver-son, Toronto; M. G. Cameron, Goderich; Francis E. Hodgins, Toronto; M. J. Gorman, Ottawa; C. E. Hewson, Barrie; Daniel L. McLean, Ottawa; William Proudfoot, Goderich; A. H. Clarke, Windsor; P. D. Crerar, Hamilton; James Bicknell, Toronto; A. M. Grier, Toronto; J. A. Hutcheson, Brockville; H. H. Collier, St. Catharines; W. H. Blake, Toronto; W. H. Wardrope, Hamilton; E. C. S. Huycke, Cobourg; H. S. Osler, Toronto; T. C. Robinette, Toronto; H. E. Irwin, Toronto; F. A. Anglin, Toronto; R. J. McLaughlin, Lindsay; Hugh Guthrie, Guelph; R. D. Gunn, Orillia; Thomas Mulvey, Toronto; M. K. Cowan, Windsor; A. G. McKay, Owen Sound; N. W. Rowell, Toronto; L. V. McBrady, Toronto; L. G. McCarthy, Toronto.

The following barristers, who occupy permanent positions in the Ontario civil service, and who have no private practice at the Bar, were also appointed King's counsel:—George Kennedy, Law Clerk, Department of Crown Lands; G. S. Holmsted, Senior Registrar, High Court of Justice; J. S. Cartwright, Registrar Court of Appeal; J. L. Capreol, of the Department of the Attorney-General; John Winchester, Master in Chambers, Supreme Court of Judicature; Allan M. Dymond, Law Clerk, Legislative Assembly; J. Howard Hunter, Inspector of Insurance and Registrar of

Friendly Societies. And G. L. B. Fraser, of the Dominion civil service, was also appointed.

Fifty-four new names have thus been added to a roll which already contained two hundred names.

We have heard some favourable comments upon the appointments, based upon the undoubted fact that nearly all the new "silks" are men who have been, some of them occasionally, and many of them frequently, heard in Court. In this respect the list certainly differs from its predecessors. Indeed, it looks as if the active junior barristers of the Province had all been promoted. Silk will henceforth be the only wear at Osgoode Hall. The Attorney-General, perhaps, declared that there should no longer be cause for sneering at his nominees for the inner Bar, as men who had never held a brief, and therefore commanded his subordinates to make a list of all who had ever lifted their voices in Court; or perhaps—but what is the good of speculating? The whole business would be absurd if it were not well understood to be part of the politics of the country. In politics nothing is absurd, it would seem. Supporters of the Government of the day are rewarded for shouting themselves hoarse on platforms, by being allowed to add two initials to their names, and a few political opponents and one or two really good counsel are thrown in to give the list an appearance of fairness. These remarks do not, of course, apply to the officials who have been dignified. They are not commercially benefited by being enrolled among His Majesty's counsel. It is not for them to climb over the shoulders of competitors in the race for business by advertising themselves as King's counsel. We do not believe that any of them sought the dignity, nor can we conceive that any evil will ensue from its having been conferred upon them. But we do not understand why, in their case, there was such a curious discrimination. With many others, we would ask why these eight gentlemen were selected and not at least as many others. The Master in Ordinary and the Master of Titles were already ennobled. The Master in Chambers and the Registrars are also officers of importance. If they like to

be King's counsel, well and good. But why not the Clerk of the Crown and Pleas, their senior? Why not the Inspector of Legal Offices, and why not the Solicitor to the Treasury? Did some one blunder? We certainly think the taxing officers ought to be King's counsel, for nearly all those who practise before them now are.

Two hundred and fifty-four silks out of a Bar nominally of about 1,500, but of not more than 500 who ordinarily do any part of a barrister's work! And the prospect of another hundred or so being added soon, for it is not to be supposed that the thing is going to stop here and now. At least 200 men are angry because they are not included, and if the other party gets into power, there *will* be a list.

Dover v. Donne.

Probably no case which has of recent years occupied the attention of the Ontario Courts is of greater interest or of more importance to trustees and executors and to their advisers, than *Dover v. Denne*, 3 O. L. R. 664. Beneficiaries sought to hold D., an executor-trustee, liable for moneys lost through defalcations of a co-executor and co-trustee, B., who had been the trusted solicitor and quasi-banker of their testator, and remuneration for whose professional services in the administration had been by his will specially provided for. D. had consented to act as executor-trustee upon an understanding with the testator that the whole management of the estate should devolve upon the co-trustee solicitor. If any verbal declaration or statement of a testator could modify or limit the duties of his executor or trustee, it was probably abundantly established that parol declarations were in this instance made, which, had they been embodied in the will itself, would certainly have relieved D. from responsibility. It was made clear that it was the express intention of the testator that the solicitor should continue to manage the business of the estate after his death just as he had managed it for him in his lifetime. This intention was fully carried out. D.'s absolute honesty was unquestioned; his entire dependence upon and absolute confidence in the solicitor, his co-trustee, was conceded. D. had no actual or personal deal-

ings whatever with the estate, and, except to make a perfunctory investigation as to its assets after the testator's death (not sufficiently careful to have made him aware that two of the mortgages, listed by the solicitor as assets, did not stand in the testator's name), and to inquire casually from time to time of B. whether there had been any change in the estate, he appears to have left everything in the latter's hands. D., by active interference as a trustee, could, in all probability, have saved the estate from loss. His abstention afforded B. ample opportunity for malversation, of which the latter took advantage.

The Master at Peterborough held D. relieved from liability, apparently because of his understanding with the testator above mentioned. Mr. Justice Ferguson dismissed an appeal from this report. The appeal of the plaintiffs from this judgment to the Court of Appeal was heard before Armour, C.J.O., and Osler, Maclellan, and Lister, J.J.A. Unfortunately, Lister, J.A., died before judgment. Moss, J.A., did not sit upon the appeal.

Armour, C.J.O., while he does not in terms hold that the verbal declarations of the testator relieved D. from, or limited, his responsibilities as a trustee, seems inclined to think that "*Mitchell v. Ritchey*, 12 Gr. 88, looks that way." That B. had virtually been the cashier or banker of the deceased, he treats also as important, citing *Churchill v. Hobson*, 1 P. Wms. 241, *In re Gasquoine*, [1894] 1 Ch. 470, and *Bacon v. Bacon*, 5 Ves. 331. These matters should, in his Lordship's opinion, be taken into account in determining whether or not D. had acted "reasonably as a trustee," within the meaning of 62 V. (2) c. 15, s. 1 (O.) The reasonableness of the trustee's conduct must be determined "in the light of all the surrounding circumstances, not as they would appear in the eyes of lawyers and Judges, but as they would appear in the eyes of ordinary, prudent business men. . . . D. had no reason to suspect B. of any dishonesty, and I am of opinion that, looking at all the circumstances, D. acted throughout as a majority of ordinary, prudent business men would have done." His Lordship's judgment certainly rests upon the relieving effect of the statute of 1901; but in aid of its application he apparently

invokes the two circumstances above mentioned. He does not find that, apart from these circumstances, the trustee's conduct would have been reasonable, and thus he apparently gives to the verbal declarations of the testator some effect in determining the scope of, or the limitations upon, the responsibilities of the executor-trustee.

Mr. Justice MacLennan, distinguishing *Mitchell v. Ritchey*, holds that the testator cannot "define, *limit*, or *qualify* the duties of an executor, otherwise than by will," and, in effect, he adds that D., by accepting probate, undertook the duties of the executorship without any qualification. Yet he, too, thinks what passed between D. and the testator "very material on the question whether under the circumstances his conduct was reasonable." Having pointed out that, the executorial functions being practically fully discharged, D. had become a trustee, his Lordship, citing *In re Gasquoine*, also alludes, as something material, to the circumstances that the testator had unbounded confidence in B., and that D. had no reason to suspect him, and, in fact, placed implicit trust in him. Reviewing B.'s conduct, his misrepresentations to D., and the payment by him of interest regularly, the learned Judge concludes:—"There could be no stronger case of the absence of circumstances to suggest or excite suspicion of wrong-doing." He further holds that "no plain, obvious duty" was neglected by D., that he "exercised ordinary care and caution; and that his conduct was reasonable as well as honest." Apparently he would hold D. not to have been guilty of any breach of trust, and, therefore, not liable, independently of the statute.

Mr. Justice Osler concurs, though dubitante, with MacLennan, J.A., in holding D. not liable. The verbal declarations he considers ineffectual to relieve the trustee, and adds that, if dealing with the case as a Judge of first instance, he would have held D. liable in respect of the two mortgages which had never stood in the name of the testator, or of his trustees.

The decision of the Court is evidently considered by the reporter, as shewn by the head-note, to rest upon the recent statute. Osler, J.A., however, concurs in the grounds and

reasons stated in the judgment of Maclellan, J.A. It may be, therefore, these two members forming the majority of the Court, that the decision in reality is that D. committed no breach of trust. If so, the learned Judges, it is most respectfully submitted, seem to have taken an extraordinarily merciful and lenient view of D.'s conduct—a view which would probably shock equity practitioners trained in a school accustomed to “the application of a cold, relentless rule of equity,” to cases of losses sustained through a lack of watchful care on the part of trustees. Based upon the late statute, whose provisions all the members of the Court would, if need be, apply, the present decision would seem perilously apt to encourage a laxity of practice fraught with danger to cestuis que trust.

That over-confidence by a trustee in his solicitor, however reputable, in the matter of leaving trust funds in his hands, will be held to be conduct imprudent in an ordinary business man, and, therefore, not reasonable, is well established: *Wyman v. Patterson*, [1900] A. C. 271. It is true that D. was unaware that B. had actually collected any principal moneys belonging to the trust. But can it be said that his ignorance upon this point was entirely blameless? The fact that one of several trustees happens to be a solicitor of unblemished character does not excuse lack of supervising care in the administration of the trust by his colleagues: *Wynne v. Tempest*, [1897] W. N. 43: nor has the super-added circumstance that the solicitor-trustee enjoyed the confidence of the testator been deemed sufficient to justify placing the uncontrolled management of the trust and its funds in his hands: *In re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536. A certain degree of confidence reposed in a co-executor, upon whom the testator had relied, certainly seems to be regarded as reasonable under the statute: *Simpson v. Johnston*, 22 Occ. N. 38: and this was not treated as a breach of trust, apart from the recent Act, in *In re Gasquoine* (supra). Apparently the only special circumstance, however, in *Dover v. Denne*, not to be found in one or other of the cases in which relief has been refused to trustees, themselves honest but too confiding, is the fact that D. consented to act as executor upon the

understanding that the whole management was to rest with B. Will every executor who can satisfactorily prove that he has received from his testator a like verbal assurance be justified in acting the part of a figurehead, if his co-trustee happens to have been the trusted solicitor of the deceased, and there is no reason to suspect his honesty? That *Dover v. Denne* will prove a source of comfort to many an anxious trustee, the victim of his own confidence in a dishonest colleague, is obvious: that it may encourage laxity in the discharge of their duties by trustees, is to be feared: that some day a trustee who, relying upon this decision for protection, has been remiss in his care of trust property, will, by a less merciful tribunal, perhaps to his surprise, find it held that the decision in *Dover v. Denne* "is not to be extended, but must be restricted in its application to the identical circumstances present in that case," and that some trifling difference will be seized upon to distinguish, and in effect to destroy, the case now under consideration (without in terms overruling it), is to be expected. May we venture to hope that the return swing of the pendulum will not have its momentum unduly increased because serious losses have befallen unfortunate cestuis que trust, owing to "honest" trustees hereafter confiding too implicitly in colleagues less upright?

The Mortmain and Charitable Uses Act.

In reviewing the Ontario Legislation of 1892, it was pointed out in this journal (vol. 12, p. 185) in reference to the Mortmain and Charitable Uses Act, 55 V. c. 20, that leaseholds being entirely exempt from mortmain laws, those laws might be entirely evaded by devising lands for long terms to religious or charitable uses. Another scheme than that mentioned now appears in the report of *In re Wilkinson*, [1902] 1 Ch. 841, a case decided in 1900, which confirms the view expressed in 1892. Land was devised to trustees on trust to sell and hold the proceeds, after making certain payments thereout, upon trust for a charity, the will containing a power to the trustees to postpone the sale: it was held that the subject-matter of the gift, being "personal" estate arising from land, was within the exception to

the definition of "land" contained in s. 3 of the English Act of 1891, and therefore s. 5 was not applicable, and it was competent for the trustees, without the leave of the Court, to retain the land unsold after the expiration of one year from the testator's death.

The Bench and the Outer Bar.

The promotion of a stuff gownsmen to the Bench is thus described in his diary by Lord Campbell, who appointed Mr. (Lord) Blackburn to a puisne judgeship almost immediately after his own appointment to the Woolsack:—"July, 3, 1859—I have already got into great disgrace by disposing of my judicial patronage on the principle *detur digniori*. Having occasion for a new Judge to succeed Erie (made Chief Justice of the Common Pleas), I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown, whereas several Whig Queen's counsel M.P.'s were considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the 'Times' and other newspapers, but Lyndhurst has defended me gallantly in the House of Lords." (Life of Lord Campbell, vol. 2, p. 372). It is rather curious that in Ontario, where we have had and have so many Queen's or King's counsel, there are frequent instances of appointments to the Bench from the outer Bar. Of Judges who never took silk, we have two at the present time—one in the Court of Appeal and one in the High Court—certainly not the inferiors of their brethren in learning or ability; and the late Chief Justice Spragge, an eminent lawyer and Judge, was not a Queen's counsel.

The Salaries of Judges.

The Chief Justice of Ontario receives the magnificent salary of £1,400, he of Quebec only £1,200; while the Chief Justices of New South Wales and Victoria each has £3,500 a year. This disparity has recently been commented upon in the English law periodicals.

How a Deaf Judge is Regarded.

The impending retirement from the House of Commons of Mr. Palmer, the member for Reading, owing to the increasing infirmity of deafness from which he suffers, will recall the fact that deafness, on one occasion at least, proved an insuperable bar to high judicial preferment. In July, 1866, the Right Hon. Joseph Napier, who had been Lord Chancellor of Ireland from March, 1858, till June, 1859, was offered by the incoming Conservative Government the position of Lord Justice of Appeal in Ireland, to which a salary of £5,000 a year was attached. Mr. Napier, who suffered from deafness, was inclined to accept the appointment, and had intimated unofficially his intention so to do. The following passage from a speech in the House of Commons by Mr. Bernal Osborne prevailed on Mr. Napier to decline the offer. He was consoled for his disappointment by a baronetcy. We quote from Hansard, the 16th July, 1866: "What has happened?" said Mr. Bernal Osborne. "A most honourable gentleman, whom we all recollect, distinguished equally for his ability and for his deafness (Mr. Napier), has had his pension of £2,000 per annum taken from him, and has been appointed to the office of Lord Justice of Appeal. (An hon. member remarked that Mr. Napier's pension was £4,000 per annum.) So much the better for him. No one grudges Mr. Napier his pension, as he has fairly earned it; but what I find fault with is that Mr. Napier—a deaf Judge—has been put, of all places in the world, into that of Lord Justice of Appeal. I ask, can this be true? I refuse to believe it till I hear from the right hon. gentleman opposite. It may be said that the Government have made this appointment in order to save money by taking away Mr. Napier's £4,000 per annum. But that is no answer; for I say that it is not to the interest of the people of Ireland that the Lord Justice of Appeal should be as deaf as a post. I understand that the noble earl (Lord Derby) at the head of the Government has received a 'round robin' on the subject." (Law Times, 7th June.)

Selected Bar Anecdotes.

An indorsement of a negotiable note in the name of the payee by one who signed his own name with the mystic addition "Atty.," worked havoc in a recent Connecticut case. Suit was brought on the note by the indorsee, and the indorsement was disputed. The attorney who signed the indorsement was placed on the stand, proved that he was authorized by the payee to negotiate the note and indorse it, and that he did so. The Court, with unequalled astuteness, rendered the following decision: "Mr. F—— is a practising attorney at law, and of that fact the Court must take judicial knowledge. Mr. F—— describes himself in the indorsement as attorney. Therefore, he made this indorsement as an attorney at law and by virtue of his authority as such. That was the contract. An attorney at law has no authority by virtue of his employment as such to indorse the notes belonging to his client. The indorsement is therefore void on its face. Nor can Mr. F—— be permitted to shew that he acted as attorney in fact, for that would vary the terms of a written contract, and contravene a well-settled rule of evidence." Therefore the Judge gave judgment for the defendant, with costs. This item was recommended to *Case and Comment* for the humorous column by a Connecticut correspondent, though to the plaintiff, who had the costs to pay, the humour may not have been apparent.

Recent American Decisions.

Animal.—The owner of a dog who has always been of a kind temper and has never given occasion to suspect that he would bite, is held, in *Martinez v. Bernhard* (La.), 55 L. R. A. 671, not to be rendered liable in damages by the mere fact that the dog bites some one, where the owner is guilty of no negligence.

Attachment of Debts.—The plaintiff in an action to recover money is held, in *First Nat. Bank v. Elliott* (Kan.), 55 L. R. A. 353, to have no right to summon or charge himself as garnishee therein, under statutes providing that in case the garnishee fails to answer the Court may render judgment against him, and giving plaintiff the right to an ex-

ecution in case the garnishee fails to pay. With this case is a note reviewing authorities as to the right of plaintiff to summon or charge himself as garnishee.

Benefit Society.—An agreement by the holder of a mutual benefit certificate to be governed by by-laws subsequently enacted is held in *Gaut v. Supreme Council A. L. of H. (Tenn.)*, 55 L. R. A. 465, not to authorize the reduction of the benefit called for by his certificate, after he has for years paid assessments on its original value.

A member of a mutual benefit society is held, in *Rogers v. Union Benevolent Soc. No. 2 (Ky.)*, 55 L. R. A. 605, not to be properly adjudged in default for non-payment of dues, where the amount of accrued sick benefits to which he is entitled exceeds the unpaid dues. With this case is a note reviewing the authorities on application of accrued benefits upon dues or assessments accruing on a benefit certificate.

Carriers.—The right to designate the route of through shipments at through rates is held, in *Post v. Southern R. Co. (Tenn.)*, 55 L. R. A. 481, to belong to the carrier, and not to the shipper, in the absence of a sufficient or controlling reason to the contrary.

The expulsion from a train of a passenger holding a round-trip ticket which is not signed and stamped by an agent of the company, as required by a condition on the ticket to make it good for return passage, is held, in *Southern R. Co. v. Wood (Ga.)*, 55 L. R. A. 536, to render the company liable in damages, where the passenger had used due diligence to find an agent authorized to sign and stamp his ticket, but was unable to do so because of the failure of the company to have such agent present at the station.

The death of a steamship passenger, caused by sleeping on a wet mattress, is held, in *Van Anda v. Northern Navigation Co (C. C. App. 7th C.)*, 55 L. R. A. 544, not to render the company liable where, because of an extraordinary passenger list, he could not be furnished with a berth, and agreed to make use of a mattress borrowed by the company from a storekeeper, the condition of which he had opportunity to inspect.

One who purchases a railway ticket for the sole purpose of checking his baggage upon it, with the intention of going to his destination in his private conveyance, is held, in *Marshall v. Pontiac, O., & N. R. Co. (Mich)*, 55 L. R. A. 650, to have no right to recover in case it is stolen from the baggage room, unless the carrier is guilty of gross negligence. The authorities as to the liability of a carrier for baggage not accompanied by a passenger are reviewed in a note to this case.

Insurance.—An insurance company is held, in *Franklin F. Ins. Co. v. Bradford (Pa.)*, 55 L. R. A. 408, to be liable on a policy properly signed and delivered by a sub-agent of its duly authorized agent, although it has expressly forbidden the agent to insure the property covered by the policy, and the agent has no knowledge that the policy has been written and the premium collected.

That one is a general agent of an insurance company for a defined territory is held, in *Insurance Co. of N. A. v. Thornton (Ala.)*, 55 L. R. A. 547, to give him no power to bind the company by contracts entered into outside of his territorial limits.

Municipal Corporation.—A municipal corporation is held, in *Levin v. Burlington (N. C.)*, 55 L. R. A. 396, not to be liable for damages resulting from the acts of its officers, under statutory authority, in arresting one who has passed the night in a house containing a smallpox patient, and compelling him to remain in the house during a period of quarantine, although he was not directly exposed to the disease and did not take it.

Negligence.—A boy twelve years old, who is injured by collision with a slowly moving team in a public street, is held, in *Gleason v. Smith (Mass.)*, 55 L. R. A. 622, to have no right to recover, where, without care or precaution to avoid collision with vehicles, he is using the street as a playground, and comes in contact with the team in attempting to catch another boy, although the driver is negligent in having his attention diverted from his horses to a vehicle behind him.

Pauper.—Persons who were induced to support a woman during several years by her fraudulent pretence that she was destitute, when in fact she had a considerable estate in bank, are held, in *Anderson v. Eggers* (N. J. Eq.), 55 L. R. A. 570, to be entitled to be recompensed out of the estate for the money and property so furnished to her. Authorities on the liability of an alleged pauper or his estate to pay for support or gifts obtained on the ground of poverty are reviewed in a note to this case.

Railway.—The fact that a railway company has permitted the use of a path along its tracks by persons going to and from its trains is held, in *Pennsylvania R. Co. v. Martin* (C. C. App. 3rd C.), 55 L. R. A. 361, not to impose upon it the duty of exercising care to protect from injury by passing trains a person using it to reach the station to interview about his own affairs a passenger expected to be on a train not scheduled to arrive at the station within an hour.

Injury by a train to a person negligently walking on a railroad trestle, without ability to save himself from the injury, is held, in *Bogan v. Carolina C. R. Co.* (N. C.), 55 L. R. A. 418, to render the company liable if those in charge of the train discover, or by the exercise of ordinary care might discover, the peril of the injured person, and might by the exercise of such care avoid the accident.

The mere fact that those in charge of an engine about to cross a footpath see a responsible traveller approaching the crossing at a speed which renders collision imminent, but fail to take steps to avoid it, is held, in *Gahagan v. Boston & M. R. Co.* (N. H.), 55 L. R. A. 426, not to entitle the latter, who, without any attention to the possibility of an approaching train, steps on to the track immediately in front of the engine, to hold the company liable for an injury, since the railway employees are not bound to anticipate the traveller's negligence. The doctrine of "last clear chance" is considered in a note to these cases.

One who is injured in attempting to cross a railway track by the negligent operation of a push car in the hands of one to whom it has been lent by the foreman of

a gang of men in the employment of the railway company, is held, in *Erie R. Co. v. Salisbury* (N. J. L.), 55 L. R. A. 578, to be entitled to recover from the company.

A railway company having power to condemn land for a right of way for a switch track is held, in *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.* (Ky.), 55 L. R. A. 601, to have no power to bind itself by an agreement with a dealer in coal that, in consideration of the right to place the track on his land, it will not be used to haul coal for other persons having access to it.

Sale of Goods.—A stipulation in a contract for the sale of a proprietary medicine, that the purchaser shall not sell it for less than a specified price, is held, in *Garst v. Hall & L. Co.* (Mass.), 55 L. R. A. 631, not to follow the medicine into the hands of a subsequent vendee. The right of a purchaser of personal property to sell or use it free from restrictions affecting it in the hands of the vendor is considered in a note to this case.

Will.—Under a statute providing that all wills shall be in writing and be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him and the writing declared to be his last will, in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator, it is held, in *Lacey v. Dobbs* (N. J.), 55 L. R. A. 580, that it is essential to validity that everything required to be done by the testator shall precede in point of time the subscription of the witnesses.

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AUGUST, 1902.

THE RIGHT OF PRIVACY.

WITHIN the past month there has again been presented for adjudication before an appellate court the question, what rights of privacy, if any, a person may enforce as a member of modern society, and incidentally what is the nature, and what the extent of the so-called right to be let alone: Cooley on Torts, p. 29.

The decision referred to is that in the case of *Roberson v. Rochester Folding Box Company*, decided 27th June by the Court of Appeals of the State of New York: reported below, 65 N. Y. Supp. 1109; above, 64 App. Div. 30, and N. Y. Law Journal, vol. 27, No. 83. In this now celebrated case, plaintiff, a young lady of considerable personal attractions, brought suit by guardian to restrain defendants from publishing and posting in public places a large number of lithographic prints containing her likeness, above which was printed in large plain letters the words "Flour of the Family," together with an advertisement of defendants' business, which was that of millers. About twenty-five thousand such likenesses of the plaintiff had been distributed and conspicuously posted in stores, warehouses, and bar-rooms throughout the United States, and particularly in the neighbourhood in which plaintiff resided. Plaintiff claimed that this publication of her picture was unauthorized, and caused her both humiliation and distress of mind, and constituted an invasion of her privacy; she also alleged that these pictures had been recognized by her friends and by other people, and that she had been greatly humiliated thereby; that her good name had been attacked, and she

had been made ill and compelled to employ a physician. Plaintiff claimed \$15,000 damages and an injunction restraining defendants from making or using any likeness of the plaintiff.

Defendants filed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This form of demurrer admits facts expressly alleged, and everything which can be implied from the allegations of the complaint by a fair and reasonable intendment: *Marie v. Garrison*, 83 N. Y. 14. A plain case for the adjudication of a legal principle was thus presented.

Upon the original argument of the demurrer, the Court held that a clear right to relief was made out by the complaint, and overruled the demurrer. Upon the argument before the Appellate Division of the Fourth Department, a unanimous Court intimated that the theory upon which the action was predicated was new, and that few, if any, precedents could be found to sustain the claim asserted by the plaintiff, while not admitting that the want of a precedent would be necessarily fatal to plaintiff's success if any principle of natural justice could be clearly shewn upon which relief might be claimed. It was asserted that it is an established principle of the common law that the person and property of every man are inviolate; that neither should be interfered with in any way, or to any, even the slightest, extent, without his consent. As regards personal rights, every person has a complete and perfect right of immunity from all interference with himself; or, as stated by Judge Cooley, he has the absolute right to be let alone. This right of immunity, says the Court, extends not only to protection against physical injury, but against any action which threatens physical harm, although, as a matter of fact, no harm may have resulted from the action. It also applies to every act which injures the reputation or the character of the person against whom it is directed. No one should be allowed to do any act which interferes or threatens to interfere with the physical comfort or safety, or which attacks the reputation or character of any person, and thereby affects injuriously his feelings or subjects him to humiliation or disgrace.

The Court adverted to the fact that, had the humiliation and distress brought upon plaintiff by defendants' act been the result of a libel, or an act which a jury could construe to be libellous in its character, or on account of a threat of physical violence sufficient to constitute an assault, the plaintiff would have a right of action to recover the damages which would naturally flow from such an act. Since such a cause of action would arise from a violation of the plaintiff's right of personal immunity—from the right not to be interfered with to her damage or danger or discomfort—the Court was unable to see any distinction in principle between an act which, without threatening physical harm, was injurious to plaintiff's reputation by words spoken in respect of it, and the like act which was injurious to her feelings and prejudicial to the respect in which she was held in the community by saying and doing something in regard to her which tended to bring her into unnecessary and unwarrantable notice.

The Court dealt with the objections that the law takes no cognizance of injury to feelings of individuals unless such injury is caused by an illegal act, and that it would not be safe to base any right of action upon the fact that a person is of a sensitive nature and easily injured by being brought into public notice. The Court held that pecuniary interests or rights of property are not the only rights protected in equity, and referred to the case of *Pollard v. Photographic Company*, 40 Ch. Div. 345, affirming that the decision of Mr. Justice North in that case has been applied to many cases since decided in the United States. An answer to the objection was also given by citing cases in which actions had been successfully brought by surviving relatives to prevent the removal of a dead body, or to assert the right to bury a corpse. In such cases, while it is conceded that no property right is involved, yet Courts of Equity have acted by injunction to protect the right which arises merely from the respect and affection which surviving relatives have towards the remains of the dead: *Pierce v. Proprietors*, 10 R. I. 227, 14 Am. Rep. 667; *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471; *Beattie v. Kurtz*, 2 Pet. 566; *Trustees v. Walsh*, 57 Ill. 363; *Snyder v. Snyder*, 60 How. Pr.

366; *Price v. Methodist Church*, 4 Hamm (Ohio) 227; *Weld v. Walker*, 130 Mass. 422; *First Presb. Church v. Second Presb. Church*, 2 Brewst. (Penna.) 372. But if the existence of a right of property were deemed essential to base a claim for relief upon, the Court was willing to rest the claim to injunction upon the right of property which every one has in his own body. It is not necessary that the property right should be tangible in its nature, or should be of any specific value. Cases were referred to where a Court of Equity restrained the publication of private letters, although these letters possessed no value whatever as literary compositions, and although it could not be said that the plaintiff was possessed of any tangible property in them, unless in the paper upon which they were written; or that he sustained any damage by their publication: *Gee v. Pritchard*, 2 Swanst. 402; *Woolsey v. Judd*, 4 Duer 379, 596. The earlier New York cases in which the Court held that the publication of private letters could be restrained by the writer only where they possess some value as literary compositions—*Hoyt v. Mackenzie*, 3 Barb. Chy. 320; *Wetmore v. Scovill*, 3 Edw. Chy. 515—were shewn to have been overruled by later cases: *Folsom v. Marsh*, 2 Story 100; *Eyre v. Higbee*, 35 Barb. 502. The reference to *Woolsey v. Judd* in High on Injunctions (s. 1012, note) is not approved.

The Court further denied that it is essential to the existence of a right of property that it should be immediately profitable. The possibility is always present that the thing possessed might become profitable in the future. The principle was laid down that one's features or limbs may be in themselves profitable to the possessor, especially if they are of noticeable beauty, or if for any other reason they possess special value; and so far they constitute a right of property which a Court will protect.

The decision in the Court of Appeals, by a bare majority of one, now overturns the decisions of the lower Courts, allows the demurrer, and apparently leaves the plaintiff without a remedy. The prevailing opinion is based upon the proposition that no charge is made in the complaint that the publication is libellous, that no property right is involved, and that injunction cannot be invoked except in

protection of a property right. The plaintiff is advised that should she find the civil and criminal law of libel insufficient for her protection, she must turn to the Legislature, which alone can establish the existence, extent, and limitations of this new and nebulous doctrine. The dissenting opinion, by Gray, J., concurred in by Bartlett and Haight, JJ., was in favour of overruling the demurrer and upholding the right claimed by plaintiff, upon the ground that the right of privacy has already received judicial recognition and is the complement of the well-recognized right to the immunity of one's person; and that any other principle of decision would be as repugnant to equity as shocking to reason.

So far as the present condition of the litigation is concerned, therefore, it may be said that four Judges of the State of New York have overruled eight Judges—certainly a most unsatisfactory result, compared by the New York Law Journal with the equally unsatisfactory disposition of the well-known case of *Allen v. Flood* (a), where a majority in the House of Lords overruled the opinion of their immediate associates and of a decisive majority of equally able Judges in the lower Courts. It is interesting to note that *Allen v. Flood* was subsequently overruled by *Quinn v. Leatham*.

The leading case in England appears to be *Pollard v. Photographic Company*, 40 Ch. Div. 345; see also *Mayall v. Highbey*, 1 H. & C. 188; *Queensbury v. Shebbeare*, 2 Eden 329. Here the plaintiff had given sittings to the defendant company for her photograph portrait, so that copies might be made for herself or upon her order. Defendant used the negative in the production of Christmas cards, which were

(a) Decided 1898. Mr. Justice Kennedy entered judgment for plaintiff. Decision unanimously affirmed by Court of Appeal, composed of Lord Esher, M.R., and Lopes and Rigby, L.JJ. Case argued in the House of Lords, before Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey. On subsequent re-argument, also Lords Ashbourne and James of Hereford. On this re-argument seven Judges attended in pursuance of the summons of the Lords, of whom six declared for affirmance. Subsequently six law Lords declared for reversal and three for affirmance. Thus there were ten Judges and three law Lords, thirteen in all, in favour of the right of action. Against it were one Judge and six law Lords—seven in all. The seven Judges succeeded in overthrowing the thirteen.

put upon exhibition and sale, and plaintiff brought the action to restrain the sale of the pictures and the misuse of the negative. The Court granted the injunction asked, basing it upon the ground that there was an implied contract between the photographer and the sitter that the negative should not be used for any other purpose than to furnish photographs at the order of the sitter. Other cases in England are the case of *Gee v. Pritchard*, 2 Swanst. 402, and *Abernethy v. Hutchinson*, 3 L. J. Ch. 209. In these cases the right of privacy was not in any way disputed, and the cases were decided upon the existence of a right of property. The decisions are those of Lord Eldon. Another English case is *Dickrell v. Dougall* (1898), 78 L.T.R. 40. In this case defendant had stated in an advertisement of his patent medicine that the plaintiff, who was a physician at St. John's Hospital, London, was prescribing defendant's medicine as an habitual beverage. The Court refused the injunction. The decision is that of a single Judge, and has been disapproved in the United States. In *Mackenzie v. Mineral Springs Company*, 18 N. Y. Supp. 240, where almost the identical state of facts was presented, an injunction was granted on the ground of the injury to plaintiff's reputation as a physician.

In the United States, the question has been presented several times within the past few years. One of the earliest cases is *Schuyler v. Curtiss*, 15 N. Y. Supp. 787, 64 Hun 594, 19 N. Y. Supp. 264. Here defendants were members of an unincorporated society, and as such undertook to set up two ideal statues of women for exhibition at the Exposition at Chicago. One of these statues was to represent the form of Mrs. Mary Hamilton Schuyler, a lady then deceased, but who had been the aunt and step-mother of the plaintiff. It was to typify "Woman the Philanthropist," as a companion piece to "Woman the Reformer," represented by a statue of Miss Susan B. Anthony. The reason for modelling the statue after Mrs. Schuyler was that the latter had taken great interest, during her lifetime, in matters relating to benefactions to women. Plaintiff sought to restrain the erection of the statue upon the ground that the act was disagreeable to plaintiff and upon the claim that it would

also have been obnoxious to Mrs. Schuyler if she were living, she having been one who never courted publicity. The Judge of first instance granted an interlocutory injunction, and the Court in banc affirmed this order: 24 Hun. 490, 19 N. Y. Supp. 264; in each case upon the ground of a violation of the right of privacy. The case was taken to the Court of Appeals, and appears in 147 N. Y. 434. In this Court of final resort judgment was reversed, but the reversal did not proceed upon any denial of the right of privacy, but upon the ground that such right dies with the person, and that any right which survives is the right which pertains to the living only. The Court laid down the principle that no person can maintain an action to prevent the exhibition of the picture of a deceased relative, unless the injury caused by that display is personal to himself: and that this action cannot be maintained simply because the exhibition is such as would have been disagreeable to the person whose portrait is exhibited had he or she been living. The dissenting opinion of Judge Gray is worthy of careful examination. The case is believed to establish an acknowledgment of the right of privacy contended for, but the decision of the majority of the Court has not met with general approval: see *Am. & Eng. Decisions in Equity*, vol. 2, p. 484.

Similar cases have arisen in New York. In the case of *Marks v. Jaffa* (December, 1893), 26 N. Y. Supp. 908, it appeared that plaintiff was an actor, and defendant was editor of a newspaper. Defendant published a picture of plaintiff, and also a picture of another actor, together with an invitation to his readers to vote which was the more popular of the two. Plaintiff brought action for damages and to restrain the publication. The Court, by McAdams, J., held that plaintiff could not be entered in such competition without his consent, and that a serious injury might be done a private person by associating him or her in such a competition with another person. In *Murray v. Engraving Company*, 28 N. Y. Supp. 271, 8 Miscell. R. 36, where it was held that a parent could not maintain an action to restrain the unauthorized publication of a portrait of his child, the general right of privacy was not denied.

In other States the decisions are not yet uniform. The identical question which was presented in the Schuyler case came up before a Michigan Court in *Atkinson v. John Dougherty & Co.*, 121 Mich. 372. In this case the action was brought by a widow to prevent the unauthorized use of the name and portrait of her deceased husband upon labels attached to cigars manufactured by the defendant. The right of a widow to bring such an action was denied in both the Circuit and Supreme Courts of the State, which held that Col. Atkinson himself, if alive, would have had no right of action under the circumstances. In the case of *Corliss v. E. W. Walker Co.*, 57 Fed. Rep. 434, and again 64 Fed. Rep. 280, injunction was brought to restrain publication of a picture of Mr. Corliss, the inventor of the Corliss engine. In the Court of first instance the injunction was denied as to the publication, but was granted as to the use of the plates from which the engraving was printed. This decision rested upon the ground that the picture in question was that of a public man, and that Mr. Corliss had in his lifetime consented to the publication of his picture in various books and newspapers; but that the plates having been obtained under certain conditions which had not been complied with, defendant was not entitled to use them. Upon motion to dissolve, new facts being presented, the Court dissolved the injunction, while upholding the right of privacy and of protection against the representation of one's portrait in any form; and maintaining that this is a property right as well as a personal right.

To sum up, then, the present position of what cannot but be regarded as a meritorious effort to engraft upon our law a principle, the recognition of which appears to be demanded by the conditions of modern life in highly civilized communities, is a matter of no small difficulty. While the decision upon a demurrer is of course not incompatible with the subsequent recognition of plaintiff's right upon an amended complaint, the opinion of a majority of the ultimate appellate tribunal in the State is at present adverse to the recognition of the principles upon which, in one shape or other, the action must necessarily be based. Yet

a doubt remains whether the objections at present successfully urged will always be deemed so insuperable as at first sight they have been regarded.

The mere novelty of the case, it need hardly be said, is in itself nothing. It is true that such a state of facts did not, and could not, arise in feudal times or among a pastoral people. One could not expect to find any decision in the Year Books bearing on it any more than a decision on rights in natural gas or electric conductors. To say that no mention of such a right is made in Blackstone or Kent is to state what is no doubt true, but the same might be said of thousands of rights well recognized and firmly imbedded in English and American law upon the absolute faith in the permanent recognition of which millions are securely invested. Let it be admitted at once that no adequate remedy is given by the common law: this very fact would appear to justify assuming a jurisdiction in equity: 1 Story Eq., ss. 49, 50; *Walworth v. Holt*, 4 Mylne & Cr. 619; *Pierce v. Proprietors*, 14 Am. Rep. 667. It must be borne in mind that Courts exist to do justice and remedy wrongs. Their conceptions of what are wrongs must necessarily be enlarged in accordance with advances in civilization and with ideas which prevail in modern times.

The decision of *Murray v. Gast Lithographic Co.*, 49 Albany L. J. 287, if an authority for the proposition that equity will not interfere by injunction except in defence of a strict right of property, is opposed to too many modern authorities to be accorded any weight at this day.

The apparent resemblance of cases of this kind to cases of libel lies so directly in the path of consideration that it has not escaped observation from the first. It is undoubted that in the earlier English cases injunction to restrain the publication of a libel was refused—*Prudential Ass. Co. v. Knott*, L.'R. 10 Ch. 142—as it is to this day refused in Federal and State Courts throughout the United States: *Francis v. Flynn*, 118 U. S. 385; *Chicago v. General Electric*, 74 Ill. App. 465. This was remedied in England by the Common Law Procedure Act of 1854, ss. 79, 81, and 82, and the remedy extended by the Judicature Act of 1873: s. 25,

s.-s. 8. But it is clear that cases such as the Roberson case and the Schuyler case cannot be treated as cases of libel. Defamatory intent is absent. The design of defendants in each case was to make the portrait as flattering as possible; and in the former case the punning use of the words "Flour of the Family," while in a sense offensive in its coarse familiarity, was not intended as defamatory. The mere giving of publicity can hardly of itself constitute a libel. Furthermore, if treated as cases of libel, the difficulty is at once met that the liberty of the press cannot be infringed, guarded as it is in most States by strong constitutional provisions. Thus, *Marks v. Jaffa* has been criticized as infringing upon this constitutional guaranty, and the final decision in the Schuyler case admits that it would prevent the issue of an injunction against defendants for writing or publishing anything not libellous in reference to the deceased Mrs. Schuyler, and limits the holding to the exhibition of a statue. Whether this distinction is sound in law, or whether there is a legal difference between the exhibition of a statue and the publication of a picture in a newspaper, remains to be seen: *Harvard Law Rev.*, vol. 9, p. 254.

Perhaps unconsciously misled by this false resemblance to principles governing libel, the Judges in some of the earlier cases were impressed by the necessity of some differentiation in principle between the protection to be afforded different classes of the community as public or private characters. It is, of course, evident that it is one thing to permit a modest girl to be subjected to the coarse indignity of having her picture displayed for trade purposes in a bar-room, and quite another to declare that a candidate for Congress can restrain an illustrated paper from publishing his portrait for the benefit of the electors. The distinction—a short-lived one—sought to be made between so-called "public characters," such as politicians, actors, clergymen, and authors, and private citizens whose lives are supposed to have in them nothing to warrant the pertinent, or impertinent, curiosity of the public in their affairs, is noticed and approved in the Roberson case, 32 N. Y. Mis. 344, by Judge Davy, who asserts that it was first pointed out in Prince

Albert v. Strange, 1 Macn. & G. 25. It is amplified in the **Corliss case**, 57 Fed. Rep. 434. It is repudiated by the **Appellate Division** in the **Schuyler case**, discredited in **Atkinson v. Doherty**, and finally demolished by the **Court of Appeals of New York** in their latest utterance.

If an opinion may be ventured in the present state of the authorities, a true and safe principle upon which to base the right to redress in all cases of infringement of privacy may well be the undoubted jurisdiction of equity to restrain unfair practices in trade, which is itself but one branch of the jurisdiction to restrain fraud: **Morison v. Moat**, 20 L. J. Chy. 522; **Little v. Gallus**, 38 N. Y. Supp. 487. But, whatever the ground finally agreed upon for the decision, it is clear that cases similar to the **Roberson case** are bound to recur, and must be redressed; and it would appear essential to secure general recognition of the principle that the right of privacy is a legal right, distinct alike from the right of property and the right of reputation; and, this once established, the arm of injunction must be so far freed from old shackles, and the obstacles exhibited in the constitutional provision for a free press so far removed, as to provide a full, substantial, and effective remedy.

New York.

WM. SETON GORDON.

AUTHORITY OF COUNSEL TO COMPROMISE.

The questions discussed in an article published last year, 21 C. L. T. 389, have recently been before the Court of Appeal in England in *Neale v. Lady Gordon Lennox*, [1902] 1 K. B. 838. The plaintiff, a lady, sued Lady Gordon Lennox for slander and libel. At the trial her counsel, Sir E. Clarke, agreed to refer the action. A motion was afterwards made on her behalf to set aside the order of reference and restore the case to the list for hearing, upon the ground that she had before the trial instructed her counsel not to consent to a reference unless all imputations against her moral character were expressly withdrawn. Lord Alverstone allowed this motion, but his decision was afterwards reversed by the Court of Appeal: Collins, M.R., and Romer and Mathew, L.JJ. The Chief Justice and the Court of Appeal all agree:—

(a) That counsel appearing for a party in an action is held out as having authority and has full authority as to all matters which relate to the conduct of the action and its settlement.

(b) And that, notwithstanding a limit may have been placed upon the authority of counsel, the client is bound unless the fact that counsel's apparent authority has been limited is communicated to the other side.

The Court of Appeal further determines, and on this point reverses the learned Chief Justice:—

(c) That there is no exception to these rules in the case of interlocutory orders.

Incidentally it also appears:—

(d) That there is no distinction between the authority of counsel and solicitors.

(e) That while a final order or judgment can only be set aside by action, an interlocutory order may, in the discretion of the Court, be set aside upon summary application, but, if there are disputed facts, an issue or an action will generally be directed even in that case.

(f) The Court can, in any case, relieve on the ground *of mistake*.

It is singular that *Stokes v. Latham* (1888), 4 Times L. R. 305, *Ellender v. Woods* (1888), 32 Sol. J. 628, and *Scheyer v. Wontner* (1890), 90 L. T. J. 116, the only recent cases of high authority bearing in the plaintiff's favour upon the effect of the secret limitation of counsel's authority, were not cited by either counsel or Court, and, as it cannot, under the circumstances, be supposed that these cases were not known (they are all recent decisions of the Court of Appeal), the only inference is that these cases in fact turned upon their special circumstances, and are not of general application.

It may also be noted that in the great majority of cases upon this subject the dissatisfied litigant was a lady.

W. E. MIDDLETON.

Toronto, June, 1902.

RECENT CASES FROM THE TIMES REPORTS.*

Bills of Exchange.]—In *Brown, Brough, & Co. v. National Bank of India*, 18 T. L. R. 669, Bigham, J., following, against his own view, *Gordon v. London City and Midland Bank*, [1902] 1 K. B. 242, held that a draft issued by the branch of a bank upon its head office was not a "bill of exchange," and therefore that the bank who had paid on a forged indorsement was not protected.

Chose in Action.]—*Hughes v. Pump House Hotel Co.*, 18 T. L. R. 645, is a useful case as to the form and effect of an assignment of a debt. The Court of Appeal held that the assignment in question (set out in the report) was an absolute one within the meaning of the English Judicature Act, 1873, s. 25, s.-s. 6 (see *O. J. Act*, s. 58, s.-s. 5), so as to pass the right of action to the assignee, though the assignment had been given only as collateral security.—In *Torkington v. Magee*, 18 T. L. R. 703, an assignment of the right to purchase a reversionary interest in some shares was held to be an assignment of a "chose in action," [*O. J. Act*, s. 58 (5)] so as to entitle the assignee to sue in his own name for damages for the breach of the agreement to sell. The words "debt or other legal chose in action" mean "debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable."

Company.]—Section 20 of the Companies Act, 1862—see *R. S. O. 1897 c. 191*, s. 10—provides that no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive. In *Aerators Limited v. Tollet*, 18 T. L. R. 637, the plaintiffs were refused an injunction to restrain the registration of a competing company under the name of "Automatic Aerator Patents, Limited." A company cannot, by registering

* Including the cases in No. 29, vol. 18, week ending 2nd July, 1902.

a single word, whatever its nature, remove that word from the English language, so far as regards its use in the title of subsequent companies. In considering whether a name is calculated to deceive it is material to see what the name is, and if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even of the name of a place.—In *In re Cataral New Mines, Limited*, 18 T. L. R. 640, it was held that the declaration by the chairman of a meeting that a resolution had been carried was not “conclusive evidence” of that fact under s. 51 of the Companies Act, 1862, because it shewed on its face that the result had been erroneously arrived at. Under the Ontario Act R. S. O. 1897 c. 191, s. 61, the chairman’s declaration is only prima facie evidence.—The question of a director’s qualification was in issue in *Sutton v. English and Colonial Produce Co.*, 18 T. L. R. 647. One of the articles of association provided that the qualification of a director was the holding in his own right of one hundred shares, and another that the office of director was to be vacated if he ceased to hold the qualifying number of shares—see R. S. O. 1897 c. 191, s. 42. The director in question was adjudicated a bankrupt. The trustee in bankruptcy gave notice to the company that he claimed the shares, but did not wish to have them transferred to him, as he purposed selling them. It was held that though the director had a possible beneficial interest in the shares in the event of his estate being solvent, he was not such a holder of the shares as to enable the company to deal with him as owner, that being the test, and that he was disqualified. It was also held that the disqualification was not annulled and the director’s status restored by the subsequent transfer to him of the qualifying number of shares.—In *Percival v. Wright*, 18 T. L. R. 697, the extent of directors’ duty of disclosure to shareholders in the company who desired to sell shares to them, was discussed, and it was held that as the directors had not sought to acquire the shares in question, but had in good faith accepted an offer made to them, they were not bound to disclose to the intending vendors the fact that negotiations for the sale of the assets were on foot.

Contract.]—That in an agreement to allow a person acting as agent for the sale or purchase of goods a commission on the sales or purchases, there is not to be implied a term that goods will be sold or bought in order to enable the agent to earn commissions, is now well settled. *Northey v. Trevillion*, 18 T. L. R. 648, recognizes the principle, and the main question there was whether the contract was one of that kind or a contract of employment for a definite time, not to be put an end to without compensation. It was held to be a mere agency agreement for the purchase of goods on commission, and the plaintiff to be without redress on the principal ceasing to carry on business, and so requiring no more goods. The principal formed a partnership, putting no capital into the firm and being paid a salary. It was further held that this was not carrying on business on his part, so as to make the agency agreement to purchase through the plaintiff goods while carrying on business—still binding upon him.

Criminal Law.]—After one of three prisoners in *Rex v. Plummer*, 18 T. L. R. 659, jointly indicted for conspiracy, had pleaded guilty, the other two were tried and acquitted. The first prisoner, who had not been sentenced, was allowed to withdraw his plea, and the conviction was quashed.

Donatio Mortis Causa.]—Local loan stock, issued by the Post Office Savings Bank, is not the subject of a *donatio mortis causa*, the document of title not being in itself sufficient to prove the contract: *In re Andrews*, 18 T. L. R. 646. See the note ante p. 135.

Judgment Summons.]—In *Rex v. Judge of Birmingham County Court*, 18 T. L. R. 698, it was held, in judgment summons proceedings in the County Court (upon the practice in which the Ontario Division Courts judgment summons is based), that where judgment had been recovered against three defendants on their joint and several promissory note, and a judgment summons had been issued against one and an order made, the terms of which were being complied with, the plaintiff could, notwithstanding the pendency of that order, take judgment summons proceedings against the

other defendants, the first order not being equivalent to an outstanding and unreturned execution.

Lien.]—A broker has a general lien upon the shares of a customer in his hands for any balance due to him, not merely a specific lien for advances made on the security of particular shares: *In re London and Globe Finance Corporation*, 18 T. L. R. 679.

Landlord and Tenant.]—In *Budd-Scott v. Daniel*, 18 T. L. R. 675, the extent of the implied obligation of the lessor to give the lessee quiet enjoyment is considered, and it was held by a Divisional Court that the implied obligation does not arise only when the word “demise” is used, but also when equivalent words such as “let” or “agree to let” are employed; in fact, as Mr. Justice Channell puts it, “from the mere fact of a letting, there is, at any rate, some undertaking for the enjoyment of the property by the lessee.”

Limitation of Actions.]—The defendant in *Langrish v. Watts*, 18 T. L. R. 658, in a letter relating to the debt in question, asked for particulars of alleged credits, etc., adding, “I will do my best to pay back what I owe;” and in another letter, after claiming credit for two specific sums, said: “At present I have no money on hand, but as soon as there is another division I will send (the creditor) some.” It was held that the first expression was not a sufficient acknowledgment, but that the second was, and that, the al- luded to division (of an estate in which the debtor had an interest) having taken place, the creditor was entitled to judgment for the whole debt, the claim to the alleged credit being disallowed. A promise to pay the whole debt, or even a definite sum, is not essential.—In *Walter v. Yalden*, 18 T. L. R. 668, the question of the time at which the right of entry accrues to a reversioner as against a sub-lessee or trespasser is dealt with, the holding being that it is at the expiration of the term, and this notwithstanding a prior surrender by the lessee.

Master and Servant.]—In *Line v. Royal Society for the Prevention of Cruelty to Animals*, 18 T. L. R. 634, it was

held, having regard particularly to its rules, that an inspector of the society had acted within the scope of his employment in causing the arrest of the plaintiff, and therefore that the society was liable in damages, the plaintiff having been given into custody on an unfounded charge.—Cases under the Workmen's Compensation Act, 1897, continue to abound, and some of them are of use in dealing with the Ontario Act. The workman, whose widow in *Dunham v. Clare*, 18 T. L. R. 645, was seeking compensation, was slightly injured by an accident in the course of his employment. Subsequently erysipelas set in and death resulted. It was held by the Court of Appeal that, although the medical evidence was clear that erysipelas was a most improbable and unexpected development in a case of the kind, the widow was entitled to compensation. "If death in fact resulted (from the injury), it did not matter how improbable it was that it should so result. The point was—did death result from the accident or was the chain of causation broken by a *novus actus interveniens*, which gave a new origin to the after consequences?" Where "the injury results in death" the Ontario Act (R. S. O. 1897 c. 160, s. 3) gives a right of action to the legal personal representatives of the workman, and in such a case the arbitration procedure does not apply (62 V. (2) c. 18, s. 4.)—While the question considered in *Armitage v. Lancashire and Yorkshire R. W. Co.*, 18 T. L. R. 648, could scarcely arise under the Ontario Act, the case is, perhaps, worth noting as a "negating" decision of the Court of Appeal, namely, that the employers were not responsible for an injury caused to the claimant by a piece of iron thrown, during working hours and in the employers' premises, by one fellow servant at another fellow servant, the act being a wrongful one, having no connection with the employment.—The judgment in *Abrahams v. Bullock*, 17 T. L. R. 557, noted 21 C. L. T. 367, the case as to jewellery stolen from a brougham, was reversed by the Court of Appeal, and the defendant, who had supplied the brougham and driver, held liable: 18 T. L. R. 701.

Mortgage.]—In *London and Globe Finance Corporation v. Montgomery*, 18 T. L. R. 661—notable at all events for

the number of counsel engaged—it was held that a transaction by which in consideration of the advance of a certain sum the defendants had the right to buy a certain number of shares at a named price, was not in effect, as contended by the plaintiffs, a mortgage of the shares with an illegal clog on the equity of redemption, but really a transaction of advance with a right to purchase.—In *Jarrah Wood Paving Co. v. Samuel*, 18 T. L. R. 674, a similar contention was successful, the transaction in question also relating to shares. A company mortgaged, as security for an advance, some of its own debenture stock. An option to the mortgagee to purchase the whole or any portion of the stock within twelve months at a fixed rate was held void as an illegal clog on the equity of redemption, and, notwithstanding the mortgagee's attempt to exercise the option, the company were held entitled to redeem upon payment of principal, interest, and costs.

Mortmain.]—In *In re Sidebottom, Beeley v. Waterhouse*, 18 T. L. R. 682, land devised to trustees in trust for sale when they should so decide, the proceeds to be then given to a charity, was held by the Court of Appeal not to be “land assured by will to or for the benefit of a charitable use,” and therefore not subject to the statutory requirement as to expeditious sale. [*Imperial Mortmain Act, 1891—R. S. O. 1897 c. 112.*] But the Court point out that the trustees would be bound to sell within a reasonable time, and that the object of the Act could not in this indirect way be defeated. Note now also 2 Edw. VII. c. 2 (O.)

Partnership.]—The case of *British Homes Assurance Corporation v. Patterson*, 18 T. L. R. 676, was decided upon the general law of partnership and not upon special provisions of the Partnership Act, and for that reason, and also, perhaps, because partnership dealings of solicitors were in question, is worth noting. A solicitor, carrying on business alone under a firm name, was appointed by the plaintiffs their solicitor, and as such was instructed to make a loan for them on mortgage security. While the matter was pending the solicitor formed a partnership with the defendant, of which he gave the plaintiffs notice. They, how-

ever, continued to address their letters in the former firm name, and made a cheque to the order of that firm name for the amount of the loan. The solicitor received this cheque, indorsed it in the former firm name, and embezzled the proceeds. It was held that the plaintiffs had elected to retain the liability of the solicitor, and that the new firm (and therefore the defendant) had not by novation become liable.

Principal and Agent.]—The judgment in *Gunn v. Showell's Brewery Company, Limited*, 17 T. L. R. 563, noted 21 C. L. T. 369, as to the right to commission, was affirmed by the Court of Appeal: 18 T. L. R. 659; while that in *Farquharson Brothers and Co. v. J. King and Co.*, 17 T. L. R. 689, noted 21 C. L. T. 410, as to fraudulent sales by an agent having limited authority, was reversed by the House of Lords: 18 T. L. R. 665. The case is a very important one in its practical bearing. Carelessness, no matter how extreme, in the conduct of a man's business, cannot, it is laid down, preclude him from recovering property which has been, in effect, stolen from him.

Trade Union.]—*Alfin v. Hewlett*, 18 T. L. R. 664, was an action arising out of the Taff Vale Railway case, in which it was held that the Amalgamated Society of Railway Servants, defendants in that case, were not justified in paying the costs of that action of their secretary, who was a co-defendant. See the note 21 C. L. T. 416.

Will.]—The danger of attempting to make a will by reference is again shewn by *In the Goods of Smart*, 18 T. L. R. 663. The testatrix, by her will, directed her trustees to give to such of her friends as she might designate in a memorandum which would be found with the will the articles specified in that memorandum. The memorandum had not been prepared at the time of the execution of the will, but after it had been prepared a codicil was executed, which confirmed the will, but did not refer to the memorandum. It was held that the memorandum could not be admitted to probate as part of the will and codicil.—In *Vaughan v. Clerk*, 18 T. L. R. 704, letters probate of a will were amended in an action by striking out of the residuary clause the

word "real" before the word "property," the word having been inserted by the engrossing clerk by error for the word "said," which was in the draft approved of by the testator.

Way.]—*Baxendale v. North Lambeth Liberal Club*, 18 T. L. R. 700, is a useful case as to the extent of user of a right of way. It was held that when a right of way is granted without restriction for the benefit of a piece of land, it may be used in connection with any purpose for which the land may lawfully be used, and not merely in connection with the purposes for which the land was being used at the time of the grant; and also that it extends not only to the grantee, but to members of his family, servants, visitors, guests, and tradespeople, even though none of these persons be mentioned in the grant. It was held that the use of the land in question for a club was, on the evidence, not a breach of a covenant "not to do anything that should be or grow to be an annoyance" to the persons entitled to the benefit of the covenant, and that the members of the club had the right to use the way, though used, at the time of its grant, only to obtain access to what was then a stable and garden.

EDITORIAL REVIEW.

The County Law Associations.

At the meeting of delegates from county law library associations held at Osgoode Hall on the 30th June last, resolutions were adopted approving of the following proposals:—

That the local Judges of the High Court be given the same power as a High Court Judge in Weekly Court.

That fees for examinations for discovery be reduced.

That the Law Society endeavour to arrange for Ontario and Dominion statutes being given free or at a reduced price to the members of the legal profession.

That the Dominion Government be asked to aid the county associations.

That the salaries of High Court and County Court Judges be increased.

The proposals for a system of nomination for the election of Benchers and for the publication of a work on practice by the Law Society, were laid over to the next meeting.

The following gentlemen were appointed a legislative committee:

Messrs. Matthew Wilson, K.C., D. Guthrie, K.C., W. C. Mikel, A. H. Clarke, K.C., Philip Holt, and William Proudfoot, K.C.

A committee composed of Messrs. Shirley Denison, Toronto, William Steers, Lindsay, W. A. McLean, Guelph, Philip Holt, Goderich, and W. C. Mikel, Belleville, was appointed to arrange for next year's meeting.

Recent American Decisions.

Bills of Exchange.—No liability in favour of a bona fide purchaser of a negotiable paper is held, in *Salley v. Terrill (Me.)*, 55 L. R. A. 730, to attach to the maker, where it was drawn and signed but not delivered or intended to be delivered, but was obtained by the payee by theft, without gross carelessness or recklessness on the part of the maker.

Dog.—That an assault committed by a dog in jumping upon a stranger and injuring him resulted merely from its mischievous or playful propensity, is held, in *Crowley v. Groonell* (Vt.), 55 L. R. A. 876, not to absolve the owner from liability, if he knew of its disposition to commit such injuries, or knew enough of its habits to convince a man of ordinary prudence of its inclination to commit them.

Master and Servant.—The noon intermission is held, in *Mitchell-Tranter Co. v. Ehmet* (Ky.), 55 L. R. A. 710, not to sever the relation of a servant to his master, so as to prevent his recovery for an injury resulting from an unsafe working place, received while attempting during that time, by direction of a superior, to remove broken timbers which render unsafe the work of the employees.

The act of a servant of a railway company instructed to watch a station and catch burglars, in mistaking a co-employee for a burglar and shooting him through want of proper care, is held, in *Lipscomb v. Houston & T. C. R. Co.* (Tex.), 55 L. R. A. 869, to render the company liable.

A foreman of a lumber camp, whose duty, in the interest of a common employer, requires him to ride on a log train to and from the camp to the mill, is held in *Sanderson v. Panther Lumber Co.* (W. Va.), 55 L. R. A. 908, to be a fellow servant with the employees of the same employer operating such log train.

Negligence.—Undisputed facts in a negligence case are held, in *Shobert v. May* (Or.), 55 L. R. A. 810, not to entitle the Court to determine the question of negligence as matter of law by instructing the jury that defendant was guilty of negligence, where the facts shew the exercise of some degree of care at least.

The manufacturer of a drop press is held, in *McCaffrey v. Mossberg & G. Mfg. Co.* (R. I.), 55 L. R. A. 822, not to be liable to a purchaser's employee for injuries caused by the breaking of a defective hook holding a heavy weight, the cause of the injury not being in its nature imminently dangerous, and there being no fraud or concealment or implied invitation to the employee to use the machine.

One who, in the operation of his coal mines upon his own land, uses a cable running upon pulleys to haul coal cars from his mine, is held, in *Uttermohlen v. Bogg's Run Min. & M. Co.* (W. Va.), 55 L. R. A. 911, not to be liable for injury to a child trespassing on the premises by such cable and pulleys.

Nuisance.—A stepping stone to facilitate access to carriages, placed near the edge of a sidewalk, which does not interfere in the least with the use of the roadway, is held, in *Robert v. Powell* (N. Y.), 55 L. R. A. 775, not to be a nuisance, so as to give a foot passenger injured by stumbling over it in attempting to cross the street at a time when it is plainly visible, a right of action against the owner.

Street Railway.—A street railway company is held in *Fewings v. Mendenhall* (Minn.), 55 L. R. A. 713, not to be guilty of negligence in attempting to operate its cars during a strike of its employees unless the conditions are such that it ought to know that it cannot do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers.

BOOK REVIEWS.

Lindley on Companies.—A Treatise on the Law of Companies, considered as a branch of the Law of Partnership; by the Right Honourable Lord Lindley, a Lord of Appeal in Ordinary. Sixth edition by the Honourable Walter Lindley, of Lincoln's Inn, Barrister-at-law. London: Sweet & Maxwell, Limited: 1902.

Lord Lindley's work is so thoroughly known and held in such universal esteem that it is not necessary to do more than refer to the circumstances under which the sixth edition (by his son) is produced, and to indicate how it differs from its predecessors.

In 1860 appeared the author's "Treatise on the Law of Partnership, including its application to Companies." At that time the law of companies was being developed by legislative enactment and judicial decision out of the law of partnership; and it appeared desirable to trace that development, and in one treatise to investigate the law of partnership and determine the extent to which its principles were applicable to companies. But since that time, as everybody knows, the law of companies has so developed as to require separate treatment; and in 1888 the author divided the former treatise into two parts, each complete without the other, viz., the law of partnership proper, and the law of companies in so far as it has any connection with the former. Since 1888 company law has been further developed in England, and has, indeed, become one of the most important—perhaps the most important—branches of commercial law. Small wonder, then, if at the end of thirteen years a new edition makes its appearance. During that period the English Companies (Memorandum of Association) Act, 1890, the Companies (Winding-up) Act, 1890, the Directors' Liability Act, 1890, and the Companies Acts of 1898 and 1900, have been passed; a new body of rules regulating the compulsory winding-up of companies has been issued; and numerous

cases connected with the subject have been decided, including the famous *Derry v. Peek* and *Salomon v. Salomon*, in the Lords; *Burland v. Erle*, in the Privy Council; and *Lagunas Nitrate Co. v. Lagunas Syndicate*, in the Court of Appeal.

The object of the editor has been to adapt the author's treatise to the present state of the law, and to incorporate the new material into it without making unnecessary alterations either in the general arrangement or in the text of the fifth edition. Where the changes in a particular branch of law have been considerable, the portion of the work dealing with that branch has been recast—and this has occurred in several instances.

We have now a very comprehensive book, in two large volumes, amply indexed, and admirably typed. It is still Lindley, but Lindley up to date.

Minton-Senhouse's Accidents to Workmen.—Being a treatise on the Employers' Liability Act, Lord Campbell's Acts, the Workmen's Compensation Acts, and matters relating thereto. Second edition, by R. M. Minton-Stenhouse, of the Inner Temple and Oxford Circuit, barrister-at-law. London: Sweet and Maxwell, Limited: 1902.

This is a very important and valuable book. We shall refer to it at greater length after the long vacation.

THE CANADIAN LAW TIMES.

SEPTEMBER, 1902.

THE COURT OF THE CORONER.

TO those interested in legal antiquities and anomalies the Court which furnishes the title for this article deserves some consideration, while the fact that it still flourishes and exercises important functions makes its present condition and the method in which it performs its duties a subject of much practical importance.

Its presiding officer is rarely, if ever, a lawyer, but little ceremony is now observed at its sessions, and its place of meeting is often a country tavern, the ward of a hospital, or some village hall, and yet it frequently tries most vital issues, and has the power, in extreme cases, of stamping those who may be the subject of its adverse findings with the brand of Cain. Its procedure is governed by rules promulgated in the days of the Plantagenets, and its founder is said to be no less a person than King Alfred the Great.

The Coroner and his Court may, therefore, lay claim to a most respectable and hoary antiquity. Not only may he refer to King Alfred for the institution of his office, but he may cite as precedents for his proceedings the sayings of the earliest text writers and reporters known to our law.

A judicial position that was described by Lord Coke as a most ancient and honourable office; that could be held by no person under the degree of a knight, "honest, loyall, and sage," and in respect of which no fee might be exacted, "for this was the policy of prudent antiquity that officers did ever give a grace to the place, and not the place only to grace the

officer—" must indeed have a history worthy of examination. 2 Co. Inst. Magna Charta, c. 17.

An inquiry into this topic will lead us through the works of Bracton, Glanville, Fitzherbert (*Natura Brevium*), Coke, *The Mirror of Justices*, Hales's *Pleas of the Crown*, Hawkins's *Pleas*, c. 9, where the subject is compendiously treated, as well as the later authorities, and would also entail an excursion through the earliest common law reports, and the many English statutes from Magna Charta (c. 18) to a very recent date. Some idea of the antiquity of the legislation passed to regulate the functions of this important personage may be obtained from a glance at the English Coroners' Act, 1887 (50 & 51 V. c. 71), consolidating and amending the statutory law upon the subject and repealing 33 statutes, or portions of statutes, dating from 3 Edw. I. to 45 & 46 V. c. 50. Even the great statute *De Officio Coronatoris*, 4 Edw. I., is said by Mr. Serjeant Hawkins, in his *Pleas of the Crown*, c. 9, s. 5, to be merely declaratory of the common law then existing, and from a comparison of that statute it will be found to have but little enlarged the scope of Bracton's treatise on the subject, written in the thirteenth century, probably 80 or 90 years before the statute was passed. See Twiss's *Bracton*, vol. 2, p. 281 et seq., and Huband on *Juries*, pp. 23 and 227.

According to one Andrew Horne, who edited an edition of the *Mirror of Justices*, afterwards published in 1646, the *Mirror* was written in the reign of this same Edward I. The introduction and a whole section (s. 3, c. 1) is there devoted to the duties of Coroners, while various other references are made to them in the work.

The evidence proving the antiquity of the office, if it depended on this fact alone, would be conclusive, but some account of the institution of the Court is given by the author in a passage, quaintly enough expressed, which, after recounting how King Alfred had ordained for a perpetual usage that the earls should meet at London "to speak their minds for the guiding of the people of God," states that Coroners were by this assembly appointed in King Alfred's time, and that "it was ordained that Coroners should receive appeals of

felony, and should give the judgment of outlawries, and should make the issues in the causes aforesaid, and that all the next Townes should present to the Coroners in the counties the mischances of the bodies of the people, and the names of the finders." Assuming that the Mirror possesses the antiquity claimed for it, which by many has been doubted, we have here probably our earliest account of the institution of this office.

Coroners also appear to have been referred to in A.D. 935, during the reign of King Athelstan, for in that reign was granted to the monastery of St. John of Beverley a charter which makes mention of this functionary, but even with this evidence the Saxon origin of the office is doubted by some who would refer it to the early Norman period: English Encyc. of Law, tit. "Coroner."

Though the office may have been dignified, it was certainly onerous in King Alfred's times, for in the Mirror of Justices, in the chapter on abuses of the common law, at p. 243 of the edition quoted, there is the startling statement that King Alfred hanged forty-four Judges for their false judgments, "and further, he caused the Coroners and officers accessories to be apprehended." It would be interesting to know whether this incident in the life of the great king and law-giver, whose millenary has lately been celebrated, has been brought out. It casts a somewhat lurid light upon the times, and illustrates, if the Mirror is an authority to be believed, the drastic measures taken by King Alfred to ameliorate them.

This ancient official was honoured, together with the sheriffs (*vicecomes*), constables, and escheators, with a special reference in the Magna Charta, and his duties and liabilities were in a manner codified by our English Justinian, King Edward I., in his statute *De Officio Coronatoris*, 4 Edw. I., statute 2. This statute is freely translated in the first book published dealing exclusively with Coroners and their duties (*Umfreville's Lex Coronatoria*, 1761, at p. xli.), and also in Huband on Juries, at pp. 23 and 24.

Coroners, however, have not always lived up to the traditions of their honourable office, for we find it recited in the statute of Westminster I., 3 Edw. I., that "mean persons and

indiscreet now of late are commonly chosen to the office of Coroner." And it is by this statute that provision is made for election from amongst "the most wise and discreet knights," but 70 years later, by 28 Edw. III., the provision appears to have been modified by requiring that they be chosen from the most wise and discreet "persons."

That the provisions of these Acts were not treated as a dead letter at the time is evident from the fact that in the *Rotula Brevium*, 5 Edw. III., number 38, cited by Lord Coke at 2 Inst., p. 31, it is recorded that "a common merchant being chosen a Coroner, was removed, for he was communis mercator," and Coroner Grindon in 1822, p. xiv., and Sir John Jervis in 1829, in their works on Coroners, quote Chaucer to prove the dignity of the office. The quotation is as follows:—

"Lord and Sire

Full often times was knight of the Shire,
A schreve had been and a Coronour."

Though the statutes requiring that knights or other persons of consequence should alone be eligible had not been repealed when Hawkins published his *Pleas of the Crown* during the Chief Justiceship of Thomas Parker, afterwards Lord Macclesfield, in the early part of the eighteenth century (book 2, c. 9, s. 3), nor for long afterwards, it is apparent that it had been the practice then and for many years previously to appoint others, and we have evidence that evil-disposed or ignorant persons were by their stupidity or misdeeds bringing the office into ridicule and disrepute.

To support this statement a well-known passage from *Hamlet*, Act V., Scene 1, may be quoted, in which, in the grave-digger's dialogue, Shakespeare (himself no mean lawyer in spite of Portia's speech), makes one of his clowns say, "But is this law?" to which the other replies, "Ay, marry is't; Crowner's quest law."

A digression may here be permitted to remind ourselves of the statement more than once made, that this dialogue in which Ophelia's right to Christian burial, although *felo de se*, is under discussion, is intended to burlesque the once

famous case of *Hales v. Pettit* (Plowden, Butterworth's edition, 1816, at p. 253). This case, and the fine-spun arguments there advanced by the six learned serjeants-at-law, are well worth perusal, apart from the interest it possesses as the possible source from which Shakespeare drew material for his famous dialogue. The case is humourously discussed in Wallace on the Reporters (3rd ed., p. 102), a work full of interest and research.

Shakespeare makes at least one more reference to "Crowners" in *Twelfth Night*, Act 1, Scene V., while in some editions, Rosalind is heard to flout "the foolish Coroners," though most editions read "chroniclers," instead. Surely Rosalind could not be unkind enough to so describe those ancient functionaries, and no recent edition contains the legal term, except in a foot-note.

We have other and more substantial evidence that coroners were subject individually and collectively to criticism. To correct their findings the writ *melius inquirendum* was invented, and an account of its scope and operation can be found in Grindon, *Lex Coronatoria*, 1822, pp. 150 et seq. It is significant that it was chiefly required where the Coroner "male se gessit."

The old reports, too, contain many decisions in which Coroners have been brought to book for their misfeasance in office, and we find such cases as *Anonymous*, Ventris 352, in the reign of Charles II., where "the Court were informed that the party (the deceased) was non compos mentis, and that there had been an undue practice by the Coroner, of both which great proof was made, and upon that, it (the inquisition) was quashed."

Lord Holt, too, had a case before him in which he felt called upon to remark, "and though this Coroner be a weak and silly man, yet that is no reason why there should not be an information against him, for such men must learn they must not thrust themselves into offices:" *The King v. Stukeley*, 12 Mod. 493.

The statutes also furnish additional proof of the troubles into which Coroners seem to have been constantly falling,

while the current of criticism has been continued down to quite modern times.

Mr. Umfreville, one of their number, writing in 1761. says in his introduction to his *Lex Coronatoria*, after a number of remarks of a not altogether flattering character. that "to reduce that censure under which the office at present labours" he had undertaken his work. Despite his well-meant efforts the criticism continued down to a later day, for we find Lord Ellenborough in *Rex v. Justices of Kent*, in 1809. 11 East 229, remarking that there were many instances of Coroners having exercised their offices in the most vexatious manner by obtruding themselves into private families "to their great annoyance and discomfiture, without any pretence of the deceased having died otherwise than a natural death, which was highly illegal." Worse still, the Court there refused an order for the payment of the Coroner's fees.

As late as 1882 the Lord Chancellor, Lord Selborne, removed a Coroner for misbehaviour in office, which consisted this time in refusing to hold an inquest where a medical man had declined to give a certificate of the cause of death: *Re Hull*, 9 Q. B. D. 689, in which case a passage from Sir John Jervis's *Manual on Coroners* came in for some criticism. In 26 Sol. Jour. 149, and 44 L. T. Jour. 325, articles appear which also bring the current of criticism down to a comparatively recent time. Nevertheless the office flourishes, and no doubt will continue to exist for some time to come, and, limited as it is to inquiries into deaths occurring under suspicious circumstances, it must be admitted that sometimes, at least, it serves a most useful purpose.

It is shorn, however, of many of its ancient functions, as well as of most of its pristine dignity; but, while it cannot be of much practical benefit, it may still be of some historical interest to glance at some of the duties which these officers formerly performed.

If the *Mirror of Justices* is to be believed, they acted with the sheriffs in the time of King Alfred as guardians of the peace, and at a later day the same authority claims for them the right to inquire into burnings, on the authority of which in 1860 a coroner actually claimed the right to investigate

the origin of a fire. Most learned and entertaining arguments pro and con were advanced, and incidentally the Mirror came in for much criticism by Mellish and Fearnley in their argument. The Court held that no such right existed. The case, *Queen v. Herford*, 3 E. & E. 115, will prove exceedingly entertaining to those who possess a fondness for the early history of the law. In Ontario, by R. S. O. 1897 c. 275, Coroners are expressly required to inquire into the origin of fires, though they do not very frequently exercise this function.

Coroners also filled the duties of sheriffs where those officers would not act, and according to Hargrave and Butler's notes to Coke's Institutes, 17th ed., 161 A, it was at one time their duty to inquire into cases of failure to prosecute actions or of making a false claim, and to fine the offenders. Some people (not lawyers, of course) may regret that this ancient check to undue litigation has fallen into desuetude.

They at one time had not only the right to inquire into the causes of deaths, and to arrest and detain offenders, but to entertain the pleas of the Crown, and thereby proceed to trial and judgment of the offenders; but this right was withdrawn by Magna Charta, c. 18.

Other incidents of their ancient dignity and power, now departed, owing to changes in our law, were the forfeiture resulting from a finding of *felo de se* in the case of a suicide who died while of sound mind, and the fact that they were bound to ascertain the value of the instrument of death, which in their finding became *deodand* and the property of the king: see Bracton, Twiss's edition, vol. II., p. 287.

Deodands were known to the law until a comparatively recent date, and as late as 1822 all the precedents for inquisitions appearing at the end of Coroner Grindon's *Lex Coronatoria* wind up with a finding of the value and nature of the instrument of death.

A curious instance of the shifts resorted to by juries to save to the innocent owner the property which, because it caused death, would otherwise be forfeited, is the finding in a case of death from being run over by a dray, that the near

wheel caused the death, and that its value was 20 shillings. Objection was taken that only the near wheel was declared a deodand, when, upon the face of the inquisition, it appeared that the cart, horses, and loading were all moving *ad mortem* and properly deodand, but this objection was not sustained: Grindon, p. 277. This is not the only instance quoted, and these precedents form an eloquent plea for the abolition of deodand in such cases, which subsequently ensued.

Another ancient duty of the Coroner was inquiry into treasure trove, and Bracton suggests, as evidence of a man finding treasure properly belonging to the king, that his food or dress are more luxurious than his means permit. Strangely enough, a Coroner in England was called upon as late as 1893 to exercise this branch of his office. See *Attorney-General v. Moore*, [1893] 1 Ch. 676; while Huband on Juries, at p. 227, refers to two other comparatively modern cases: *Regina v. Thompson and Millett*, Leigh & Cave C. C. R. 313, and *The Queen v. Toole* (1867), Ir. Rep. 2 C. L. 36.

Bracton also says that Coroners shall inquire into blows and breaches of the peace, and shall measure the wound and apprehend the offender, or take bail for his appearance in case the wounds result in death: Twiss's edition, p. 289.

This enumeration of the ancient duties of a Coroner is not exhaustive, and Bracton, who is supposed to have furnished the model for the Statute de Officio Coronatoris, 4 Edw. I., mentions others, while the Act is itself merely declaratory of the common law, and it has been suggested that it was rather a code of rules framed for the guidance of Coroners than a solemn enactment: see Twiss's Introduction to Bracton, vol. II., p. lxi.

No wonder, therefore, that this officer, the subject of so much legislation, who performed duties bringing him into contact with all classes of people, frequently under most solemn circumstances, should have flourished notwithstanding adverse criticism, judicial and journalistic or literary; and it need not occasion much surprise that we find the word turned into a colloquialism in the form of Crowner and Crooner, and the officer himself is referred to by many authors,

from Chaucer to Tennyson, including Thomas Hardy, Captain Marryatt, and Shakespeare.* The only wonder is that the translators of the authorized version of the Bible did not use this title to describe some ancient Jewish or heathen functionary, as the word sheriff is used in the catalogue of the rulers of the provinces, appearing in the third chapter of Daniel.

Another incident of the office that must have popularized it greatly was the fact that in England it was in most instances elective. There are exceptions, such as the Grand Justiciar, afterwards Lord Chief Justice, who has been, *virtute officii*, sovereign Coroner since the time of William the Conqueror (Campbell's *Lives of the Chief Justices*, vol. I., p. 34), and the king appointed a Coroner within his verge, while others filled the position by right of some other office held under ancient charters, of which an instance is furnished in *Re Local Government Act, 1888*, Ex p. London County Council, [1892] 1 Q. B. 33, where the Steward of the Court of the Tower of London was *ex officio* Coroner within the liberties of the Tower, under charter granted by King James II., in 1687. Nevertheless the great majority of Coroners were elected, and in Fitzherbert, *Natura Brevium*, 75 K., we have the form of Writ of Election given us. The exercise of the franchise was not the every-day matter in ancient times that it is now, and we can imagine the interest that would be taken in a local contest for the position. As late as 1761, Umfreville, in his quaint Introduction, refers with much pride to the fact that he was chosen in preference to two other competitors after a stirring election, so that we may infer that the choice of Coroner was not a cut and dried affair, but a matter which aroused considerable interest in the community.

Are we further forced to infer that even from ancient times this office suffered from the baleful influence of local party politics? And that Coroners would not have been so

* Charles Dickens, so recently exalted by Mr. Swinburne, has, in "Bleak House," given a most minute account of a Coroner's inquest, indeed of two inquests. The summoning of the jury by "Mooney, the active and intelligent beadle," and the summing up of the Coroner to the jury, are delightful. It is not quite certain that a London street arab would call an inquest an "inkwich," but, be that as it may, "inkwich" has become quite as familiar as "Crownor's quest law."

frequently in disgrace, but for the fact that sinister influences were at work, which, owing to the demands of certain members of the electorate, to whom they owed their position, they were unable always to resist? No hint of such a thing is to be found in any work so far consulted, but it might furnish an argument to those who are not in favour of placing too many offices, more or less lucrative, in the gift of an unenlightened majority.

The system of election is still in force in England, but in Ontario it is an office in the gift of the Crown, which, being interpreted into modern parlance, means that it forms a portion of the patronage exercised by the party in power. No complaints of "undue practice," to quote Sir Peyton Ven-
tris's reports, have been made in Ontario. The office has been bestowed almost exclusively upon members of the medical profession, who have performed its functions, if not uniformly with great distinction to themselves, at least with entire propriety; but, to turn from the historical to the practical phase of the subject, it may be doubted whether, in the majority of cases that are now inquired into, any very useful purpose is served.

Where death occurs under suspicious circumstances, a view of the body is frequently essential, and a post mortem examination by medical men is usually not only useful but absolutely necessary; but it is a question whether the evidence tendered and taken down before a jury can be of much assistance in any future trial for murder or manslaughter. The same evidence could be equally well obtained by competent officers of the Crown, properly authorized to collect testimony, and, if necessary, enforce its production; while a verdict of the jury can at best serve no other purpose than would be just as well effected by the indictment of a grand jury, or a committal by a magistrate for trial.

It follows that the testimony produced at an inquest, where the presiding officer has no legal training, and cannot be expected to require a strict adherence to the ordinary rules of evidence, of which he must necessarily be but partially informed, cannot receive in courts of justice the weight that should properly be attached to testimony involving frequently

the issues of life and death. Juries, too, are not chosen with any great degree of care, and, as it is essential that a view should be had before the body is buried, and this necessitates haste, the panel is made up, as a rule, from bystanders, without much (if any) inquiry into their legal qualifications, and without the slightest regard to their mental or moral equipment. We find, therefore, that, nominally by virtue of the Coroner's warrant, but actually by the choice of some mere constable who serves the warrant upon such persons as he can find at hand, the curious onlooker, with a taste for gruesome sights, becomes quite often the judge of fact, called upon to decide a question, which, if it has any significance at all, is of the most vital importance, namely, the question of responsibility for the death of some fellow creature.

In country places witnesses, Coroner, and jurors probably live at a distance from the improvised court room, and another excuse for undue haste is furnished; so that at the best of times it is not to be wondered at that the finding of the jury, if more than a mere verdict of accidental death, is not reached in a manner that will impart much satisfaction to any of the parties concerned.

Too frequently inquests are held where death was palpably due to misadventure, and perhaps entirely owing to the carelessness of the deceased, or where it is the result of a deliberate determination to commit suicide, and as forfeiture of property is no longer an incident of *felo de se*, and it is not now usual to bury the corpse at cross roads with a stake driven through it, an inquest can only result in unnecessary publicity and consequent pain to the relatives of the deceased.

The feelings of the jury are also too often enlisted in favour of the deceased or his relatives. If the accident happened in the course of his employment, and he was in the service of a large corporation, the usual conflict between capital and labour, between property and poverty, is imported into the inquiry, and the possible carelessness and negligence of the workman is studiously overlooked by the jury, while any slight dereliction of duty on the part of the employer is seized upon to support a finding of negligence, sometimes under

circumstances that compel one to believe that the jury entertained the charitable intention of making a pecuniary settlement with the relatives of the deceased seem desirable and necessary, thereby tending to encourage fruitless litigation.

In workmen's accident cases, while there may be faults of system or negligence sufficient to justify a verdict for the claimants in a civil action, there is, as a rule, no pretence of foul play or criminal negligence, and juries, secure in the knowledge that their censure can do no practical harm, allow their general views against wealthy corporations, or their sympathy with the relatives, to outweigh the responsibilities of their office, thereby defeating the true end of the inquiry upon which they have entered, by obscuring, instead of explaining, the actual cause of death.

Probably from motives of sympathy, and on the principle *de mortuis nil nisi bonum*, laudable enough in themselves, but out of place in judicial proceedings, it is almost an impossibility to get the average Coroner's jury to state frankly that deceased came to his death because he was careless or drunk, and such a finding is carefully avoided, sometimes with rather ludicrous results. For instance, in one case which came under the writer's notice, it was shewn that deceased had been run over on a railway track in a lonely place at night. The evidence disclosed that he was seen drunk a few hours before, on the train, that he alighted in a state of intoxication at a small station nearest to the scene of the accident, and a flask, smelling of whisky, but empty, was found upon him. He had no duties to perform on the track, and was, under the Railway Act, a trespasser.

The necessity for an inquest under such circumstances was hardly apparent, but one was held, and upon the evidence being given, the jury, out of the kindness of their hearts, found that deceased came to his death "by carelessly sitting down upon the track," while the true cause of the accident was scrupulously ignored.

If some further reference to personal experience is permissible, it may be said that in the course of attendance upon many inquests in all parts of Ontario, only one case arose

where criminal proceedings were taken after a finding of a Coroner's jury, and in that instance while the street railway company whose car caused the death, was censured for negligence, the proceedings were by indictment taken regardless of the verdict. On the other hand, in no other case was it even sought to bring about a finding which would justify an indictment, and the jury, relieved from the responsibility of giving a verdict resulting in serious consequences to anyone, were free to dispense censure or make suggestions, as to them seemed best.

It must not be supposed that all inquests are open to criticism for anything that occurs at them; because, though sometimes levity is indulged in in the jury room, which is unseemly, having regard to the distressing nature of the inquiry, Coroners always, and, with some exceptions, juries, proceed to the discharge of their duties with becoming decorum and zeal. This does not, however, detract from the weight of the argument here submitted, that in the majority of cases the whole proceeding is entirely unnecessary.

Such inquiries may, of course, be useful in detecting carelessness and faults of system, or in clearing up doubts where there are suspicious circumstances; but while one would regret the departure of such an honourable and historical office, it is a matter worthy of consideration whether the useful functions still performed by a Coroner's jury might not be as satisfactorily fulfilled by some less cumbersome and uncertain machinery.

The argument that this institution having found a place not only in our laws, but in our literature, must still serve some useful purpose, is at least weakened when we consider the changed conditions of our country and our laws. In the troublous times of the Saxons, it was indeed the part of wise and sound statesmanship to leave the detection of violence and the vindication of the law to an officer and the people residing in the neighbourhood of the offence, and while, as we have seen, a Coroner was empowered until Magna Charta to entertain appeals of felony, it was proper that a jury should be summoned, so that a man might not be sentenced save by the judgment of his peers, and even after the times became more settled, and the authority of the king and

his Justices was everywhere acknowledged, and after the power to try offences was taken away, a finding of murder or *felo de se* resulted in the forfeiture of a felon's property and of the instrument of death as a deodand; so that the knowledge that no such finding could ensue except upon a verdict of at least twelve men, presided over by an elected officer, instead of being the result of an investigation by some official of the Crown, who, on his master's behalf, might be suspected of an interest in procuring a forfeiture, must have created a feeling of greater security. It may be suggested with some confidence that it was considerations of this nature which gave to the Court of the Coroner its strong hold upon the people, but its *raison d'être* having been removed, the desirability of its continuance is no longer so apparent.

While the new and strange nomenclature adopted by Jeremy Bentham rendered his suggested reforms in the law distasteful to a people so conservative as the Anglo-Saxon, quite as much as the reforms themselves, and while we might not choose to classify the duties now performed by Coroners and their juries under such a startling title as that of the "Death recordation function," suggested by him (vol. ix., p. 628, ed. of 1843), the scheme there drawn up by him is worthy of due consideration, and the time may yet come when we shall be called upon to try and remodel the procedure now in vogue for the discovery of the cause of death where mysterious or suspicious circumstances surround it. It may be mentioned that a comparatively recent instance has occurred where a Coroner's jury, after acquitting a member of a new cult (an osteopath) of any intentional blame, felt called upon to pronounce judgment in sweeping terms of censure upon his tenets; and while we might not all willingly adopt or submit to the treatment they uphold, it is extremely doubtful whether the necessarily hasty judgment of a few men chosen almost at haphazard can serve any useful purpose. As was wittily suggested by the *Toronto Daily Star* shortly after the verdict, "It is a pity that this jury was allowed to disband without expressing its views on free trade, protection, communication with Mars, perpetual motion, and other vexed questions."

PUBLICATION OF LIBEL THROUGH EMPLOYEES.

Publication is the communication of the defamatory words to some third person (Odgers p. 151), and it is an elementary and well known proposition of law that there is no libel without publication, but what is actionable publication under one set of circumstances has been held not to be such in another almost identical set of circumstances.

Under what circumstances, then, can a libellous communication be made to an employee without incurring the ordinary consequences of publication? That a communication of a libel to his clerk or stenographer, by a person acting on behalf of a corporation, company, or association, or by a solicitor acting for a client, is not an actionable publication, while a like communication by a merchant or other individual acting for himself and on his own behalf to his clerks, quite to the contrary, is an actionable publication, is the result of a rather fine distinction drawn between the two classes of cases.

We shall examine as briefly as possible a few of the more recent authorities, and endeavour to make appear from these authorities the reason, as explained by the Judges themselves, for this distinction. It must be admitted, however, that the authorities are somewhat conflicting, and the subject one by no means free from doubt and difficulty.

It is said of Lord Esher that when a precedent stood in his way he did not hesitate to pass it by. "There is no such thing," he said, "as a rule which says that a Court shall determine that to be true which the Court believes and knows to be untrue." One would almost be inclined to think, even after a careful consideration of the case, that he had applied this doctrine in giving judgment in *Boxsius v. Goblet*, [1894] 1 Q. B. 842, just three years after deciding *Pullman v. Hill*, [1891] 1 Q. B. 524. The two cases present such a sharp contrast as to appear to be irreconcilable, but the reason

for the distinction as given by the learned Judges who disposed of the appeals, seems, at all events, perfectly consistent to the judicial mind, for it has been specially considered and approved of in a recent American decision: *Lambrill v. Schooley* (Md.), 52 L. R. A. 87.

Pullman v. Hill was an action brought by R. & J. Pullman, members of the firm of Pullman & Co., against Walter Hill & Co., Limited, advertising agents, for the libel contained in a letter accusing the plaintiffs of obtaining money under false pretences. The letter was dictated by defendants' managing director to a shorthand clerk, who transcribed it on the typewriter. The managing director then signed the letter, and, having been press-copied by an office boy, it was sent by post in an envelope addressed to Messrs. Pullman & Co. The letter was opened by a clerk of the plaintiffs' firm in the ordinary way of business, and it was read by two other clerks. The defendants denied publication and pleaded privilege. The Court held that there was a publication to which no privilege attached. *Esher, M.R.*, p. 527, says: "If the writer of a letter shews it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is shewing it to a third person; the writer cannot say to the person to whom the letter is addressed: 'I have shewn it to you and to no one else.' I cannot, therefore, feel any doubt that if the writer of a letter shews it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the typewriter." And he held that because the typewriter and clerks had no interest in the communication it was not privileged. It was urged by counsel that the necessities of business methods required the employment of clerks, and that the decision would cause inconvenience and hardship in a merchant's office, but by way of answer to this contention the same learned Judge says, on p. 529: "I do not think that the necessities or the luxuries of business can alter the law of England." *Lopes, L.J.*, says it is not

in the usual course of a merchant's business to write defamatory letters, and therefore there is nothing in this contention; and Kay, L.J., at p. 531, is of the same opinion: "I have never heard of any authority for such a proposition. The consequence of such an alteration in the law of libel would be this—that any merchant or any solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of business." The learned Judge could not have intended his reference to a solicitor in the sense of his acting for a client, for while acting in that capacity a solicitor's letter is privileged: *Baker v. Carrick*, [1894] 1 Q. B. 838; *Boxsius v. Goblet*, *ib.* 842. This case has been followed by the Maryland Court in *Lambrill v. Schooley*, above referred to, and also by Meredith, C.J., in *Puterbaugh v. Gold Medal Co.*, 1 O. W. R. 250. In the latter case, the learned Chief Justice, in the circumstances, felt himself bound by and applied the principle of the *Pullman* case, and held the principle of the other cases inapplicable.

Boxsius v. Goblet was apparently somewhat similar to *Pullman v. Hill*, but in reality and results an entirely different case. Mrs. Buderus owed Messrs. Goblet Frères a wine bill. Wrensted & Sharp, their solicitors, wrote plaintiff, thinking she was identical with Mrs. Buderus, a defamatory letter demanding payment. This letter was dictated to and written by a clerk in the solicitors' office, and was copied by another clerk, and sent to plaintiff. The plaintiff sued Goblet Frères and their solicitors for libel. The Court, composed of Esher, M.R., Lopes, L.J., and Davey, L.J., held that this was a privileged publication, and distinguished *Pullman v. Hill* on the ground that it was not in the ordinary course of a merchant's business to write defamatory letters, but it was so in the case of a solicitor on behalf of his client, and it was also necessary for a solicitor in the conduct of his business to employ clerks; that the communication, if made by the solicitor direct to plaintiff, would have been privileged; and that publication to his clerks was necessary and usual in the discharge of his duty to his client, and was made in the interest of the client. In other words, that the merchant is

writing a libel out of the ordinary course of his business, and publishes to his clerks at his risk, whereas the solicitor is not writing a libel out of his ordinary business, and to perform his duty to his client has to employ clerks. There would be privilege if the client in this case himself wrote the libellous matter; therefore the solicitor is privileged, in the absence of malice, and must employ clerks to carry on his business.

It has been held by the New York Court of Appeals that if the manager of a corporation dictates a libellous letter on the business of the corporation to his private stenographer, both persons being employed by the company, and engaged in the performance of the duties which their respective employments require, the stenographer will not be regarded as a third person in the sense that the dictation to her, or the subsequent reading of the letter by her, could be regarded as a publication by the corporation: *Owen v. Ogilvie*, 32 N. Y. App. Div. 465.

It is difficult to say to which class of cases *Lawless v. Anglo-Egyptian Cotton and Oil Co.* (1869), L. R. 4 Q. B. 262, belongs. The plaintiff there was manager of the defendant company. The defendants had a report of their trade, finances, and affairs printed, containing the statement complained of. It was held, there being no malice and the shareholders being interested in the report, that the communication was privileged, and that to print the report was a necessary and reasonable method of communicating it to the shareholders. *Hannen, J.*, on p. 269, says: "It is obvious that a company itself cannot communicate by writing. It must communicate by the aid of some person to whom it deposes the duty of making the communication, and if the argument of the plaintiff's counsel were pushed to its logical conclusion it would amount to this, that a company must employ one of the shareholders to write, or if he be a printer to print, the reports which they wish to communicate to the other shareholders. I think that this mode of communication might in some circumstances be a fact to go to the jury as evidence of express malice; but it was not suggested that the shareholders had departed in any

way from what was the usual course, having regard to the exigencies of business and the necessary means of making known that which they think ought to be made known to the shareholders at large." A Divisional Court in Ontario followed this decision in *Harper v. Hamilton Retail Grocers' Association*, 32 O. R. 295. The communication complained of there was prepared by the defendant association's secretary, and copied by a person occasionally employed by him for that purpose. The Court held, affirming the ruling of Street, J., the trial Judge, that, as the communication to the members was privileged, so was the communication to the copyist, as her employment was a reasonable means of communicating to the other members. These two cases approach very nearly in principle to *Boxsius v. Goblet*, so that it may be said that the decisions can all be reconciled if properly classed.

We would therefore submit as a fair conclusion to be drawn from these rather conflicting decisions, that a person may not himself employ his clerks to send a libellous communication, if in so doing the matter is communicated to the clerks, but one who is properly acting for another may employ his clerks to assist in transmitting the libel.

JOHN G. FARMER.

RECENT CASES FROM THE TIMES REPORTS.*

Banking.]—In *Bank of New South Wales v. Goulburn Valley Butter Factory*, 18 T. L. R. 735, bankers were held to have been justified in transferring by cheques in proper form handed to them by a company's manager balances at the credit of the company's account with them, to cover balances at the debit of the account of the company's manager, the banker knowing that the company and the manager had large financial transactions, and not knowing, as was the case, that the company was not indebted to the manager.

Contract.]—The principle recognized by the Court of Appeal in *Tredegar Iron Co. v. Hawthorn*, 18 T. L. R. 716, is that one party to a contract cannot by a repudiation of it before the time for performance force the other party to the contract to treat it as then broken, and thus to cast upon that party the obligation to minimize the damages. On the contrary, the other party to the contract is, notwithstanding the repudiation, entitled to wait till the time fixed for performance, and to recover the damages suffered by the default at that time.

Costs.]—*Ridout v. Green*, 18 T. L. R. 709, was an action for illegal distress against four defendants, the result of which made the awarding of costs a matter of some nicety. One defendant failed completely, and against him the plaintiff had judgment with costs; one defendant succeeded completely, and was given his costs against the plaintiff; the other two defendants failed on the issues raised by them, but the damages awarded against them by the jury were less than sums paid into Court by them with a denial of liability; and the plaintiff was given his costs of the action against them up to the time of payment in, and his subsequent costs of the

*Including the cases in No. 32, vol. 18, week ending July 23rd, 1902.

issues on which they failed, while they were given as against him their subsequent costs of the action.

Covenant.]—The plaintiffs in *Holloway Brothers v. Hill*, 18 T. L. R. 745, had leased from the owner thereof for a specific business three of four shops, the lessor covenanting with them, for himself and his assigns, not to use the fourth shop for business of the same character. This covenant was held to be binding upon a subsequent lessee of the fourth shop, and he was restrained from carrying on a business of the prohibited kind. Many of the authorities are considered.

Criminal Law.]—The right of a prisoner, even though defended by counsel, to make an unsworn statement to the jury, has not, it was held in *Rex v. Pope*, 18 T. L. R. 717, been indirectly put an end to by the Criminal Evidence Act, 1898, which allows him to give evidence. Compare the *Canada Evidence Act*, 1893, 56 V. c. 31, and the amendments thereto.

Dedication.]—*Great Western R. W. Co. v. Solihull Rural District Council*, 18 T. L. R. 707, is based upon the principle—appealed to in *Guthrie v. Canadian Pacific R. W. Co.*, 27 A. R. 64, 31 S. C. R. 155, upon a question of prescription—that a statutory body called into existence for the exercise of powers in which the public have an interest, cannot dedicate to the public a right of way over its property, if the user of the right of way will either directly, or indirectly, by causing expenditure for repairs, be inconsistent with the exercise of the statutory powers and duties.

Sequestration.]—It was held in *In re Pollard, Pollard v. Pollard*, 18 T. L. R. 717, that mere notice of a writ of sequestration does not bind a chose in action in the hands of a third party, and therefore that bankers were not liable to pay to the sequestrators an amount which the bankers, after notice of the issue of the writ, had allowed the defendant to draw from his account with them.

Solicitor's Lien.]—The judgment of the Divisional Court in *Redfern and Son v. Rosenthal Brothers*, 17 T. L. R. 638,

noted 21 C. L. T. 416, was reversed by the Court of Appeal. 18 T. L. R. 718, on the short ground that when the document in question came into the solicitor's possession it had ceased to be a negotiable instrument, so that therefore the question whether they as lien-holders could have any better or higher right than their client did not arise.

Third Party.]—When the defendant counterclaims against the plaintiff, the latter may, by a third party notice, bring in a third party, and claim indemnity in respect of the counterclaim: *Levi v. Anglo-Continental Gold Reefs*, 18 T. L. R. 720.

Trade Name.]—*Worcester Royal Porcelain Co. v. Locke & Co.* and *Worcester Royal Porcelain Co. v. Rhodes*, 18 T. L. R. 712, are trade name cases of more than usual legal and intrinsic interest, the right to the exclusive use of the geographical term "Worcester," used by the plaintiffs and their predecessors for more than one hundred and fifty years to distinguish china made by them, being upheld.

Trust.]—In *In re Tufnell*, *Byng v. Tufnell*, 18 T. L. R. 705, the Trustee Limitation Act was successfully invoked by a trustee who had allowed the trust funds to remain in the hands of a firm of solicitors, one of whom was his co-trustee, with the result that they were misappropriated. Trust property is not "still retained by the trustee," within the meaning of the Act—R. S. O. 1897 c. 129, s. 32—where it has not been paid over by the trustee, though technically it is, under those circumstances, still in his hands.

Vendor and Purchaser.]—The judgment in *Fleming v. Loe*, 17 T. L. R. 757, noted 21 C. L. T. 451, allowing a purchaser to recover from an assignee of the vendor moneys expended upon the property in question, was reversed: 18 T. L. R. 736.

Will.]—In *In the Goods of Hutchison*, 18 T. L. R. 706, evidence was admitted to shew that certain bequests written upon part of one side of a sheet of paper were intended to form part of a will written on the other side and signed there.

—Under the will in question in *In re Wood, Wood v. Wood*, 18 T. L. R. 710, the Court of Appeal held that a gift over to the next of kin of a named illegitimate daughter of the testator went to those persons who would have been her next of kin if legitimate, treating her thus for the purpose of the will as legitimate, the testator having referred to and dealt with his legitimate and illegitimate issue as his "children."—In *In re Delaney*, 18 T. L. R. 741, gifts to named persons, who in fact held certain offices respectively in certain religious organizations, were held to be gifts to them in their official capacity, the testator having, in most instances, added after the legatee's name the words "or his successor," and the organizations existing, as was held, for charitable purposes, the gifts failed.—*Leonard v. Leonard*, 18 T. L. R. 747, afforded, as Mr. Justice Gorell Barnes said in delivering judgment, "a remarkable illustration of the dangers of altering wills when once they had been made." The testator duly executed a will written on five sheets of paper. Subsequently, on two or three occasions, he took sheets from this will, altered the provisions contained therein, had the sheets re-engrossed, then on each occasion re-executed these sheets in the presence of duly attesting witnesses, and re-attached the sheets to the will. It was held that the whole will had been destroyed.

EDITORIAL REVIEW.

Contempt of Court in British Columbia.

The lay press all over Canada has been much excited over the committal of a Mr. McAdams, a British Columbia journalist, for contempt of Court. The incident was probably welcomed as an agreeable excitement and a relief to the monotony of the dull season. We have not observed that anyone has endeavoured to shew that the man was not guilty of contempt of Court. Indeed, he repeated his contempt in the face of the Court. Fault seems to have been found with the sentence of nine months' imprisonment, and there was a great outcry because the journalist was not tried by a jury. There was, however, nothing for a jury to try, for the charge was not denied; and it seems to be forgotten that even when an accused person is tried by a jury, the punishment, if he is found guilty, is awarded by the Court. Ample opportunity was apparently given to the editor to purge his contempt before he was committed; but he did not do so until he had actually seen the inside of the gaol, when he hastened to make an apology, which was promptly accepted by the Court, and his release ordered. The proceedings really seem to have presented no unusual features. Mr. McAdams made general charges of corruption against the Bench, well calculated, if believed, to shake confidence in the administration of justice in British Columbia, but did not condescend to particulars. It is difficult to suppose that he really thought that the statements he made were in the public interest; he probably wrote with a view to making a reputation for what is sometimes called plain speaking, with the object of gaining notoriety and increasing the sale of his newspaper. It would have been wiser perhaps for the Judges to have ignored the offence, but, the man being before them in admitted contempt, we fail to see what fault can justly be found with the award of punishment, or with the procedure adopted. The offence was certainly a serious one. Not all the editors are in sympathy

with their brother journalist. "The Province," a Vancouver paper, says that the sentence passed upon Mr. McAdams was no more than he deserved; that he had "consistently courted the admiration of that section of the populace given to applauding newspaper articles which go beyond the bounds of the conventional on moral questions, and which are prone to bid defiance, in a mere spirit of bravado, to all forms of constituted authority."

Now Rules of Court.

The following Rules have been made by the Supreme Court of Judicature for Ontario during the first half of the present year.

(29th March, 1902.)

1235. All proceedings under the Mechanics' Lien Act, R. S. O. c. 153, shall be legibly indorsed as follows:

"In the matter of the Mechanics' Lien Act—

"Between A. B.,

Plaintiff,

and

C. D.,

Defendant."

(10th May, 1902.)

1236. Rule 56 is hereby further amended by adding thereto the following sub-section:—

(5) From and after the first day of April, 1902, the interest to be paid on any suitor's account which has been heretofore allowed at four per cent. per annum, is to be three and one-half per cent. per annum; but this Rule is not to affect any payments of interest at four per cent. already made on such accounts.

1237. The Finance Committee may, subject to the approval of the Attorney-General for Ontario being first obtained, arrange for the investment of any moneys in Court in first mortgages on lands in the Province of Manitoba.

(7th June, 1902.)

1238. The costs of and incidental to proceedings in the Court of Appeal for Ontario and in the High Court of Justice for Ontario and in any Divisional Court thereof, for or in

relation to the quashing of convictions or orders, shall be in the discretion of the Court, and the Court shall have power to determine and direct by whom and to what extent the same shall be paid, whether the conviction or order is affirmed or quashed in whole or in part.

1239. Consolidated Rule 117 is amended by adding to the proceedings and matters which it is thereby provided shall be heard and determined before the Divisional Courts, the following:

Proceedings for or in relation to the quashing of convictions or orders.

1240. Consolidated Rules 355 and 356 shall not extend or apply to proceedings for or in relation to the quashing of convictions or orders.

1241. Consolidated Rule 1130 shall apply to the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders whether the conviction or order is affirmed or quashed in whole or in part.

The last four Rules were, no doubt, made in consequence of the decisions in *Rex v. Meehan*, 3 O. L. R. 361, 22 Occ. N. 133, and *Rex v. Bennett*, 22 Occ. N. 290.

The Ontario Supreme Court.

The Court of Appeal and High Court will be weakened for some months by the absence on leave on account of ill health of the Chief Justice of Ontario and Justices Ferguson and Robertson. The High Court sittings for the latter half of the present year have been arranged for eight Judges instead of ten, as regards trials as well as Divisional Court and Weekly Court sessions. There will be only one week's sittings of a Divisional Court in September. Rumour has it that all the Judges named will retire from the Bench at the end of their respective periods of leave. Mr. Justice Robertson's resignation has of course been expected; his malady is understood not to be susceptible of cure, and while it does not render him unfit for some kinds of work or for the enjoyment of life, it incapacitates him for judicial service. It is to be hoped that Chief Justice Armour and Judge Ferguson

will find themselves so much benefited by rest and change that they will be able to resume their duties sooner or later. The loss of both would be a severe blow to the Bench.

New Dominion King's Counsel.

The following members of the Bar of Quebec have been appointed King's Counsel by the Governor-General in council:—The Hon. H. G. Carroll, Solicitor-General; Mr. J. A. C. Madore, M.P. for Hochelaga.

Mr. E. R. Cameron, of the Ontario Bar, Registrar of the Supreme Court of Canada, has also been appointed a King's Counsel for the Dominion.

Authority of Counsel to Compromise.

The decision of the English Court of Appeal in *Neale v. Lady Gordon Lennox*, [1902] 1 K. B. 838, to which attention was drawn in a short article in the August number (ante 292), has since been reversed by the House of Lords, who unanimously laid it down that where the authority of counsel is, in fact, limited, although that limitation is not communicated to the other side, the client will not be bound by any terms of compromise entered into exceeding these limitations. The Lord Chancellor prefaced his remarks by stating that he did not propose to go through the cases which had been cited, as the appeal involved a higher principle than the mere question whether a bargain made in the course of an action was or was not within the discretion of counsel. "To suggest that a court of justice was so completely bound by the action of counsel as to be deprived of the opportunity of doing justice is a most extraordinary proposition. When a final contract has been made between the parties to an action, it is conclusive, and there is no policy of the law to prevent its being carried out. But when parties have sought the intervention of the Court, and one of them has given a consent on certain conditions to withdrawal of matters at issue from the Court, to contend that counsel's assent without the conditions is to be conclusive, is an attempt to bind the Court itself and prevent its doing full justice to the parties." When the full text of the judgment is published, the subject will be referred to again.

Damages for Nervous Shock.

In Scotland a somewhat different view has been taken from that which prevailed in the Court of Appeal for Ontario in *Henderson v. Canada Atlantic R. W. Co.*, 25 A. R. 437. Dr. Henderson's ground of action was that, by reason of negligence on the part of the defendants, his horses were frightened by an engine and ran away and upset him out of his carriage, thereby causing him injury. The jury found against the defendants. They also found that the injury to the plaintiff was partly attributable to "mental shock" and partly to shock caused by a blow, and they separated the damages upon these two heads. In a recent Scottish case—*Cooper v. Caledonian R. W. Co.*, 9 Sc. L. T. Rep. 373, 10 ib. 104—damages were sought to be recovered from the defendants in respect of illness caused by a nervous shock sustained by the plaintiff, a passenger, through the defendants' negligence, there having been no immediate bodily hurt or even contact. In the Ontario case the Court of Appeal held that the damages assessed for mental shock were not recoverable. In the Scots appellate court (Second Division) it was held (apparently on demurrer) that the damage claimed for was not too remote and that the question as to the reasonableness or unreasonableness of the passenger's terror was for a jury. The case was sent to trial accordingly, and the plaintiff recovered £100 damages. In England the point as to remoteness is considered by Sir F. Pollock (*Torts*, pp. 50-52) to be doubtful upon the authorities. The Ontario Court followed *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, feeling bound by it as a decision of the Privy Council, though it has not always been accepted in England. We venture to believe that the law will eventually be settled as now laid down by the Second Division in Scotland.

Mr. Justice Holmes.

Oliver Wendell Holmes the younger, a distinguished son of a distinguished sire, has replaced Mr. Justice Horace Gray in the Supreme Court of the United States. Judge Holmes is sixty-one, "in the ripe prime of his powers physically and mentally," as the *Boston Post* remarks, and he comes to the

Supreme Court, as did Judge Gray, from the Chief Justiceship of Massachusetts. He served with conspicuous gallantry in the civil war, was wounded in the neck at Antietam, in the breast at Ball's Bluff, and in the foot at Fredericksburg. Dr. Holmes's little volume on "My Hunt after the Captain" tells of his long search over battle fields and through hospitals, after Antietam, in quest of his wounded boy.

The Philadelphia *Press* has the following appreciation of the newly elevated jurist:—

"Judge Holmes may be said to have made the common law known to itself. Beyond any other jurist, in this country or in England, he has made plain the development of the common law. Under his guidance and explanation contradictions, anachronisms, and infelicities have taken their place as part of a harmonious and continuous growth in which statute and judge, legislature and court, are carried along unconsciously, part of an organic life greater than their own.

"The learning, the historical judgment, the penetrating criticism, and the sense of style which Judge Holmes has displayed in this task place him apart. His gifts are all greatly needed in the Federal Supreme Court. It is to-day an able, but not a learned bench, and while its members can console themselves by remembering that the greatest of American judges and one of the greatest in all time was not erudite, still it does not follow that a Judge without learning is on the way to become another Marshall. A great court like that at Washington demands great learning. Justice it can dispense without this, but if it is to add to law as well as to decisions, such a court must and should have among its narrow number some one man like Judge Holmes, to whom all the vast past of law is a living and very vital knowledge."

The Philippine Law Journal.

Some numbers of this very enterprising journal, published at Manila, have been sent to the editor. Naturally, it is not like any other law journal. In the first place, it is a daily; in the second place, it is printed on a broad sheet like an ordinary newspaper; and in the third, it is bi-lingual, Spanish and English. The price is five cents in gold for a single copy,

and the subscription price for a month is one dollar. It contains Court calendars, General Rules of Court, a summary of the law, names of the Judges of the Supreme Court of the Philippine Islands, a list of attorneys, and much other useful information; but, at least in the specimen copies sent us, no learned expositions of the law. About 250 persons seem to have been admitted to practise as attorneys in the Philippine Islands, most of them bearing Spanish names, with, however, a considerable sprinkling of Anglo-Saxons. This publication will, no doubt, be of assistance to those engaged in the task of introducing law and order, as understood in English-speaking countries, into the Philippines.

Moonshine Law Lexicon.

The following definitions are from the "Law Times" of the 19th July:—

A judgeship is an old-age pension for a barrister who has no practice at the Bar and a near relative in the Cabinet.

A joke (made by a Judge) is that in which there is no point.

A summing-up is length without breadth.

A litigant is a *rara avis*.

A brief is a much rarer *avis*.

The common law has nothing to do with common sense.

A law student is an undergraduate who comes up to town for a couple of nights every term.

A prisoner is a man who is now allowed to convict himself out of his own mouth.

A lunatic is a person who commits a carefully thought out murder.

A Pontius Pilate is the Judge who sentences that person to death.

A murderer is the Home Secretary who allows the law of the land to take its course.

A theatre is not a law court.

A verdict is the opinion of twelve men on a subject which they don't understand.

Bankruptcy is the result of employing our legal system for righting wrongs.

Jurisprudence is the prudence shown by those jurymen who provide themselves with flasks.

Recent American Decisions.

Bank.—The death of a bank depositor is held, in *Raesser v. National Exch. Bank* (Wis.), 56 L. R. A. 174, not to revoke the authority of the bank to pay a cheque which he has given for a valuable consideration under circumstances which make it irrevocable as to the assignee where the cheque is deemed to work an assignment *pro tanto* of the fund on deposit.

A bank to which is presented a cheque for a greater sum than the drawer has on deposit, after it has notice of the drawer's death, and which thereupon refuses payment and protests the cheque, is held, in *Roden v. State Nat. Bank* (Ky.), 56 L. R. A. 178, to have no right to subsequently apply the deposit upon the cheque.

Evidence.—Account books of one charged with having obtained money by false pretences are held, in *Blum v. State* (Md.), 56 L. R. A. 322, not to be admissible in evidence against him, under the rule protecting him from giving evidence against himself, although they have been voluntarily turned over to receivers appointed by the Court in a proceeding to which the accused consented.

Husband and Wife.—A husband who refuses to permit his wife to live with him is held, in *Kirk v. Chinstrand* (Minn.), 56 L. R. A. 333, to be chargeable with her maintenance and support, and not to be relieved from liability by shewing that he had procured board and lodging for his wife with a person with whom she refused to live, since she has the right to select her own home.

Insurance.—The words "total loss" in a fire insurance policy are held, in *Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co.* (Minn.), 56 L. R. A. 108, when applied to a building, to mean total destruction as a building, and there can be no total loss so long as a remnant of the structure left standing upon the foundation is reasonably and safely adapted for use as a basis upon which to restore the building to the condition in which it was immediately before the fire.

A provision in an insurance policy, that if a policy holder, in case of forfeiture for failure to pay assessments, shall afterward pay the amount due from him, the policy "shall be holding from the date of the receipt of said amount," is

held, in *Johnston v. Phelps County Farmers' Mut. Ins. Co.* (Neb.), 56 L. R. A. 127, to prevent receipt of the amount of the delinquent assessment from operating as a waiver of the forfeiture, if at the time of such receipt any of the insured property remains in existence to which the revived insurance may attach.

A condition in a policy insuring a building against loss or damage by fire, which purports to give the insurer the option to rebuild in case of total loss, is held, in *Milwaukee Mechanics' Ins. Co. v. Russell* (Ohio), 56 L. R. A. 159, to be repugnant to a statute providing that in case of total loss the whole amount mentioned in the policy shall be paid.

The owner of a life insurance policy having agreed to pay a city for support furnished him out of its poor fund, the city is held, in *McQuillan v. Mutual Reserve Fund Life Asso.* (Wis.), 56 L. R. A. 233, to be his creditor for the value of the support furnished, within the meaning of a clause in the policy providing that, in case of its assignment to a creditor, it shall be valid only to the amount of his claim.

An injury caused by a fall from the steps of a moving train is held, in *Smith v. Ætna L. Ins. Co.* (Iowa), 56 L. R. A. 271, to be covered by an accident insurance policy if the injured person did not intend to alight, but inadvertently did so by attempting to descend to another step which he erroneously supposed was below the one on which he was standing.

Landlord and Tenant.—The owner of an apartment house who rents the apartments and retains control of the common stairways, is held, in *McGinley v. Alliance Trust Co.* (Mo.), 56 L. R. A. 334, to be liable for injuries to a member of a tenant's family caused by a stair railing which was defectively constructed, or had been negligently permitted to become out of repair.

Libel.—Statements made by defendant in an action for libel, not voluntarily, but in answer to inquiries made of him by interested persons touching defamatory remarks made by other persons, are held, in *Buisson v. Huard* (Iowa), 56 L. R. A. 296, to be within the protection of the rule as to privileged communications.

Negligence.—A druggist who sells phosphorus to a customer without instruction as to the safe method of handling it is held, in *Gibson v. Torbert* (Iowa), 56 L. R. A. 98, not to be, for that reason, liable for injuries caused thereby to the customer, where the latter has reached the age of discretion, and there is nothing to indicate that he cannot safely be trusted with the substance.

Perpetuity.—A devise to trustees for accumulation for a period of thirty years, when the property is to be distributed according to directions as to possible conditions existing at that time, is held, in *Andrews v. Lincoln* (Me.), 56 L. R. A. 103, to be void as creating an unlawful perpetuity, although the trustees are empowered to appropriate portions of the income to the support of testator's son and his wife and the education of the grandchildren.

Railway—Carriage of Goods.—A common carrier is held, in *Ullman v. Chicago & N. W. R. Co.* (Wis.), 56 L. R. A. 246, to have the right, in consideration of a special freight rate, or other valuable consideration, to secure entire exemption from liability as an insurer for loss of or damage to property received from a shipper for transportation, not caused by negligence or wilful misfeasance.

Railway—Passengers.—A railway company is held, in *Scofield v. Pennsylvania Co.* (C. C. A. 6th C.), 56 L. R. A. 224, not to be able to absolve itself from its duty to carry a passenger to his destination by taking up his ticket, so as to require him to sue for the breach of the contract thereby consummated, and prevent his suing for the tort in case he is subsequently ejected from the train.

Revenue.—Intent to defraud the revenue is held, in *United States v. One Pearl Necklace* (C. C. A. 2d C.), 56 L. R. A. 130, not to be necessary to work a forfeiture of articles omitted by a passenger from the statement of his baggage, required by statute, such omission alone being sufficient. A note to this case reviews the authorities on forfeiture of dutiable articles in passengers' baggage.

BOOK REVIEWS.

Minton-Senhouse's Accidents to Workmen.—Being a treatise on the Employers' Liability Act, Lord Campbell's Acts, the Workmen's Compensation Acts, and matters relating thereto. Second edition, by B. M. Minton-Senhouse, of the Inner Temple, Barrister-at-law. London: Sweet & Maxwell, Limited: 1902.

Mr. Minton-Senhouse has in this work combined his former treatise on the Employers' Liability Act and Lord Campbell's Acts with his later treatise on the Workmen's Compensation Acts. The portion of the book relating to the Employers' Liability Act and Lord Campbell's Acts is that which will be found of most utility in Ontario. The former edition of these Acts was distinguished by care and lucidity, and the correctness of the author's opinions as to the matters in doubt have generally been borne out by subsequent judicial decisions; a new edition of the work will, therefore, be gladly welcomed by those who have had the advantage of using the former edition—especially as litigation arising out of similar legislation is fairly active.

This treatise, like the former, is practically a commentary on the statutes above referred to, in which most of the important decisions have been collected. The editor has printed the words of the statute in large italics, and after each section his notes follow in Roman type, preceded by catch words printed in antique type, which enables the reader to see at a glance the nature of the subject discussed in each note.

This mode of dealing with a statute has some advantages, as it enables the reader to gather the meaning of the statute, as interpreted by legal decisions; at the same time it precludes the author from dealing with the law in anything like a logical way, as he has necessarily to follow the meanderings of the statute, which, in the case of the Employers' Liability

Act, delays the definition of words till one of the closing sections—an arrangement which would hardly be followed in an independent treatise.

Two very useful discussions are to be found in the notes, one on the maxim "*volenti non fit injuria*," and the other on the doctrine of "common employment," in which the law is carefully summarised. "Contributory negligence," with its various limitations, as bearing on the subject, is also carefully explained. We notice that the author adopts the doctrine of Lord Selborne in *Seward v. The Vera Cruz* (1884), 10 App. Cas. 59, to the effect that Lord Campbell's Act creates a new cause of action distinct altogether from any claim the deceased person may have had; but we are inclined to think that in a text book of this kind it might be well to have noticed that, although Lord Blackburn concurred, he had nevertheless given a different opinion in *Read v. Great Eastern R. W. Co.*, L. R. 3 Q. B. 555. No Canadian cases are referred to, or we should expect on the same point to see a reference to *Canadian Pacific R. W. Co. v. Robinson*, 19 S. C. R. 322; *Walkerton v. Erdman*, 28 S. C. R. 332; *Zimmer v. Grand Trunk R. W. Co.*, 19 A. R. 698; and *Mason v. Peterborough*, 20 A. R. 683.

Those who use this book in Ontario will, of course, have to bear in mind that the law here is not in all respects the same as in England. Where, for instance, the author says: "No action will lie against the executors of an employer. *Actio personalis moritur cum persona*:" the Ontario reader will have to bear in mind the practical abrogation of that maxim in many cases by R. S. O. c. 129, s. 11, which enables actions to be brought against the personal representatives of a deceased for wrongs committed by him, *inter alia*, in respect of the person of another, in which respect, it may be remarked, it goes beyond its English prototype.

The table of cases covers 32 pages, and probably includes most of the cases bearing on the subjects treated of, but our examination of the work leads us to believe that the collection of the cases is not exhaustive. We have failed to find in its pages any reference to such cases as *Hardaker v. Idle Dis. Council*, [1896] 1 Q. B. 335; *Dalton v. Angus*, 6 App. Cas. 740; *Penny v. Wimbledon*, [1898] 2 Q. B. 211, [1899] 2

Q. B. 72; *Mersey Docks v. Gibbs*, 11 H. L. C. 686; *Hill v. Tottenham*, 79 L. T. 495; *The Snark*, [1900] P. 105; and *Holiday v. National Telephone Co.*, [1899] 2 Q. B. 392, which might well have been cited. But the fact is that this branch of law has so many ramifications that it would take a much larger book than that under review to deal with it exhaustively.

The publishers have done their part well, and the paper and typography are excellent, notwithstanding some slight defects in the latter which may be detected by a critical eye. The proof-reading also appears to have been carefully attended to. We have only noticed one mistake, and that, strange to say, is the word "reasonable."

General Digest, American and English.—Bi-monthly digest (advance sheets) of the decisions first reported during the months of April and May, 1902. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co.

This is a very useful digest. It seems to contain a selection of Canadian cases, and, though perhaps it is not easy to see on what principles the selection is made, we should be grateful for small favours. It would be well, however, when taking cases from the new series of Ontario Law Reports, to correct the list of publications digested which prefaces the volume.

THE CANADIAN LAW TIMES.

OCTOBER, 1902.

“OUR SOVEREIGN—THE PEOPLE!”*

—— *Toast of C. J. Fox at the Whig Club, 1798.*

IT is the aim of this paper to shew that with the coming of the twentieth century it behooves us to look upon the maxim “*Rex non potest peccare*” as having passed within the limbo of discarded constitutional fallacies.

In order to establish that the King is above the law, one must needs postulate that Great Britain and her dependencies are ruled by an absolute monarch, i.e., one that has the power to make and unmake the law. But a professional humourist would be constrained to apologize for advocating such a theory at the present day (Cf. Herbert Spencer’s “*First Principles*,” c. i.).

“*L’état, c’est moi!*” was the proud, and withal, shameless, boast of Louis XIV. in the latter half of the seventeenth century; and to “*le Grand Monarque*,” as descriptive of his absolute political power, was first applied the term “Sovereign.” In respect of that period, and since, the word is meaningless as applied to the occupant of the English throne.

Sovereign power, or sovereignty, as a term in political science, may be defined to be the ultimate coercive power in a State. In jural science it is recognized as the foundation upon which rest all the sanctions of positive law. It is

*Part of a lecture on Political Sovereignty delivered before the Ottawa Literary and Scientific Society on 21st March, 1902.

neither reposed in, nor synergetic with, the organ of Government, which makes and administers the law, but is behind it. Sovereignty in the abstract resides in the whole body of the people of a State. And that is only another way of putting the famous apothegm of the American Declaration of Independence that "all Governments derive their just powers from the consent of the governed." To deny this proposition is to say that the body-politic is a dead thing upon which the vultures of tyranny and usurpation have a prescriptive right to feed.

With this estimate of sovereignty firmly fixed in your minds, you will, I think, be quick to apprehend that the Sovereign Power and the King are not convertible terms in the constitutional polity of Great Britain and her colonies; nor will you be disposed to scent sedition and disloyalty in my words when I declare that the maxim "*Rex non potest peccare*" is no sufficient support for the view that His Gracious Majesty King Edward the Seventh is impeccable in the eye of the law by reason of "the divinity" that "doth hedge a King," or that he is above the law. And you will be justified in acquiescing in my declaration notwithstanding the views of the *jure divino* apologists of the seventeenth century, Sir Robert Filmer and Sir George McKenzie, or those of Sir William Blackstone, the eighteenth century apostle of constitutional confusion. If you look upon this utterance of mine as presumptuous, read the Introduction to Professor Dicey's "*Law of the Constitution*," where, after quoting Blackstone's famous apotheosis of the King, he curtly says: "It has but one fault; the statements it contains are the direct opposite of the truth." However, we are not obliged to resort to an exponent of the New Law Learning in order to dissipate this mist of constitutional fallacy; we can find the truth of the matter adequately set forth in the pages of an eighteenth century churchman, namely, by Paley in his "*Moral Philosophy*," especially in Book VI. c. vii. He tells us there that while theorists have ascribed to the King absolute power and impunity, yet when one turns to the actual exercise of royal authority in England, we see those formidable prerogatives dwindle into mere ceremonies.

But I fancy I hear you object: There must be something more than theory in the question of the impeccancy of the King, because it is daily brought home to our business and bosoms. For instance, one can hardly listen to an argument in the Canadian Exchequer Court without hearing the maxim applied in derogation of the doctrine of universal amenability to the law. And I answer your objection in this wise: The maxim manifests its sole activity to-day in actions at law, being chiefly relied on in Crown suits of a civil nature to excuse the Executive from responsibility for the negligence of departmental officers and servants. But in order to understand how it came to discharge this function we must make an extensive survey of political history.

The Norman Conquest imposed on England the feudal system in all the vigour which it had obtained in France at that period. By that system, the fabric of which was built from foundation to turret of usurpation and force, the King assumed not only the paramount ownership of all the land within his dominions, but also the political over-lordship, which recognized no superior. This, of course, was radically different constitutional doctrine from that which the Anglo-Saxons evolved before the Conquest. In the days of the Heptarchy the supreme sovereignty of the people of the several kingdoms was demonstrated in the fact that the Witenagemot not only claimed but actually practised the right to make laws, impose taxes, negotiate treaties, and, mirabile dictu, even to elect and depose the King himself—he being, of course, a constituent part of the assembly. Cf. Green's "Conquest of England," i. 11; Kemble's "Saxons," ii. 219.

Now the Witenagemot was not only the germ of the present British Parliament, but we find in it all the constituent parts of that august body. The King was generally present in person, and at his summons came the prelates, the abbots, the earldormen, and the thegns—foreshadowing the House of Lords on the one hand; while, on the other hand, the democratic element of Parliament potentially inhered in this ancient assembly by reason of every freeman in the kingdom theoretically having the right to attend. We all can recall how our youthful imaginations were fired by the picture drawn in

our school books of the crowd of freemen present at the deliberations of the Witan, signifying their approval of or dissent from its decisions by loud shoutings or the clash of arms. Professor Freeman says ("Growth of Const.," c. 1): "Down at least to the Norman conquest, the body which claimed to speak in the name of the nation was, at all events in legal theory, the nation itself. . . . There was a time when every freeman of England could raise his voice or clash his weapon in the assembly which chose bishops and earldormen and kings; when he could boast that the laws which he obeyed were laws of his own making, and that the men who bore rule over him were rulers of his own choosing." And Kemble ("Saxons," ii. 239, 240) declares that "whether the assembly of the Witan making laws is considered to represent in our modern form an assembly of the whole people, it is clear that the power of self-government is recognized in the latter."

We have well-authenticated instances of the deposition of Kings by the Witenagemot, numbering amongst them Ethelwald and Alcred, in Northumbria, and Sigebert, Ethelred II., and Harthacnut, in Wessex. (Cf. Taswell-Langmead's Eng. Cons. His. c. 1.) As to the people's right of electing the King, I shall speak a little later on.

However, under the absolutism of the Normans, we cannot expect to hear much of the theory, still less of the practice, of popular sovereignty as conceived in the polity of the Anglo-Saxons. The popular assembly of the former gave way to the Curia Regis—in its early stages, at least, a mere court of the King's feudal vassals, who, as was to be expected, pandered to his despotism; and thus was the progress of the liberty of the subject retarded for nearly two hundred years. It was not until the effectual blending of the Franco-Norman with the Anglo-Saxon stock that the blossom of Magna Charta appeared on the tree of British freedom, a magnificent promise of the full fruitage of popular government with which the Empire fearlessly confronts the issues of the new century.

The late Dr. Rudolph Gneist (Const. Hist. Eng. I., c. xvi.), next to Bishop Stubbs the most acute explorer of the constitutional history of England, says: "The Norman Government of the kingdom rested upon a combination of the

relations of the military, judicial, police, financial, and ecclesiastical authority, consequently its central point was found in the person of the King." Thus, with the advent of the Conqueror, as Professor Edmund Robertson, in his monograph on Government in the *Encyclopædia Britannica*, so well puts it, "Every ancient common right has come to be a right of the Crown, or a right held of the Crown by a vassal."

From this usurpation of the ultimate sovereignty of the State by the Conqueror and his immediate successors arose the doctrine of the legal sinlessness of the King and his immunity from the obligations of law, which Blackstone has so erroneously declared to be "an ancient and fundamental maxim." After examining with much care the sources of history which have been revealed since the time when Blackstone wrote, I am persuaded that the doctrine, contrary as it is to the most archaic theory of English Constitutional law, had its origin in procedure rather than in substantive law; in fact manifesting itself first in the anomaly which the old pleaders professed to see in the King commanding himself, by process issued in his own name, to appear and submit to judgment pronounced by himself in one of his own Courts. That, however, was an idea not evolved until more than two hundred years after the Conquest, as will be shewn hereafter; but when it did appear it was eagerly seized upon by ecclesiastical advocates of the celestial authority of Kingship, jointly with certain sycophantic jurists of the times of Tudor and Stuart absolutism, and by them palmed off as being of the very pith and marrow of the British constitution.

Had the immunity of the King from actions at law been always recognized in history, the advocates of the doctrine of his inherent supremacy over the law would have had much more countenance. But, unfortunately for them, the record is the other way. The very phraseology of the Coronation Oath which King Edward VII. will soon subscribe, amid surroundings of unprecedented pomp and circumstance, bespeaks potential naughtiness on his part, for it requires him to swear to govern, not his people, mark you, but "the people of the United Kingdom of Great Britain and Ireland

and the Dominions thereunto belonging, according to the Statutes in Parliament agreed on, and the respective Laws and Customs of the same." But I have something much more conclusive of the question than this for your consideration. In the report of a case determined in the year 1351, the twenty-fourth of the reign of King Edward III., (Y. B. 24 Edw. III. 55b), Wilby, C.J. of the Common Pleas, declared he had seen a writ thus framed: *Præcipe Henrico Regi Angliae*, etc.—"in lieu whereof," he says, "is now given petition by the prerogative." Wilby's statement has been severely criticised by Brooke, C.J., in his *Abridgment*, tit. *Petition*, 12, and tit. *Prerog.*, 2 (d), and by Erle, C.J., in the comparatively recent case of *Tobin v. The Queen*, 16 C. B. N. S. 356. But such criticism entirely overlooks other ancient authorities quoted by Mr. Horwood, the translator and editor of certain of the Year Books, who says (Y. B. 33 & 35 Edw. I., *Introd.* XVI.) : "The ordinance of the Council and of the twelve chosen by the Commons made in the year 1258, and confirmed by Henry III. in the following year, seems plainly to give the subject the right to sue by writ against the King (see Rymer's '*Foedera*,' i., 381, ed. 1816); and it may have been one of the writs issued after this provision that Wilby saw." Bishop Stubbs (*Const. Hist. Eng.* ii., p. 250) thinks that Chief Justice Wilby's statement has much corroboration in the older reports of cases; and Mr. Alfred Cutbill, in a valuable essay on *Petition of Right* (pp. 8 and 9), seemingly adopts the authorities cited by Mr. Horwood as substantiating the view that up to the time of Edward I. the subject's right to sue the King by writ was undoubted, but that in this reign petition of right was declared to be the only remedy against him, not by an Act of Parliament, but by a mere ordinance of the King himself.

As this "mere ordinance of the King" harmonized with the theory of the attorneys of that day that the King ought not to command himself, my own view of the matter is that they were able, by appealing to the interests of their clients, to stifle the protesting voice of popular rights. "Humour the King in his royal whim." one might fancy them saying, "and your claim will be allowed. Take a writ against him,

and you may lose it in litigation." Certain it is, that the remedy by petition shortly after became the only method used for obtaining redress for the peccancies of the impeccable King; but it must be remembered that there is no enactment of the English Parliament depriving the subject of any remedy he may have anciently exercised. The Act 23 & 24 V. does not do so, it being limited to amending the procedure on petitions of right. (See Clode on Pet. Right, 157.)

Before leaving this subject I must not omit to mention the important fact that in Prynne's "Plea for the Lords" (p. 97), the Patent Rolls of 43 Hen. III. are cited as giving power to every man injured "to freely sue against, or arrest the King."

After all said and done there is practically little difference between the modern Petition of Right and a Writ of Summons, so far as getting the King into court is concerned, for the constitutional rule is that the executive should never capriciously withhold a fiat for a petition to be filed in the Courts (Clode on Pet. of Right, 166). So it would appear that the history of this matter of procedure unfolds but a weak foundation for the theory of the legal sinlessness of the King.

On the other hand, when we turn to the repositories of the law of the Constitution, we find that they are almost unanimous in maintaining that the King is subject to the law of the land. Furthermore, English constitutional history repeatedly shews that the people have not scrupled on great occasions to assert their sovereignty over the person of the King. I have already given instances that the Witenagemot deposed him, and shall supplement them with instances where the people exercised the same and also cognate powers later on in history. Suffice it to say here, that both constitutional theory and practice shew very conclusively that the paramount sovereignty of the people is, and has ever been, the true genius of English political institutions.

First, taking up the threads of constitutional theory, we find that even before the Revolution of 1688 they might have been woven into a web of argument through which the most subtle advocate for absolutism could not break.

"The further back we carry our researches," says Allen in his masterly "Inquiry into the Rise and Growth of the Royal Prerogative in England" (p. 10), "the stronger is the evidence we discover that, however the monarchical theory may have been proclaimed in law-books and magnified by Churchmen, it was never reduced, strictly and completely, to practice; nor was it ever recognized or quietly submitted to by the people as the Government handed down to them by their ancestors."

Now we have it on the authority of Tacitus (*de Mor. Germaniæ*, c. 7) that the primitive political constitutions of the Germans, the ancestors of the Anglo-Saxons, were essentially democratic, hence the assertion of ultimate sovereignty by the Witenagemot, as I have before pointed out. Says Professor Freeman (*Growth of Eng. Const.* c. 1) : "In the Germany of Tacitus, as at this day in the democratic cantons, the sovereign power is vested in the whole people, acting directly in their own persons."

I have already shewn how the people in the time of the Heptarchy did not lack the courage to assert their sovereign right to depose Kings who failed to rule in conformity with the law. The correlative right of electing the King was also claimed and exercised by the Witenagemot. Undoubtedly there was a royal family in each of the several kingdoms of the Heptarchy, but they had no vested right to the throne. The Crown was then an office, and not a piece of inheritable property, as it afterwards became. Among the members of this particular family the Witenagemot had the right of free choice, and usually they confined their selection to it. Thus Ethelred I., in 866, was chosen in preference to the issue of his elder brother. In 946 Edwy, son of Edmund, was at first ignored and his uncle Edred elected to the throne; but on the latter's death Edwy became King by the choice of the people. Ethelred II., after having been deposed in 1013, was restored the following year. In 1066, however, the royal family was overlooked altogether, and Earl Harold, the greatest Saxon statesman after Alfred, was elected King. Cf. Allen's *Royal Prerog.* p. 44; Taswell-Langmead's *Eng. Const. Hist.* c. 1.

And so history establishes beyond cavil that the Saxon kings were subject to the sovereignty of the people.

Now, when we come to the Conquest, there is one important fact, apt, indeed, to be obscured by the despotic character of his conduct as soon as he felt himself securely on the throne, namely, that William of Normandy, at his own request, was formally elected King by the Witan, and, moreover, as I have pointed out before, swore by the ancient Coronation Oath to govern the Kingdom in conformity with the laws then existing. It seems to me that this fact throws a great deal of illumination over the post-Conquest deposition of Kings by the English people, as well as over the last instance of the assertion of their ancient sovereign right to elect a King, namely, in 1689.

The first King to be deposed after the Conquest was Edward II. He was formally deposed by the Parliament which assembled at Westminster in January, 1327, because, in the opinion of Parliament, he had broken the Coronation Oath, had ruined his Kingdom and people, and had suffered himself to be led in all things by evil councillors. Clearly, then, Edward II. was not impeccable.

Possibly the mind of Parliament at that time was supported by what Bracton, whose book on the laws of England is called "the crown and flower of English mediæval jurisprudence" (Pollock & Maitland's *Hist. Eng. Law*, I., 185), wrote nearly a century before: "The King has as superiors (1) God, (2) the law, and (3) his Court; for the earls are the King's comites, and he who has a comes has a master."

Just here I would like to refer to Dr. Gierke's recently published scholarly work on Political Theories of the Middle Age. At pp. 39, 40, he says that it was the well recognized theory of the European jurists in the twelfth century that "the legal title to all Rulership lies in the voluntary and contractual submission of the Ruled." This, it seems to me, is a very remarkable anticipation of the apothegm I have already quoted from the American Declaration of Independence.

The next great and salient instance where the sovereignty of the people constrained the King, was the case of John, of

infamous memory. True, John was deposed by the Pope rather than by the English Parliament, and it is also true that the Great Charter was wrung from the pusillanimous King by the people under arms ; but the Charter was a triumphant vindication of the amenability of the King to the law. Speaking of the Great Charter during the hey-day of Stuart absolutism, Sir Edward Coke said: "Sovereign power is no parliamentary word. Magna Charta and all our statutes are absolute, without any saving of sovereign power. Let us take heed what we yield unto. Magna Charta is such a fellow that he will have no sovereign."

Then we come to a most notable occasion in history, when, for the first time after Parliament had assumed its settled form and character, the whole executive government was taken from the King, he being ultimately deposed. (See Hallam's *Mid. Ages*, iii., 59.) I speak of the case of Richard II. You remember the story. After repeated quarrels with his Parliament over his tyrannical conduct, his partiality for favourites, which had been the undoing of Edward II., and his determined policy to subvert the fundamental laws of the land, Parliament declared that it had become "lawful for his people, by their full and free assent and consent, to depose the King from his royal throne, and in his stead to raise up some other of the royal race upon the same." Taswell-Langmead says (*Eng. Const. Hist.* c. viii.) : "Although Richard was induced to resign the crown, and Henry of Lancaster had laid claim to it, the deposition, the vacancy of the throne, and the subsequent election of Henry, are each recorded in the most distinct terms in the official entry on the rolls of Parliament." And so passed away the claim of Richard II. to legal and political sinlessness.

With these examples to countenance them, the Convention Parliament of 1688-9 had no hesitation in declaring that James II. had "broken the original contract between King and People" by violating the fundamental laws and abdicating the Government; nor did they fail to follow up such declaration with a pronouncement that the throne had thereby become vacant. I shall not weary you with a review of

the facts of this momentous event in our constitutional history, because I am sure Macaulay's glowing recital of them has not yet failed to irradiate your memories. Suffice it for me to avow the firm conviction that while the Revolution of 1688 apparently resulted in a mere transfer of the executive supremacy of the realm of England from a monarch deposed to a monarch newly chosen, it was in reality a formal and final resumption by the people, through their representatives in the Convention Parliament, of their ancient heritage, the whole and entire supreme power in the State. The Declaration of Right may be said to have been the symbol of a constitutional "reversion to type"—to use the language of biology—a getting back, so to speak, from the pseudo-genus of Norman, Tudor, and Stuart times to the true genus of the Anglo-Saxon epoch. From that time forward Lincoln's famous characterization of true popular sovereignty, "government of the people, by the people, for the people," is practically, although not theoretically, as applicable to the body-politic of modern England as it is to that of the United States of America.

Now, with all deference to the contrary opinion of some great political thinkers, I would submit with some confidence that the Revolution of 1688 did not, as they maintain, witness a delegation by the people to the House of Commons "of the supreme power of the State." (Cf. J. R. Green's *Short Hist. of the Eng. People*, p. 680.) It is true, that, as a result of the Revolution, the executive power of the Crown has become vested in the Cabinet, but that is not the supreme power. The present position of the Cabinet was never better described than in the querulous remark of George II.: "Ministers are the King in this country." (See Lord Mahon's *Hist. of Eng.* iii. 280.) As the King lacked the ultimate sovereignty of the realm, so do the Ministers lack it now. It is Parliament, in its three parts, that wields supreme power in the State by the delegation and authorization of the people tacitly or impliedly given. Never has this great constitutional truth been more correctly stated than by Sir Thomas Smith in his *Commonwealth of England* (Book II., c. 2) published a century before the Revolution: "The most high and absolute

power of the realm of England consisteth in the Parliament. . . . All that ever the people of Rome might do, either Centuriatis, Comitibus, or Tributis, the same may be done by the Parliament of England. . . . For every Englishman is intended to be there present either in person or by procuration and attorney, of what preëminence, state, dignity, or quality soever he be, from the prince (be he King or Queen) to the lowest person of England. And the consent of the Parliament is taken to be every man's consent."

And I may say, by the way, that in the theory that every man is present in Parliament either in person or by representative, lies the reason of that apparently hard maxim: "Ignorance of the law excuses no one;" in other words, that a man shall not excuse his wrongdoing by pleading ignorance of the law. It is apparent to the meanest intelligence that the law-maker cannot well be a law-breaker propter ignorantiam !

"Here," says Sir Frederick Pollock (First Book of Jurisprudence, c. iii.), referring to the above quotation from Smith's "Commonwealth," "we have the first exposition by any English writer, if not by any European one, of the notion of sovereignty in its modern amplitude." And Sir Frederick proceeds to shew the fallacy of claiming supremacy for the House of Commons simply because it can prevent government from being carried on in opposition to its will. The House of Commons cannot legislate by itself, and its ability to mould legislation by forcing its wishes upon the other constituent parts of Parliament is a matter of practical politics rather than of legal sovereignty.

Father Time has ever manifested a relish for irony, and the annals of English constitutional history are not without their laughable side. Who can fail to appreciate, for instance, the magnificent humour of the situation when George III., a hundred years and more after the passage of the Bill of Rights, dismissed Charles James Fox from the Lord Lieutenancy of the West Riding of Yorkshire, because at a certain dinner of the Whig Club he gave as a toast: "Our Sovereign—the People!" Of course, it is to be said that there

was no political significance in this dismissal, and the incident is possibly memorable only to shew the dislike that George III.—the last of our monarchs to entertain the delusion that Englishmen might be ruled otherwise than according to their will—ever manifested toward Fox. In illustration of this dislike, Lord Townsend said that when Fox kissed the King's hand on becoming one of the coalition Ministry of 1783, His Majesty "turned back his ears and eyes just like the horse at Astley's when the tailor he had determined to throw was getting on him." History also records many other instances of this unfortunate monarch's chafing under the bit of popular sovereignty, among them the following: Expressing himself in the presence of Lord Chancellor Thurlow to the effect that he would rather retire to Hanover than accept Ministers or measures of which he disapproved, the grim lawyer pithily replied: "Your Majesty may go; nothing is more easy; but you may not find it so easy to return when your Majesty becomes tired of staying there." (See May's Eng. Const. Hist. i. 64.)

Although George III., until his reason failed him, zealously sought to bring the independent Kingship out of the study of the *jure divino* doctrinaire into the practical domain of State affairs, it may be said that it disappeared from our political history when his son and successor George IV., after much perturbation of soul and many overt struggles against the unswerving march of progress of British freedom, consented to the policy of his Ministers in introducing a bill for Roman Catholic Emancipation in 1829 (Gladstone, "Gleanings," i. 38, 78). There have been, indeed, since then one or two shadowy and fleeting reappearances of this constitutional phantasm upon the stage of history, but they only serve to remind us of the royal apparition in Hamlet—

"So like the King that was,"

and prompt us to ask of it—

"Why the sepulchre
Wherein we saw thee quietly inurn'd,
Hath oped his ponderous and marble jaws,
To cast thee up again?"

Even at the risk of prolixity, I cannot forbear quoting to you some recent thought-compelling remarks on the present relative positions of Crown and People by a Cambridge professor well known to every studious lawyer, and of whom I have come to hold the opinion that as an exponent of the history of jurisprudence he has no superior in Europe to-day. I speak of Professor Maitland. He says: "In the course of the eighteenth century it became a parliamentary commonplace 'that all political power is a trust;' and this is now so common a commonplace that we seldom think over it. But it was useful. Applied to the kingly power it gently relaxed that royal chord in our polity which had been racked to the snapping point by Divine Right and State religion. Much easier and much more English was it to make the King a trustee for his people than to call him officer, official, functionary, or even first magistrate. . . . Much has happened within and behind that thought of the King's trusteeship; even a civil death of personal government, an euthanasia of monarchy. And now in the year 1900 the banished Commonwealth, purged of regicidal guilt, comes back to us from Australia and is inlawed by Act of Parliament." (Introduction to Gierke's "Political Theories of the Middle Age," p. xxxvi.)

With this quotation I feel that I may very safely rest the case for *The Sovereign People of Great Britain v. His Majesty the King*.

I trust I am not presumptuous when I venture to think that the authorities I have marshalled support to a very satisfactory degree the thesis advanced in this paper—which may be recapitulated as follows, namely: That the maxim that the "King can do no wrong" is a constitutional dogma entirely out of harmony with the genius of free institutions within the British Empire; that the history of England shews that in all political crises the maxim has been "more honor'd in the breach than the observance;" and, lastly, that it is a "fond thing vainly invented" by the mediæval attorneys presumably to further the interests of their clients in proceedings against the King.

Notwithstanding the evidence I have given you that the King is not superior to the law, that he is not incapable of doing legal wrong, that he may be deposed from his office by the will of the people, the seventh edition of Broom's "Legal Maxims," published in the year 1900 (c. ii. p. 33), calmly tells us that "the principal attributes of the Crown are sovereignty, or preëminence, perfection, and perpetuity; and these attributes are attached to the wearer of the Crown by the Constitution, and may be said to form his constitutional character and royal dignity."

Alas, the evil done by those old attorneys does indeed live after them !

"The ideal King of the lawyers," says Allen (Inquiry into Prerog. p. 34) "is a King above the law; the real King of the Constitution is a King subject to the law."

Walter Bagehot in his unique work on the Constitution says (The Eng. Const. pp. 58, 59) : "If any man will run over the pages of Comyn's Digest, or any other such book, title 'Prerogative,' he will find the Queen has a hundred powers which waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if she tried to exercise them. Some good lawyer ought to write a careful book to say which of these powers are really usable, and which are obsolete. There is no authentic explicit information as to what the Queen can do, any more than of what she does."

To quote for the last time from Professor Freeman (Growth of Eng. Const. c. iii.) : "The whole conception of the Sovereign as one, personally at least, above the law, as one personally irresponsible and incapable of doing wrong . . . is purely a lawyer's conception, and rests upon no ground whatever in the records of our early history."

Now, I fancy, that by reason of what I have just said and quoted, the suspicion of a smile at the expense of the integrity and good judgment of the Bar will beset the countenances of those who have not the honour of belonging to that profession. Be it so. It is to the credit of the profession that they can stand well-founded criticism of this sort without any sense

of shock or dismay. Unlike the ideal King of their seventeenth century doctrine, it is possible for them to make mistakes. But, on the other hand, those mistakes are few, and they are not ashamed to correct them upon conviction of error. The master-masons of the splendid structure of English Jurisprudence are not going to be dismissed as unworthy servants of their country because, in a moment of weakness, they builded one of the more ornamental parts of the edifice a little worse than they knew.

I have not been careful to predicate that my observations on the royal prerogative are just as applicable to the body-politic in Canada as to that of the mother country; because that the prerogatives of the Crown, so far as they intersect the domain of colonial legislative powers, are as amenable to Parliamentary control here as they are in England, is a matter of which every political student is cognizant. But our forefathers did not obtain the proud measure of constitutional liberty that lies behind that declaration without a series of conflicts that searched the very marrow of the stuff whereof they were made. Only in the travail of great souls may civil liberty be born. In Nova Scotia and New Brunswick we repeated, in miniature, the post-Conquest history of Constitution building in England, starting with a sort of Curia Regis, represented by an autocratic Governor and his Council, and ending with representative Government bearing upon it the hall-mark of the truest freedom. In Prince Edward Island the attainment of a similar boon was complicated and retarded by a system of landlordism which reproduced some of the worst features of feudal tenures in the middle ages. In the two Canadas it was in the dispensation of Providence that civil war should lay its baleful shadow over the land before the people should be privileged to greet the coming of free political institutions in the train of "white-robed Peace." And so in these segregated provinces were laid the foundation-stones of constitutional liberty and self-reliance upon which the great Dominion was thereafter to be built by the genius of native statesmen. Was not their conception of a federal State the best possible cement to unite these individual political crystals? And may I not justly ask if the

world has ever seen better nation-building than theirs, and that, too, in the face of obstacles which, to the mind of the speculative publicist, seemed wholly insurmountable.

And so I am brought to conclude the examination of my theme with the observation that, inasmuch as the executive power of Government is now in the hands of the Cabinet, both Lord Salisbury in England and Sir Wilfrid Laurier in Canada have more concern with the maxim *Rex non potest peccare* than His Most Excellent Majesty King Edward the Seventh. Indeed, if it were permitted to one to be curt in his expressions touching so august a matter, one might be tempted to aver that to-day the King can do no wrong, for the very simple reason that he has no power to do it.

It remains to be said that the Executive can do no wrong, because "they are the people"—by representation.

What then? Shall we say that as the English people have come round again to their old-time way of democratic thinking, we no longer ought to retain the fiction of kingship? God forbid. We must not forget that we had kings in the days of our purest democracy. A hereditary King with the checks and restraints that hedge him about under the modernized constitution, is the very best sort of a President that our veiled republic can possibly have. We escape all the exacerbations of periodical elections; and, on the other hand, we have the advantage of the holder of the office always knowing his place—an inestimable quality, for then we miss all those crude impolicies which usually characterize the novitiate of the holder of an elective office. Then, again, there is the consideration, not as trifling as it would on the surface appear, that with a hereditary aristocracy still in the vigour of its prime, like that of England, it would be an anomalous and unfortunate thing for the chiefest and most picturesque figure in the social life of the nation to be constantly changing its personality.

No, beyond a doubt the time has not arrived for any overt modification in our Constitution touching its manifest head. Nor need we citizens of this young Dominion be fearful of

any fierce revolutionary upheaval in the future should the interests of the British people as a whole demand some such modification. We have only to remember that history unfolds a splendid record of the self-control and discretion of our race under the strain of constitutional crises. Nor do we who stand upon the threshold of still mightier enterprises in empire-building than the past has witnessed, lack counsels of hope and guidance from the great Englishmen of former times, whose souls expatiated in the pure æther of freedom—

“Nought shall make us rue
If England to itself do rest but true.”

CHARLES MORSE.

RECENT CASES FROM THE TIMES REPORTS.*

Carriers.]—The judgment in *Dunn v. Donald Currie and Co.*, 17 T. L. R. 739, noted 21 C. L. T. 449, as to the carriers' liability where delivery of goods was delayed owing to the shipment with them of contraband goods, was affirmed by the Court of Appeal: 18 T. L. R. 807. The case also deals with the question of the measure of damages, the special importance of punctual delivery being known to the carriers.

Company.]—*Hilder v. Dexter*, 18 T. L. R. 800, though decided under s. 2 of s. 8 of the Companies Act, 1900, is a useful case to note for reference in considering questions as to the issue of shares at a discount. It was held that even under the Imperial Act an option to subscribers for shares to take within a limited time further shares at par, the market value being greater, was valid.—*Molineux v. London, Birmingham, and Manchester Ins. Co.*, 18 T. L. R. 753, is another case under the Companies Act, 1900, of general interest. A director of a company who had been present at meetings at which an increase of capital and of directors' qualification was directed, and had afterwards signed as director a prospectus, was held to have retained office and to have impliedly contracted with the company to obtain within a reasonable time the additional shares required to make up the increased qualifying number, and that not having done so the company were entitled to transfer the requisite number to him and to treat him as the holder thereof.

Compromise of Action.]—The judgment of the House of Lords in the much discussed case of *Neale v. Gordon-Lennox*, is reported 18 T. L. R. 791, and need not be referred to at length. The judgment of the Court of Appeal, 18 T. L. R. 494, which has been reversed, is noted ante p. 207, and the judgment of the Lord Chief Justice, 18 T. L. R. 390, which

*Including the cases to the end of Volume 18,

has been restored, is noted ante p. 174. The House of Lords lay down the general principle that agreements by counsel are not binding if made contrary to the instructions of the client, even though that fact be not known to counsel on the other side.

Contract.]—*Krell v. Henry*, 18 T. L. R. 823, was brought forth because of the postponement of the Coronation, and is the first reported case of the crop promised as the result of that unfortunate necessity. The defendant leased for the two "proceSSIONal" days a flat overlooking Pall-mall, for the express purpose of viewing the processions. It was held that a condition that the processions would take place was to be implied, and that there was a total failure of consideration. The plaintiff's action was therefore dismissed, and the defendant was given judgment on a counterclaim for repayment of a deposit paid on account. The principle relied on was that the house was to have a particular character impressed upon it for the two days in question, and that, as it failed to have that character on those days, it, legally speaking, ceased to exist, and *Taylor v. Caldwell*, 3 B. & S. 826, was held to apply. To which it was unsuccessfully answered that it might as well be contended that a man renting a room in order to observe the transit of Venus would be entitled to a guarantee that Venus would be visible at the appointed time. And there seems so much force in this that the result of the promised appeal is probably not by any means a foregone conclusion.—The judgment in *Tolhurst v. Associated Portland Cement Manufacturers*, 17 T. L. R. 581, as to the assignability of a contract, noted 21 C. L. T. 362, was reversed by the Court of Appeal, 18 T. L. R. 827, the Master of the Rolls giving an elaborate and very useful judgment on the general law.

Criminal Law.]—*Rex. v. Lindsay*, 18 T. L. R. 761, discusses the nature of the evidence required, on a prosecution for bigamy, to prove the marriage of the prisoner.

Derogation from Grant.]—The case of *Quicke v. Chapman*, 18 T. L. R. 817, while dealing with interference with light, and therefore not of much direct importance in this

Province, is yet useful as giving a very liberal construction to the maxim that a man shall not derogate from his own grant. The defendant built on leasehold land a house which he sold to the plaintiffs. He then proceeded to build on the adjoining lot a house which when completed would necessarily interfere seriously with the access of light to the plaintiffs' house. Of this adjoining lot the defendant would, upon the house being completed, be entitled to demand a lease. It was held that his equitable interest was sufficient to make the maxim apply to him, and he was ordered to pay damages.

Distribution of Estate.]—A person who leaves by will all his estate to a person who predeceases him dies intestate within the meaning of the Statute of Distributions, 22 & 23 Car. II. c. 10, and children to whom advances have been made by him, must, in the division of the estate, bring the advances into hotchpot: *In re Ford, Ford v. Ford*, 18 T. L. R. 809.

Insurance.]—The judgment of the Court of Appeal in the gold commandeering case—*Janson v. Driefontein Consolidated Mines*, 17 T. L. R. 604, noted 21 C. L. T. 369—was affirmed by the House of Lords: 18 T. L. R. 796.—In *Wimbledon Park Golf Club v. Imperial Insurance Company*, 18 T. L. R. 815, the plaintiffs, lessees of a building destroyed by fire, asked for a mandamus to compel the defendants to expend the insurance moneys payable by them to the lessor, who had covenanted (in effect) to keep the building in repair, in rebuilding; or in the alternative to compel the defendants to take sufficient security from the lessor for re-instatement of the building: see 14 Geo. III. ch. 78. The lessor had given to the defendants his bond, without sureties, to expend the money in rebuilding, but it was contended that a bond without sureties would not do. It was held, however, on this branch of the case, that if the lessor were shewn to be financially responsible his personal bond would be sufficient; and on the other that there was not an imperative obligation under the statute upon the company to rebuild. The opinion is expressed that the proper remedy in a case of the kind would be an injunction to restrain the payment by the insurance company of the money until proper security for its due expenditure should be given.

Mortgage.]—The judgment of the Court of Appeal in *Lisle v. Reeve*, 18 T. L. R. 61, noted *ante* p. 32, as to an alleged clog on an equity of redemption was affirmed by the House of Lords: 18 T. L. R. 767.

Particulars.]—The judgment of the Court of Appeal in *Wernher Beit and Co. v. Markham*, 18 T. L. R. 143, noted *ante* p. 71, as to particulars in an action of slander, was affirmed by the House of Lords: 18 T. L. R. 763.

Patent of Invention.]—In *Dominion Cotton Mills Co. v. General Engineering Company of Ontario*, 18 T. L. R. 766, the Judicial Committee, reversing the judgment of the Supreme Court of Canada, 31 S. C. R. 75, construe s. 8 of the Patent Act, R. S. C. c. 61, as amended by 55 & 56 V. c. 24, s. 1, to mean that a Canadian patent expires at the time of the expiration of any foreign (which includes for this purpose British) patent for the same invention, which may be in existence, not merely at the time of the application for or granting of the Canadian patent, but at any time during its continuance.

Prescription.]—The judgment in *Union Lighterage Co. v. London Graving Dock Co.*, 17 T. L. R. 447, noted 21 C. L. T. 279, as to the nature of the enjoyment required in order to give rise to an easement of support by prescription, was affirmed by the Court of Appeal (*Romer and Stirling, L.JJ.*), *Vaughan Williams, L.J.*, dissenting.

Trade Mark.]—The judgment in *Bass, Ratcliff, and Gretton v. John Davenport & Son's Brewery*, 18 T. L. R. 108, noted *ante* p. 38, was reversed: 18 T. L. R. 785, *sub nom.* In re Trademarks of Bass, Ratcliff, and Gretton, and the device in question—a diamond, with the words “trade mark”—was upheld.

Trade Union.]—*Glamorgan Coal Company v. South Wales Miners' Federation*, 18 T. L. R. 810, is another step in the attempt to define the legal rights of employer, as represented by the great corporations, and employed, as represented by

their unions. It was held that an action would not lie against a union and its executive officers because of the declaration by the latter of a holiday—i.e., strike—this step having been taken, as was found on the evidence, in good faith for the benefit of the men and not from a desire to injure the employers.

Watercourse.]—In *Corporation of Bradford v. Ferrand*, 18 T. L. R. 830, it is decided that there are no rights in the nature of riparian rights in a subterranean stream, the exact channel of which cannot be ascertained except by excavation of the soil. Tapping the channel by means of wells, and thus lessening the supply of water coming to the surface where the subterranean stream issued from the ground, was held not to be an act the doing of which could be prevented by injunction.—In *Ambler and Sons v. Corporation of Bradford*, 18 T. L. R. 758—an action arising out of the same improvement scheme—the plaintiffs failed to make out in fact that the flooding of their premises complained of was caused by the works, lower down the stream in question, of the defendants. The important point of the case is that an injunction will not be granted in respect of an obstruction in a stream unless damage has actually been caused by it, or may with reasonable certainty be expected to result.

Way.]—In *Roberts v. James*, 18 T. L. R. 777, a right of way was claimed by prescription or dedication. The land over which the way was alleged to exist had been held in strict settlement by tenants for life since 1810, and it was held that during that time a right could not have been acquired by prescription, and that a tenant for life could not have effected a legal dedication, though acts sufficient to shew dedication, if the power existed, were proved.

EDITORIAL REVIEW.

Half-yearly Digest of Ontario Cases.

The Half-Yearly Digest of Ontario Cases, published as part of the Ontario Weekly Reporter (The Carswell Company, Toronto), is a new and important aid to the legal profession in Canada. We say in Canada, because Ontario cases are very frequently considered and often followed in the other Provinces, as a perusal of the reports shews. Many, perhaps, will be surprised to hear that the digest for the first half of 1902, just issued, comprises close upon 400 cases. Some of these are of comparatively trifling importance, but we believe that no case in which a judicial opinion has been written is of absolutely no importance; and at the very least the Ontario Weekly Reporter renders an important service in making a record of all considered decisions given at Osgoode Hall. And by the publication of an analytical digest, referring to the Ontario Law Reports, as well as to the Ontario Weekly Reporter, the value of the record is doubled.

The Gaynor-Greene Case.

One of the most interesting, and, from a legal standpoint, one of the most curious, extradition cases which has come before the Courts of this country during the last few years, is that which is known in the Province of Quebec as the Gaynor-Greene Case. Briefly, the facts are as follows:—

Benjamin J. Greene and John F. Gaynor are American citizens who are accused of taking part in certain frauds whereby, with the assistance of Oberlin M. Carter (a former officer in the United States Army, now serving a term of imprisonment for the offence in question), they obtained by false pretences large sums of money from the United States Government. Some months ago, after legal proceedings against them had been commenced, they left the United States and took up their residence in the city of Quebec.

On the 19th May, 1902, Mr. Lafontaine, an Extradition Commissioner in the city of Montreal, issued a warrant for their arrest; and by virtue of this process they were suddenly arrested in Quebec and taken in a private tug to Montreal. Mr. Justice Andrews, a Judge of the Superior Court for the district of Quebec, subsequently granted writs of habeas corpus directing that the accused should be returned to the city of Quebec, which was consequently done. After argument, it was announced that judgment would be rendered on this writ on the 21st June. On the preceding day the attorneys for the United States Government notified the governor of the Montreal gaol that such judgment would be given in the city of Quebec at the time stated, and that it was his duty to be present in order to take possession of the accused if the court should quash the writ of habeas corpus—it being stated in the course of this letter that “if the Attorney-General for the Province had appeared upon the proceedings, as he should have done, it would be unnecessary to give you this notice,” and adding that should he fail to appear, such failure, whether attributable to himself or to the Attorney-General, would form the subject of an investigation. The governor of the Montreal gaol accordingly went to Quebec, and Mr. Justice Andrews on that day gave judgment quashing his own writ of habeas corpus and directing that the accused should be handed over to the governor of the Montreal gaol, which was accordingly done by the sheriff. On the 20th June, the day prior to that fixed for the rendering of the judgment, the accused filed a withdrawal of their writs of habeas corpus, giving as a reason that the jurisdiction of Mr. Justice Andrews to issue a writ of habeas corpus at Quebec, addressed to Montreal, had been disputed, and that they did not desire to have the matter jeopardized by such a question of jurisdiction. Mr. Justice Andrews, however, rendered judgment as above stated, and on the same day petitions for writs of habeas corpus on behalf of the accused were made to Mr. Justice Caron, another Judge of the Superior Court for the district of Quebec, which set forth that the accused were then illegally in the custody of Mr. Vallee, a governor of the Montreal gaol, who was then in Quebec.

These writs were accordingly issued. Counsel for the United States then moved to have them quashed upon the grounds, *inter alia*, that no new facts were alleged in this last petition, and that the writs issued by Mr. Justice Andrews upon a similar petition having been annulled by him, the same demand could not be renewed before any other Judge, and that, as Mr. Lafontaine had already been seized of the case, any order taking it out of his hands would be null. Mr. Justice Caron, however, decided that the cases were not similar, and that the only reason why Mr. Justice Andrews had ordered the prisoners to be sent back to Montreal was because he thought that writs issued in Quebec could not be executed in Montreal, and that his writs of habeas corpus were defective in that point. Mr. Justice Caron stated, moreover, that he did not consider that his colleague's judgment was a decision on the merits of the case, nor did he think that he was bound by it.

Proceeding then to examine the reasons set up by the accused against the proceedings which had led to their arrest, his Lordship arrived at the conclusion, that two of these objections were maintainable, namely, (1) that the warrant issued by Mr. Lafontaine did not contain the date of the alleged charge against the accused, and (2) that according to the record it appeared that the real offence with which they were charged by the United States was "conspiracy to defraud"—a crime not included in the Extradition Treaty between Great Britain and the United States of America. Mr. Justice Caron, therefore, came to the conclusion that the warrants were defective, and that the real offence for which extradition was sought was not included in the treaties, and his judgment discharging the prisoners followed accordingly.

The Alaska-Canada Boundary Dispute.

The excellent and timely article on the above subject written by Mr. Thomas Hodgins, K.C., Master in Ordinary of the Supreme Court of Judicature for Ontario, and published by the *Contemporary Review*, also appears in the September issues of the *Canada Law Journal* and *Canadian Law Review*. It is an able, scholarly, and eminently fair resumé of the

whole controversy. We should like to be able to republish the article, but that has been done elsewhere, and the demands upon our space are such that we can afford to give only the conclusion of Mr. Hodgins's thesis:—

The United States have made themselves the champions of, and have declared their national faith in, "the honourable rest and justice found in international arbitration;" and at the Hague peace conference they pledged their nation "to use their best efforts to secure a pacific settlement of international differences;" and joined with Great Britain and other nations in affirming that "in questions of a legal nature, and especially in the interpretation of international conventions, arbitration is recognized by the signatory powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle." Diplomacy has failed to settle this boundary controversy. After urging Great Britain into arbitration over the Alabama claims, and the Behring Sea fisheries, and especially after driving her into arbitration over the Venezuelan boundary dispute (which in no way affected their territory or national interests), will the United States refuse to recognize their own precedents, or to give effect to their compact with the nations as expressed in the Hague convention?

Recent American Decisions.

Carriers of Goods.—A railway company via whose railway compress cotton is shipped on a through bill of lading, a manifest of which accompanies the property consigned to "order notify" consignor, is held, in *Southern R. Co. v. Atlanta National Bank* (C. C. A. 5th C.), 56 L. R. A. 546, to be liable to the holder of the bill of lading for the loss thereby inflicted on him, in case the cotton is delivered from the compress to a third person under direction of the consignor.

Carriers of Passengers.—A stipulation in a pass releasing the carrier from liability for negligent injuries to one travelling thereon is held, in *Payne v. Terre Haute & I. R. Co.* (Ind.), 56 L. R. A. 472, to be valid.

Injury to a passenger who, in attempting to have her baggage checked, is knocked down in a passageway leading from the ticket office or waiting room to the baggage room, by cabmen who, in sport, are scuffling in the passageway, is held, in *Exton v. Central Railroad Co. of New Jersey* (N. J. Err. & App.), 56 L. R. A. 508, to render the railway company liable, where the occurrence of similar conduct on the part of the cabmen to the annoyance and injury of passengers was known, or should have been known, to the company.

A railway company which ejects from its cars, at a station where his ticket expires, a drunken passenger acting in a boisterous manner, using no more force than is reasonably necessary, is held, in *Chesapeake & O. R. Co. v. Saulsberry* (Ky.), 56 L. R. A. 580, not to be liable for any injury which may result to him from his effort to pursue and re-enter the train.

Company.—A corporation which permits an executor to transfer on the books of the corporation stock of his testator to a legatee is held, in *Wooten v. Wilmington W. R. Co.* (N. C.), 56 L. R. A. 615, to be charged with knowledge of the contents of the will, and bound to see that any trust provisions of the will are carried out.

Damages.—Damages for mere mental suffering caused by failure to promptly deliver a telegram are held, in *Connelly v. Western Union Teleg. Co.* (Va.), 56 L. R. A. 663, not to be recoverable either at common law or under statutes imposing penalties for failure to promptly transmit and deliver telegrams, authorizing the recovery of damages sustained by reason of the violation of the statute, and making telegraph companies liable for special damages occasioned in transmitting or delivering despatches, in determining the quantum of which, grief and mental anguish may be considered.

Evidence.—Dying declarations of a woman whom defendant is charged with killing by means of an abortion are held, in *Worthington v. State* (Md.), 56 L. R. A. 353, to be

admissible in evidence where they were accompanied by constant affirmation of expectancy of death, and begging the doctor to save her, as she was dying, although he held out hope of recovery.

An instrument prepared by an injured person in full possession of his mental faculties and in the confident hope of recovery, to be signed as a dying declaration in the event of subsequent conviction of fatal termination of the injury, is held, in *Harper v. State* (Miss.), 56 L. R. A. 372, not to be admissible in evidence as a dying declaration, although executed under conviction of death. An extensive note to these cases reviews all the other authorities on dying declarations as evidence.

Gift.—A finding of gift of an insurance policy, including delivery sufficient to make it effective, is held, in *Lord v. New York Life Ins. Co.* (Tex.), 56 L. R. A. 596, to be supported by declarations of the insured that the policy is the donee's, although it is found among his papers, at his banker's, after his death.

Insurance.—Mere knowledge by the donee of mortgaged personalty that the mortgagor has agreed, but failed, to insure it for the benefit of the mortgagee, is held in *Shadgett v. Phillips & Crew Co.* (Ala.), 56 L. R. A. 461, not to entitle the mortgagee to the benefit of insurance procured by the donee for his own benefit.

A husband having by statute the sole right of control of community property is held, in *Martin v. McAllister* (Tex.), 56 L. R. A. 585, to be entitled to appropriate community funds, without the consent of his wife, to the procurement of insurance upon her life, the proceeds of which, in case of her death, will belong to him in his individual right. A note to this case collates the other authorities on consent of the person whose life is insured, as a condition of insurance thereon.

A condition in a life insurance policy that if, within three years from the date of the policy, the insured should die by suicide, sane or insane, the liability of the company should

be limited to the amount of the premiums paid, is held, in *Scherar v. Prudential Ins. Co.* (Neb.), 56 L. R. A. 611, to be valid.

Judgment.—A decree rendered after the death of one of the defendants, although on the same day, is held, in *Ex p. Massie* (Ala.), 56 L. R. A. 671, not to be valid, the rule by which fractions of a day are not regarded not applying in such case.

Municipal Corporation.—The death of a city employee from smallpox contracted in tearing down a smallpox hospital, of the danger from which he receives no warning, is held, in *Nicholson v. Detroit* (Mich.), 56 L. R. A. 601, not to render the city liable, where the work is done through a board the duties of which are statutory, and which is required to provide smallpox hospitals in case of emergency, since the city's act is a governmental function.

Negligence.—For a druggist to fill an order for calomel tablets with morphine, and place them in a box labelled "calomel," without giving notice of the fact, is held, in *Smith v. Middleton* (Ky.), 56 L. R. A. 484, to be gross negligence which will render him liable for punitive damages in case injury results therefrom.

A railway company which undertakes to care for and treat one of its employees suffering from smallpox, and negligently permits him to escape, is held, in *Missouri K. & T. R. Co. v. Wood* (Tex.), 56 L. R. A. 592, to be liable to persons to whom he communicates the disease while he is at liberty.

Nuisance.—The replacing of hitching posts which have been removed by the municipal authorities as public nuisances is held, in *Mercer County v. Harrodsburg* (Ky.), 56 L. R. A. 583, to be properly enjoined where, although not nuisances in themselves, their manner of use makes them such.

Railway.—Signals at a private crossing are held, in *Louisville & N. R. Co. v. Bodine* (Ky.), 56 L. R. A. 506, to be required for a special train running at high speed, when

the crossing is peculiarly dangerous, because a view of the approaching train is cut off until it is almost at the crossing, and the crossing is used, not only by the landowner, but by the public, and it has been customary for trains to give signals at that place.

Before the public can be said to have acquired an implied license to cross the right of way and tracks of a railway company at a place other than a public crossing, so that the company, in the operation of its tracks, is bound to anticipate foot passengers at such place, it is held, in *Atchison T. & S. F. R. Co. v. Potter* (Kan.), 56 L. R. A. 575, that the path must be so well defined as to attract public attention, and the use must be continuous and for such length of time that the company knows, or, in the exercise of ordinary care, should know, that the public is thus using its right of way.

Will.—At common law it is held, in *Billington v. Jones* (Tenn.), 56 L. R. A. 654, that a will is revoked by writing upon it a signed pencil declaration, "This will is null and void," stating to witnesses that it is killed, and filing it away, where it remains more than twelve years until testator's death, and is referred to only once, and then merely by stating that testator would never have any peace about it.

BOOK REVIEWS.

Coulson and Forbes on The Law of Waters.—The law relating to Waters, Sea, Tidal, and Inland, including Rights and Duties of Riparian Owners, Canals, Fishery, Navigation, Ferries, Bridges, and Tolls and Rates thereon. By H. J. W. Coulson, of the Inner Temple, and Urquhart A. Forbes, of Lincoln's Inn, Barristers-at-law. Second edition (£1 15s. 0d.). London: Sweet & Maxwell, 1902.

This is a comprehensive and well arranged book. It is 22 years since the first edition appeared, and during that time a good many important statutes have been passed and decisions rendered. This new edition, bringing the law relating to waters up to date, will certainly be of use to the profession and public, in Canada, as well as in England.

Danaher's Courses of Study for Law Clerks.—A Paper read by Franklin M. Danaher, of Albany, N.Y., member of the New York State Board of Law Examiners, before the section of Legal Education of the American Bar Association, at Saratoga Springs, N.Y., 29th August, 1902. Published by the Board.

Mr. Danaher takes up the case of students of the law whose circumstances prevent their attendance at a law school, and expounds the offer of the New York State Board of Law Examiners to the law clerks of the United States of courses of law study based upon scientific method, which can be followed in the office.

The Digest.—A Monthly Journal containing Brief Notes of Indian Cases and other Legal Matters. Edited by Dharm Das Suri, Vakil, Pleader, etc. (August, 1902.) Lahore : Kishen Chand Seth.

The Punjab Law Reporter.—A Monthly Journal containing Cases Determined by the Chief Court of the Punjab and the Financial Commissioner, Punjab, and Other Legal Matters. Edited by Dharm Das Suri, Vakil, Pleader, etc. (August, 1902.) Lahore: Kishen Chand Seth.

Cyclopaedia of Law and Procedure.—Edited by William Mack and Howard P. Nash. Vol. IV.—“Assignments” to “Baggage.” New York: The American Law Book Co. London: Butterworth & Co. 1902.

We have commended to our readers the earlier volumes of this work as they appeared. What was then said applies with equal force to the volume now before us. The plan of treating all the law—both substantive and adjective—in one work, is excellent. Pleading and practice and substantive law are so closely interrelated that a logical division is impracticable.

The volume now in our hands, the fourth of the series, commences with “Assignments” and ends with “Baggage.” “Assignments,” written by Roderick F. Rombauer, sometime of the St. Louis Court of Appeals, is a complete and exhaustive treatment of that subject. “Assignments for the Benefit of Creditors” is fully treated by Marion C. Early, of the St. Louis Bar, whose edition of “Bishop’s Commentaries on the Law of Statutory Crimes,” warrants the conclusion that the subject has been ably and comprehensively handled. “Associations,” by H. Gerald Chapin, editor of the “American Lawyer;” “Assumpsit, Action of,” edited by Jonathan Ross, former Judge of the Supreme Court of Vermont; “Asylums,” by Edward M. Winston; “Attorney and Client,” by George F. Tucker, of the Boston University Law School; “Attorney-General,” edited by Robert F. Walker, sometime Attorney-General of Missouri; “Auctions and Auctioneers,” by Archibald C. Boyd, of the Maine Bar—are among the other subjects treated.

Perhaps the most important topic to the general practitioner is “Attachments,” edited by Roger Foster, author of

"Foster's Federal Practice." No existing text book has covered this subject adequately.

Williams and Bruce's Admiralty Practice: — A Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals, being a Third Edition of Williams and Bruce's Admiralty Practice. By the Hon. Mr. Justice Bruce and Charles Fuhr Jemmett, Barrister-at-law, assisted by George Grenville Phillimore, Barrister-at-law. London: Sweet and Maxwell, Limited: 1902.

When the first edition was published in 1868 the High Court of Admiralty was a separate Court with limited jurisdiction, but in 1875, by the operation of the Judicature Acts, it was consolidated with other courts into the Supreme Court of Judicature. There was a second edition in 1883, after the Rules of the Supreme Court of that year had annulled the old Admiralty Rules, leaving, however, the old procedure and practice in force where no other provision was made by the Acts or Rules of 1883. The difficulty of determining to what extent the old procedure remained in force was apparent when the second edition was published, and the same difficulty still exists to some extent, but since 1883 many decisions have been given to consolidate and develop the practice in Admiralty actions, so that the present edition finds it more certain and less complex than the previous one. Two cases, *The Dictator*, [1892] P. 304, and *The Gemma*, [1899] P. 285, are most important in this regard, and these are fully outlined and discussed. The whole of the work has been carefully re-written, and the forms and precedents are new and excellent. Professional men engaged in practice before the Exchequer Court of Canada, on the Admiralty side, will find "Williams and Bruce" a reliable guide, saving the usual just exceptions as to differences in the Acts and Rules.

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WAGERING CONTRACTS.

SIR WILLIAM BLACKSTONE tells us that we seem to have inherited the passion for gaming "from our ancestors, the ancient Germans; whom Tacitus describes to have been bewitched with a spirit of play to a most exorbitant degree. 'They addict themselves,' says he, 'to dice (which is wonderful) when sober, and as a serious employment, with such a mad desire of winning or losing, that when stripped of everything else they will stake at last their liberty and their very selves. The loser goes into a voluntary slavery, and though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honour: *ea est in re pravâ pervicacia, ipsi fidem vocant.*' One would almost be tempted to think that Tacitus was describing a modern Englishman." (Vol. iv., p. 172, Lewis's edition.)

The modern Englishman of the twentieth century is evidently not yet freed from this passion, as is seen from the fact that during several weeks past* a select committee of the House of Lords has been inquiring into the evils occasioned by betting.

The witnesses have, so far, been an exceedingly interesting and varied body of men, covering between them a very wide experience of life. They are almost at one in regard to the

* This article was prepared several months ago; the publication has been unavoidably delayed.

gravity and extent of the evil at present associated with betting. Thus Sir Albert De Rutzen, senior magistrate at Bow Street, gave it as his opinion that more mischief had been done by betting than by anything he remembered. He also believed that the evil had increased in recent years. Another London magistrate said that he almost invariably found that betting was at the bottom of the cases of fraud and embezzlement which came before him. The Rev. J. W. Horsley, formerly chaplain of Clerkenwell prison, spoke of the "sad procession of young men of hitherto immaculate character who, at each sessions of the Old Bailey, went off to penal servitude for offences caused by betting." The recently* published pronouncement of the Ministerial Association of the city of Toronto on this subject would seem to prove that the subject is a "live" one in Ontario, and no doubt this is true of other Provinces as well.

It may, therefore, not be untimely to deal with wagering in its civil aspect.

The writer did this to some extent in an article published some years ago (32 C. L. J. p. 217), but the recent important changes made by the Ontario Legislature in the law on this subject make it necessary, in order to understand the effect of these changes, to repeat a large part of what is contained in that article, which, moreover, may not be readily accessible to all readers of this magazine.

There are two essential characteristics of a wagering contract: first, an unascertained event; secondly, the parties to the contract must stand respectively either to gain or lose, according as the uncertainty shall be determined in the one way or the other.

The consideration for the contract consists in the mutual promises to pay made by the parties one to the other, according to the event of the uncertainty. (Coldridge, p. 1.)

"It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore

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remaining uncertain until that issue is known. If either of the parties may lose but cannot win, it is not a wagering contract." (Hawkins, J., in *Carlill v. Carbolic Smoke Ball Company*, [1892] 2 Q. B. 484.) ✓

In the same case a simple illustration of a wagering contract is given by Hawkins, J., an expert in the subject. A. backs Tortoise with B. for £100 to win the Derby. B. lays 10 to 1 against him, that is £1,000 to £100. How the event will turn out is uncertain until the race is over. Until then A. may win £1,000, or he may lose £100; B. may win £100, or he may lose £1,000; but each must be a winner or a loser on the event.

The event must be uncertain, but it may at the time of the contract be either past or future. If it is past in time, then in so far as it has happened, it is certain and beyond the control of the parties; but, if the result has not been ascertained by the parties, then, quoad them, it is uncertain, and as between them can be properly made the subject of a wager. (Coldridge, p. 2.) For example, in *Pugh v. Jenkins* (1 Q. B. 631), a wager as to which horse had won the Derby on the previous day was enforced, as being a wager on the accuracy of information relating to the race, and not on the event itself.

All wagering contracts, except as hereinafter mentioned, were good at common law, and the winner might recover by an action at law.

The general rule has been stated to be, "That all wagers are legal, excepting those which tend to a breach of the peace; or are contra bonos mores; or tend to hurt the character of, or expose to ridicule a third person; or are against the rules of sound policy and morality; or are contrary to a positive enactment of the law."

Instances of these exceptions are: (1) A wager which would give a party an interest in interfering with the course of justice; e.g., a wager on the conviction or acquittal of a man charged with forgery. (*Evans v. Jones*, 5 M. & W. 77.) "Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet

the very tendency of his mind to act in such a way as to pervert the course of justice is a sufficient foundation for the illegality of such wagers." (Lord Abinger, C.B.)

On the other hand (*Jones v. Randall*, 1 Cowp. 37), a wager was held to be good, "whether a decree of the Court of Chancery would be reversed or not, on an appeal to the House of Lords." An attempt was made, unsuccessfully, to arrest the judgment, upon the grounds, first, that the wager was not contingent, but certain, because the rules of law are known, and certain; and, secondly, that it was *contra bonos mores*. Mr. Dunning, in arguing against the wager, propounded the startling theory that "the laws of this country are clear, evident, and certain; all the Judges know the laws, and knowing them, administer justice with uprightness and integrity." Lord Mansfield, in his judgment, said: "This contract is equal between the parties; they have each of them equal knowledge or equal ignorance; and it is concerning an event which, reasoning by the rules of predestination, is, to be sure, so far certain that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties whether the House of Lords would be of the same or of a different opinion with the Chancellor; the presumption, if any, is rather against the person betting in opposition to the Chancellor's judgment. As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort." His conclusion was that the transaction contained "nothing either immoral or contrary to justice."

With Lord Mansfield's statement as to the glorious uncertainty of law may well be read what was said by Lord Halsbury, L.C. (*Quinn v. Leathem*, [1901] A. C. at p. 506): "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Lord Mansfield, in giving his judgment (in *Jones v. Randall*), said: "If the present wager had been made with one

of the Judges, or with one of the Lords, it would have been a bribe." And again: "If it had been a wager with either the attorney or counsel in the cause, it would have been an objection." (Jones v. Randall, 1 Cowp. 37.)

Lord Ellenborough, C.J., comments upon this case (see *Gilbert v. Sykes*, 16 East 150, at p. 158) as follows:—"As that was between parties having no interest whatever in the decision, it was considered merely as an innocent wager; but Lord Mansfield then said that if it had been with one of the Judges or Lords of Parliament, it would have been clearly void on account of its mischievous tendency; and yet the danger of influencing such illustrious persons, who would not probably mix at all in the decision, would be infinitely remote; but, notwithstanding the improbability of any mischief in fact, such a wager was deemed void on account of its tendency upon general rules of law."

See also the case of *Allen v. Hearn*, 1 T. R. 56, where a wager between two voters with respect to the event of an election of a member to serve in Parliament, laid before the poll began, was held illegal as tending to bias the mind of the elector, and to influence him in giving his vote, and also as possibly being a colour for bribery.

(2) Where the ascertainment of the fact or the event would involve inquiries respecting the age or sex of third persons, or tend to make them objects of curiosity or annoyance.

The singular case of *DaCosta v. Jones* (2 Cowp. 730) is an important illustration of this. It was an action upon a wager between the plaintiff and defendant upon the sex of Monsieur le Chevalier d'Eon, who was so described in the declaration. The subject of this wager was a man of singularly effeminate appearance, who was connected with the French embassy at London, in 1763. He had served with credit as a soldier. The question of his sex was deemed worthy of the attention of the French Parliament, which decreed him to be a woman, and to wear feminine apparel, which he did for many years in Paris and London. Horace Walpole says of him: "She looked more feminine, as I remember her in her

regimentals, than she does now. She is, at best, a hen-dra-goon or a herculean hostess. (Humourous Phases of the Law, by Irving Browne.) "This case" (said Lord Mansfield), "upon the trial of the first cause made a great noise all over Europe." This learned Judge, who tried the cause, when it came before him afterwards on a motion in arrest of judgment, expressed great regret that he had not dismissed it at the trial. The Court unanimously arrested the judgment on the ground that the case was "indecent in itself and manifestly a gross injury to a third person; therefore ought not to be endured."

Very similar are the remarks of Buller, J., in another case: "I am of opinion that a bet on a lady's age, or whether she has a mole on her face, is void." (Good v. Elliott, 3 T R. p. 699; see also Eltham v. Kingsman, 1 B. & Ald. 683.)

(3) Wagers which gave either party an interest in doing or procuring an unlawful act.

In Gilbert v. Sykes (16 East 150) a wager upon the life of Napoleon Bonaparte, then First Consul, was held void. Napoleon was at that time making active preparations for an invasion of England, and the bet arose out of a conversation concerning the probability of his assassination or other violent death, which was then considered not improbable. The terms of the bet in question were: The defendant received from the plaintiff one hundred guineas on the 31st May, 1802, in consideration of paying the plaintiff a guinea a day as long as Bonaparte should live. The defendant paid his guinea daily from 31st May, 1802, to 25th December, 1804, but no longer. The plaintiff claimed for arrears due £2.296. It was proved that the bet arose after dinner at the defendant's table, and evidence was adduced to shew that it was not intended seriously, but that, although the plaintiff offered to cancel it, the defendant stuck to it out of a sense of honour. The Court thought the wager bad as against public policy on two grounds; "it would tend to dampen the patriotic ardour of the plaintiff to take up arms against the invader lest he should thereby lose a guinea a day by shooting Napoleon, and it would give the defendant a pecuniary interest in compassing

the violent death of another person by whatever means procured; an interest which he has no right to create by his own voluntary act." Le Blanc, J., said: "In my opinion it is both impolitic and immoral to bet concerning the life of a sovereign whether he shall come to his death by assassination or other violent means." Bayley, J., thought such a wager when applied to the person of a foreign potentate, to be "also particularly impolitic; because it tends to create disgust against this country amongst foreign potentates to have such subjects discussed in our courts of law." Lord Ellenborough's judgment in that case affords striking judicial evidence of the panic which Napoleon's fictitious demonstrations of invasion had created in the kingdom of Great Britain. If the little corporal had really set foot on British soil he would have had nothing to fear from his lordship individually, for he was turned out of the awkward squad of the Lincoln Inn soldiery on account of incorrigible unfitness for military affairs. (Humourous Phases of the Law.)

(4) Wagers on abstract questions of law.

An attempt was made in the case of *Henkin v. Guerss* (12 East 247) to get the opinion of the Court in regard to a wager on an abstruse point as to "bail on a special original for a debt under £40." The trial Judge, Lord Ellenborough, C.J., on hearing the nature of the cause, refused to try it. Application was thereafter made to the full Court to have the action tried. The other Judges concurred with the chief Justice in the propriety of his refusal to try a case of this kind. His Lordship added "that courts of justice were not bound to answer whatever impertinent questions persons thought fit to ask them in the shane of an action upon a wager. That though there was nothing immoral in the subject of this wager, yet he considered it as an extremely impudent attempt to compel the Court to give an opinion upon an abstract question of law not arising out of pre-existing circumstances in which the parties had an interest.

(5) Where one party could determine the event in his own favour.

In *Fisher v. Waltham* (4 Q. B. 889) a wager by an attorney's clerk that he would not pass his examination was held void. "It is a pity" (said Lord Denman, C.J.) "that our time is to be occupied in discussing questions of this sort. But I think there is a fatal objection to this contract; namely, that one of the parties has the event in his own hands." It has been suggested that this wager was also void on the ground of public policy as tending to hinder the promotion of legal knowledge.

(6) Wagering contracts against public policy.

In *Hartley v. Rice* (10 East 22) a wagering contract for fifty guineas that the plaintiff would not marry within six years was held to be *prima facie* in restraint of marriage and therefore void, there being nothing to shew that such restraint was prudent and proper in the particular instance. "A contract to restrain marriage generally has been determined to be illegal, as being against the sound policy of the law." (*Le Blanc, J.*)

Chief Justice Wilmut dealt with this kind of contract as follows: "A covenant of this kind doth not only hinder a greater moral and social good, it does not only hinder and check that 'profectum in bono' which we owe to God and our country, but it tends to evil and the promotion of licentiousness; it tends to depopulation, the greatest of all political sins: it is a contract, 'vergens ad publicam perniciem,' and therefore has a moral turpitude in it." (*Lowe v. Peers, Wilm. p. 372.*)

Judges from time to time protested against "the inconvenience of countenancing idle wagers in courts of justice." "It occupies" (said Bayley, J.) "the time of the Court, and diverts their attention from causes of real interest and concern to the suitors; and I think it would be a good rule to postpone the trial of every action upon idle wagers till the Court had nothing else to attend to." ((1812) 16 East p. 162.)

In the earlier case of *Good v. Elliott* ((1790) 3 T. R. p. 693), which was an action on a wager as to whether one Susannah Tye had or had not before a certain day bought a

waggon, Mr. Justice Buller was of the opinion that no action could be maintained upon a wager if it concerned the "person or transactions of another," and he urged that it was not too late to discuss the question as to whether wagers in general should not be held void and therefore unenforceable. In this he was overruled, and the wager in question was determined, after a solemn argument, to be a good wager; and the plaintiff recovered.

We find precedents of pleadings in declarations on a wager concerning the weight of hogs, on a wager that the plaintiff would marry in a quarter of a year, on a wager whether a man at backgammon should be moved or not, and on a wager concerning the weight of two penny loaves of rye bread; *cum multis aliis similibus*.

The case of *Hussey v. Crickett* (3 Camp. 168), an action upon a wager of a rump and a dozen whether the defendant was older than the plaintiff, is a good illustration of the frivolous actions that occupied the time of the Courts in those days. In that case Sir James Mansfield, C.J., said:—"I am inclined to think I ought not to have tried this case. While we were occupied with these idle disputes, parties having large debts due to them and questions of great magnitude to try, were grievously delayed." See also *Earl of March v. Pigot* (5 Burr. 2802.)

There is, however, a class of wagering contracts which does not come under the ban of the law, being wagering contracts directed to commercial objects. These are contracts of insurance or indemnity against risks to the life or property of one party or speculative sales of stocks and shares, unless the contracts for sale and purchase are purely fictitious, and what are called "time bargains," or "difference transactions." (*Forget v. Ostigny*, [1895] A. C. 318; *Universal Stock Exchange v. Strachan*, [1896] A. C. 166; *Eng. Encyc. VI. 48.*) This latter class will be discussed later. These classes of wagering contracts are tolerated and even encouraged as being for the welfare of the community.

"Insurance," says Bentham, "is nothing but a kind of bet." An insurance company bets John Doe that he will not die until such and such a time, or that a fire will not destroy

his house, or that an accident will not befall his person. John Doe bets the company that these things will happen. It is in each case an uncertain event, over which those who stake their money have, or should have, no control. John Doe may, indeed, commit suicide or burn his house, or break his arm on purpose, but in doing so he would commit a crime, and if discovered would in most cases vitiate the insurance as well. To quote Bentham once more: "If, then, all bets, without restriction, were prohibited, insurances, so useful to commerce, and such a resource against a multitude of calamities, would not be lawful." (Jelf, *Where to Find your Law*, 2nd ed., p. 260.)

But even such a beneficial contract as that of insurance is liable to be abused and made an engine of mere gambling; where, for instance, a man insures the life of another, a mere stranger, in whose life he has no interest, the transaction is nothing but a wager. This was, in fact, a very common mode of gambling before the Act 14 Geo. III. c. 48 was passed. This prohibits wager policies, as they are called, altogether; it prevents a man from insuring an event in which he has no interest, and where he has an interest, but not to the extent insured, prohibits him from recovering more than the amount of his interest. This statute is in force here, modified by "The Insurance Act," (R. S. O. c. 203, s. 151).

The subject of wagering policies of life insurance has been discussed in the recent case of *North American Life v. Brophy* (2 O. L. R. 559), and in an earlier case of *Craigie v. North American Life* (13 S. C. R. 278).

It is principally in connection with betting upon sports and pastimes that the Legislature has had to intervene from time to time in the interests of the public weal.

By the ancient common law all games were lawful. But so early as the reign of Richard the Second the legislature found it necessary to interfere, and to make several games illegal, as "*coytes, dyces, gettre de pere, keyles, et autres tielx jeux importunes*." This Act was only aimed at labourers and artificers, and was repealed in the reign of James the First.

Again in the reign of Edward the Fourth the games of "cloish, kayles, half-bowles, hand in and hand out, and check-board," were prohibited under severe penalties, as being the cause of "divers and many murders, robberies, and other very heighnous felonies."

The principal object of these early statutes was to encourage archery, and to make that the only lawful sport for the lower ranks of the people. (Disney, pp. 46, 47.) In Brandt on Gaming the curious reader will find an account of these early games.

Many later statutes, especially the 33 Hen. VIII. c. 9, were passed to regulate games, and to repress the subtle, inventive, and crafty persons, who had discovered many and sundry "new and crafty games and plays," to the great detriment of archery, from which it resulted that as people were too poor to buy long bows on account of indulging in tennis play, bowles, coysh, and other unlawful games, poverty, murders, and robberies had resulted (Coldridge and Hawksford, p. 43); but it was "found by experience that the said good and wholesome laws have not effectually answered the good ends, intents, and purposes in and by the said Acts designed." (See 12 Geo. II. c. 28). Sir Edward Coke (case of the Monopolies, 11 Rep. 87, b) speaks of the futile efforts made to repress these "*et alios ludos vanos*."

The first statutory restriction upon the enforcement of gaming and wagering debts is to be found in 16 Charles II. c. 7, "An Act against deceitful, disorderly, and excessive gaming."

Horse-racing was then fast becoming a national pastime. As a natural consequence the practice of betting increased at a proportionate rate, and to such an extent as to interfere with individuals pursuing their ordinary avocations. There were in those days also, it would seem, the equivalent to the "flannelled fools at the wicket or the muddled oafs at the goals" of modern times.

The preamble to that statute recites: "Whereas all lawful games and exercises should not be otherwise used, than as innocent and moderate recreations, and not as constant

trades or callings to gain a living, or make unlawful advantage thereby; and whereas by the immoderate use of them, many mischiefs and inconveniences do arise, and are daily found, to the maintaining and encouraging of sundry idle, loose, and disorderly persons in their dishonest, lewd, and dissolute course of life, and to the circumventing, deceiving, cousening and debauching of many of the younger sort, both of the nobility and gentry, and others, to the loss of their precious time, and the utter ruin of their estates and fortunes, and withdrawing them from noble and laudable employments and exercises," etc.

Provision was then made to put a stop to winning of money "by any fraud, shift, deceit, cousenages, etc., in playing at or with cards, dice, tables, tennis bowles, kittles, shovel-board, or in cock-fightings, horse-races, dog-matches, foot-races, or other pastimes or games whatsoever" (s. 2). This section aims solely at cheating at play. The next section aimed at excessive gaming on credit. It provided that anyone playing "at any of the said games, or any other pastime or games whatsoever (other than with or for ready money)," or betting thereon and losing any sum over £100 at any one time or meeting "upon ticket or credit or otherwise and not paying down at the time, should not be" compellable to pay or make good the same.

It further enacted that "the contract and contracts for the same and for every part thereof," and all securities whatsoever for the same or any part thereof, should be "utterly void and of none effect."

This statute, it will be seen, did not make wagering illegal so long as it was unaccompanied by fraud, and the parties were at liberty to wager to any extent provided they paid ready money.

Next came the more drastic statute, 9 Anne c. 14, "An Act for the better preventing of excessive and deceitful gaming," by which, after reciting that "the laws now in force for preventing the mischiefs which may happen by gaming, have not been found sufficient for that purpose," it was enacted "for the further preventing of all excessive and deceitful gaming," that notes, bills, bonds, . . . etc., or

other securities given by any person whereof the whole or any part of the consideration should be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowles, or other game or games whatsoever, or by betting on the players, etc., should be "utterly void, frustrate, and of none effect to all intents and purposes whatsoever."

This statute carried the restrictions on private betting and gaming considerably further than the statute of Charles II. It prescribed additional penalties for fraud, and made a great reduction in the test of excessive gaming by substituting £10 for £100 as the maximum sum which a person might lose. Further than this, it made it penal to exceed the limit laid down, instead of merely making the money irrecoverable; and if the money had been paid by the loser it might be recovered back. This enactment avoided not only the security, even where negotiable, but also the contract to pay or repay. (*Applegarth v. Colley*, *infra*; see *Stutfield* (2nd) p. 6.)

The statute does not deal with wagering generally, but only with gambling and betting on games, sports, or pastimes.

In *Applegarth v. Colley* (10 M. & W. 723) it was held that "according to the construction which a great variety of cases have put upon these Acts it must be taken that the games contemplated in the statute of Anne, though not there enumerated, are the same as those referred to in the statute of Charles II." (p. 729).

Cricket apparently was within the mischief of the statute of 9 Anne. *Jeffreys v. Walker* (1 Wils. 220) was an action brought on a bond arising out of a "bet upon tick" made on an occasion where "certain persons who styled themselves of the county of Kent played against certain other persons who styled themselves all England, at a certain game called cricket." The learned Serjeant tells us that: "For the defendant it was insisted that cricket is a game, though not mentioned in the statute, and comes within the general words . . . it is (to be sure) a manly game, and not bad in itself, but it is the ill-use that is made of it, by betting above £10 upon it, that is bad and against the law, which ought to be construed largely to prevent the great mischief of excessive

gaming. The Court inclined to give judgment for the defendant that cricket is a game, and that the present bond is void; but it stood over for further argument and the parties agreed, *ut audiui*." See also *Lynall v. Longbottom* (2 Wils. 36.).

Cock-fighting, dog fights, and foot-races would come within the meaning of the statute, and horse-racing, as will be seen later.

By virtue of these Acts all securities coming within their provisions were held to be void, even in the hands of innocent holders for value. The negotiability of bills and notes was thus utterly destroyed, and this sometimes caused hardship to innocent persons.

To remedy this supposed hardship (as to which see *Bower v. Bampton*, Strange 1155,) the statute of 5 & 6 Wm. IV. c. 41 was passed by the Impérial Parliament, which, after referring by name to the statutes of Charles and Anne and other similar Acts, recites as follows: "Whereas securities and instruments made void by virtue of these several Acts are sometimes indorsed, transferred, assigned or conveyed to purchasers or other persons for a valuable consideration without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice." 5 & 6 Wm. IV. c. 41, s. 1.

It then repeals so much of these Acts as avoids such securities, and enacts that "every bill, note, or mortgage which, if this Act had not been passed, would, by virtue of the said several mentioned Acts, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration," and these Acts (of Charles II. and Anne *inter alia*) are to be construed as if they had so enacted.

The result of this Act is that the holder of such bills or notes, in good faith and without notice of the illegality, can recover upon them, but that the burden of proof that he is so lies on him, if it is pleaded and shewn that the bill arises out of a gaming transaction.

Cheques have been held to come within the operation of the statute: *Lynn v. Bell* (10 Ir. Rep. C. L. 487.)

Next came the Imperial statute 8 & 9 Vict. c. 109, "the most important legislative measure on the subject which has been passed." The 18th section of that statute effected "a most sweeping and beneficial change in the state of the law, for it rendered all contracts by way of gaming or wagering null and void."

This "broad and general enactment includes under one sweeping enactment all contracts by way of gaming, and therefore has a much wider application than the previous statutes of Charles II., Anne, and William IV., which apply only to wagers on games and pastimes." But under these statutes money lent to make or to pay bets could be recovered, and if one man employed another to make bets for him the ordinary rules prevailed which govern the relation of employer and employed. This was altered by the Gaming Act of 1892 (55 V. c. 9).

It will be convenient to sum up the law in Great Britain and Ontario respectively up to the date of the last session of the Legislature of Ontario, before considering the changes then made therein.

A. IN ENGLAND.

By the Act of 1845 (8 & 9 V. c. 109, s. 18) the statutes of Charles and Anne are repealed, but the statute of William is not affected. As a result:

(1) All contracts of wager are null and void.

(2) As to securities: if the wager is upon a game or pastime, it comes within the statute of William IV., and is held to be taken upon an illegal consideration.

Once the illegality is proved, the onus is upon the holder, not being one of the original parties to the wager, to shew that he gave value for the security and was ignorant of its origin; in other words, that he is a bona fide holder for value. If, however, the wager was not upon a game or pastime, but upon some other subject, the statute of Victoria is the only one that applies. It says nothing about securities,

but merely makes the contract void; the security has simply no consideration, and, therefore, though worthless as between the original parties to the wager, is good in the hands of a purchaser for value, even though he may have full knowledge that there was no consideration for the giving of the security. The onus is upon the party denying that value has been given to prove its absence.

B. IN ONTARIO.

The statutes of Anne and Charles were in force here, having been introduced by the Constitutional Act of 1792, and they were the only statutes regulating wagering contracts. (*Bank of Toronto v. McDougall*, 28 C. P. 345.) The statute of William was not in force here.

A wager on a game or pastime, if exceeding £10, was therefore absolutely void in Ontario under the statute of Anne.

A security given for the amount of such a wager was absolutely frustrate and void, even in the hands of an innocent holder for value, though without any notice of the illegal origin of the instrument. (*Re Summerfeldt*, 12 O. R. 48.) And in this case it made no difference that the bet was for less than £10.

The innocent indorsee had only one remedy, and that was against his indorser on the indorsement, which is equivalent to an assertion of the validity of the security. (*Coldridge*, p. 80. See *Bowen v. Brampton*, 2 *Strange*, p. 1155.)

A wager upon something other than a game or pastime would have been legal in Ontario, and the contract valid and enforceable, unless in the cases above referred to, where it was opposed to public policy or the rules of the common statute law. All securities for such a wager as this would be perfectly good and enforceable by action.

What is the effect of the legislation of 1902? (2 *Edw. VII. c. 7*, ss. 8, 9, *R. S. O. c. 329*.)

The first section of the 9th Anne c. 14 has been struck out and an entirely new section substituted for it, composed partly of the eliminated section and partly of the first section of the Imperial Act 5 & 6 Wm. IV. c. 41.

Gaming securities are no longer "utterly void, frustrate, and of none effect to all intents and purposes whatsoever," and the position of transferees of such instruments has been entirely altered.

Instead of avoiding the securities given for gaming debts, the present statute declares that the consideration for which they are given is illegal, or, in other words, puts such securities on the same footing as those given for an illegal consideration.

What is the effect of this change?

As between the original parties to the contract the effects of illegality and nullity are the same. A bill or note, where the consideration is illegal, is entirely void as between the original parties. But a transferee for value without notice may sue all the prior parties and recover. Where a transfer has been made a presumption is raised that the indorsee is the agent for the original holder, and that indorsement to him is merely a means of evading the law and of enforcing an originally illegal contract.

As soon as the security is shewn to have arisen from a wagering transaction, the burden of proof is shifted on to the transferee of shewing that he took the instrument bona fide, that is, without notice of the illegality, and that he gave valuable consideration. Even after shewing that he gave value, the plaintiff may still be defeated by proof that at the time he took the instrument he knew of the illegality. The illegality would affect the transferee if at the time of the transfer the security were overdue. (See *Farmer v. Ellis*, 2 O. L. R. 544.)

If the instrument were simply "void," no taint would be upon collateral transactions, and, therefore, there would be no presumption against a subsequent holder. (*Fitch v. Jones*, 5 E. & B. 238.) He can recover, if he gave value, even though he had full knowledge when he took the security that there was no consideration for it. Where the original contract is merely void, a negotiable instrument given to secure the payment of money under it, is founded not upon an illegal consideration, but upon no consideration at all,

and, therefore, the defendant to an action on the instrument is obliged to shew affirmatively that the plaintiff did not give consideration for it, and if the plaintiff gave consideration, it is immaterial whether he took with or without notice of the defect in the original contract.

What is the effect of the statute upon non-negotiable securities such as mortgages or bonds ?

The learned writers above referred to (Coldridge and Hawksford) consider this a question difficult of solution. The statute would seem to deal with these instruments as if they were or were intended to be negotiable. This is clearly a misconception; for if a mortgage security is given for an illegal consideration, then, as between the mortgagor and the mortgagee, it is absolutely void, and no debt exists thereunder; hence, it must follow as a necessary consequence that no chose in action exists that can be transferred (*ib.* p. 100). There is no authority in point as to the rights of the transferee of such mortgage. For short discussions of the subject see Coote on Mortgages, 5th ed., vol. II., p. 976, and Robbins on Mortgages, I., p. 621, where it is stated that such a document can be enforced by a transferee for valuable consideration without notice, and by no other person. Coldridge and Hawksford consider this view untenable, but suggest as a solution of the problem that in most instances the doctrine of estoppel would apply as against the mortgagor in favour of the assignee or purchaser (*ib.* p. 101). Where there is a danger that a security, to which the taint of illegality attaches, may be assigned to the detriment of the maker, grantor, etc., proceedings may, and should, be taken for the cancellation and delivery up of the security. (Robbins I., p. 622; Coldridge and Hawksford, p. 104.)

The 9th section of the Act of 2 Edw. VII. re-enacts for Ontario the 2nd section of 5 & 6 Wm. IV. c. 41. This section "is complementary to the first. A. loses \$— to B. at gaming, and gives a bill, note, or mortgage to B. as security. B., in consideration of \$— paid to him by C., assigns the security to C. Subsequently C. enforces payment of the \$— so secured from A. Then the second section enables A. to recover from B. the amount \$— which he has paid C." (Coldridge and Hawksford, p. 104.)

In the case of *Lynn v. Bell* (10 Ir. Rep. C. L. 487) the plaintiff lost to the defendant, on bets on three horse races, sums which he paid by three cheques as follows: "To the Ulster Banking Company. Pay Mr. R. Bell or bearer £—, which charge to the account of James Lynn." The first and second cheques were indorsed by Bell to third persons, bona fide holders for value, who cashed them; the last was indorsed by Bell alone, and was cashed by a person who received it from him in payment of losses on betting transactions. Lynn thereupon brought his action to recover the amount of the cheques. It was held that payment by the bankers was payment by Lynn within the statute, and that he was entitled to recover.

Messrs. Coldridge and Hawksford draw attention (p. 106) to one particular instance of the operation of this section which merits notice. A. gives B. a security for the repayment of money knowingly advanced by B. to A. (say \$100) for the purpose of gaming, or lent at the time and place of the gaming to A., a player. B. assigns the security to C. for \$100. C. enforces the security against A. and thereby compels A. to repay the money advanced by B. to him. Can A. now sue B. for the recovery of the \$100 so paid by A. to C. in respect of the assigned security? If yes, then B. first lends A. \$100, and then because he takes a security for the payment of the money lent and assigns the same, he has again to pay A. a further sum of \$100. In the result he is compelled to lose the amount he actually advanced to A. in the first instance.

Speaking with respectful submission, a grave mistake was made in not enacting for Ontario the Imperial statute 8 & 9 V. c. 109, above referred to. This Act is salutary in itself. No good reason can be assigned for allowing validity to wagering contracts, more especially when the mischievous tendency of the habit is admitted.

Moreover, by enacting this statute our legislation would have been brought into line with that in England, a desirable result when changes are being made. Why introduce legislation of 1835 and not include the important statute in *pari materia* of 1845? If a wager were made in Ontario as to

whether the moon is composed of green cheese, the Courts might be called upon to settle the question; not so in England, where the general enactment avoids all wagers.

Wagers are now generally prohibited by statute in the United States (Ruling Cases XII. 406). In the Province of Quebec the law on this subject is contained in Art. 1927 of the Code, which says: "There is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet."

Ontario might well follow these three examples.

HORSE-RACING.

We are told that in the reign of Queen Elizabeth races were first established in various parts of England, but there was no regular system, and all sorts of horses ran. The prize was usually a wooden bell adorned with flowers; and this afterwards was exchanged for a silver bell, and "given to him who should run the best and furthest on horseback on Shrove Tuesday." (Oliphant on Horses, p. 355.)

In the reign of James the First horse-racing began to be ranked as a distinct sport; up to this time it had been mixed up with other exercises of skill and activity (ib. p. 358). Charles the Second encouraged it in many ways; the breed of horses was also much improved in his reign by horses brought over from Tangiers, as part of the dowry of his queen, Catherine of Braganza. But no sooner had horse-racing been fully established than we find an Act was passed to endeavour to prevent the evils which have unfortunately always attended it. This was the 16 Charles II. c. 7, which came into operation in A.D. 1664, and in it horse-racing is mentioned for the first time in the statute book. (Ib. p. 359.)

Then came the statute of 9 Anne c. 14. It has been held in several cases that horse-racing was within the statute of Anne (*Blaxton v. Pye*, 1 Wils. 309; *Woolf v. Hamilton*, [1898] 2 Q. B. 339). As a consequence, any race for £10 a side or upwards was illegal, all losses paid might be recovered back, and the winner was in danger of the penalties imposed by the statute. It was found after the passing of this Act that the number of horse races had very much increased;

and in consequence of their being run under £10 a side, and therefore for small plates, they had contributed very much to the encouragement of idleness, and the breed of horses was supposed to have been deteriorated (*ib.* p. 362). But it was thought that horse-racing, confined within due limits, had a tendency to improve the breed of horses, and thereby promote the interests of the country at large. Acts of Parliament were, therefore, passed providing for this particular object, and excepting such races to a certain extent from the provisions of the Gaming Acts.

“The benefits which have been derived to our country by the improvement in the breed and management of horses, have induced the Legislature to put the amusement of horse-racing under certain regulations; and when these regulations are complied with, it receives a certain protection; and the reason of this was the improvement of the breed of horses, as is evident from the preamble of the statute of 13 Geo. II. c. 19, which recites that by horses running for small plates ‘the breed of strong and useful horses hath been much prejudiced; for remedy whereof,’ etc., clearly shewing what the object of the Legislature was.” (*Disney* p. 27.)

The principal Acts were the 13 Geo. II. c. 19 (A.D. 1740), and 18 Geo. II. c. 34, s. 11, each described as “An Act to restrain and prevent the excessive increase of horse races.”

All horses were to be entered by their real names, and no person was to start more than one for the same plate under penalty of forfeiting the horse. No plate or sum was to be run for under the value of £50, and all horses were to be entered by their real owners.

An action was brought to recover a wager of £5 on the event of a horse-race. At the trial the plaintiff was nonsuited, as the bet was made on a horse-race for a smaller sum than £50. On motion to set aside the nonsuit, it was held: *per Curiam*:—It is sufficient, without adverting to cases, to say that the horse-race itself is prohibited by statute 13 Geo. II. c. 19, s. 2; and as the race, which is the subject of the wager, is illegal, so also is the wager. (*Johnson v. Bann*, 4 T. R. 1.)

In the case of *Shilleto v. Theed* (7 Bing. 405) it was argued that the horse-race on which the bet in question was made, having been rendered valid by the statute 18 Geo. II. c. 34, the bet itself, as a collateral and incidental consequence, must be valid and create legal consequences. The Court held, however, that the legalizing of horse-races did not interfere with the operation of the statute of Anne.

These statutes (of Geo. II.) have been held to be in force in Ontario. (*Sheldon v. Law*, 3 O. S. 85; *Battersby v. O'Dell*, 23 U. C. R. 482; *Davis v. Hewitt*, 9 O. R. 435.)

The result of these cases appears to have been that the statute of Anne still applied to horse-races, and that any bet on a horse-race over £10 was void; and any bet was void unless there was also a match between the horses of at least £50, as required by 13 Geo. II. c. 19, because, if not, the whole race was illegal, and a wager on an illegal game was contrary to public policy.

But important changes have been made in the law as to horse-racing by the legislation of 1902, which must now be considered.

By 2 Edw. VII. c. 1, the statutes of 16 Car. II. c. 7, 13 Geo. II. c. 19, and 18 Geo. II. c. 34, are repealed. All restrictions upon horse-racing have been thus removed, and there is no longer anything on the statute books "to restrain and prevent the excessive increase of horse-races;" the cases in our Courts on the subject above referred to are no longer authorities.

It may well be asked what was the necessity for this legislation?

The only answer that suggests itself is that the same thing was done in England by 3 & 4 V. c. 35.

In view of the evils from betting at race-courses in England, which are being proved before the Committee of the House of Lords, it may well be thought that this is an insufficient excuse for legislation now in this country giving "a new charter to horse-racing."

But the more serious question remains, how does the repeal of the statute of Charles and the amendment made in

the statute of Anne affect wagering contracts upon horse-races.

The following points must be noticed. Horse-racing is specifically mentioned in the Act of Charles II., but not in that of Anne. The statute of Anne was, however, designed, as is shewn in its preamble, to effectuate the provisions of that of Charles II., and the decisions shew that horse-racing was a "game" within the statute of Anne. The statute of William IV. refers specifically, both in the preamble and in the enacting part, to the statutes of Charles II. and Anne, and, while repealing the clauses therein which avoid securities absolutely, enacts that all securities which would by virtue of these Acts have been absolutely void, shall be deemed and taken to have been made, etc., for an illegal consideration.

This statute, therefore, practically incorporates with its provisions those of the two earlier statutes, and deals expressly with securities affected by those statutes. "It will be seen to be a modification of the previous statutes of Charles and Anne, and only to affect such securities as would have been by these statutes rendered null and void."

In *Woolf v. Hamilton*, ([1898] 2 Q. B. 339) an attempt was made to convince the Court of Appeal that horse-racing was not covered by 5 & 6 Wm. IV. c. 41, but Lord Justice A. L. Smith said: "It has been held that horse-racing came within the provisions of 9th Anne c. 14. It was expressly mentioned in the statute 16 Charles II. c. 7, and the authorities shew that the same kinds of games were covered by the statute of Anne as by the statute of Charles II. We clearly should not be justified in overruling the authorities to that effect, seeing that the Legislature has on many occasions since legislated upon these matters, and has not touched these decisions."

Our Legislature, however, would seem to have "touched these decisions." The present statute repeals the statutes of Charles and Anne, but a part of the latter statute, as has been seen, is re-enacted in conjunction with part of the statute of William. The preamble of the last mentioned Act, and the references in the enacting part to the statutes of

Charles and Anne, are not re-enacted, and have never been in force here. The foundation of the cases which have decided in England that horse-racing was covered by the statute of William, namely, the interlacing of the three Acts, has thus been swept away, and the conclusion seems irresistible that wagers on horse-racing are not within the meaning of our present law. They would not, it is submitted, be covered under the *ejusdem generis* doctrine by the reference to "other game or games whatsoever." If the Legislature designedly omitted any reference to horse-racing it is a calamity, but this is incredible; it is doubtless the result of oversight in consolidating the earlier statutes. Beyond question, had the possible effect of what has been done been foreseen, the word "horse-racing" would have appeared in the enumeration of the sports contained in s. 8 of the Act.

The provisions of s. 8 "are not in effect, the same as those of the repealed Acts and parts of Acts for which it is substituted" (2 Edw. VII. c. 13, s. 10), and must be held to govern, and cannot be construed as merely "declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which it is substituted." (Ib. s. 9.)

Whatever be the true position in regard to this, it is to be hoped that the Legislature in its next session will, *ex abundanti cautela*, prevent any danger by curing this undoubted defect.

This article, before closing, ought to make a brief reference to a species of wagering, which, there is reason to fear, is very commonly practised, and is very dangerous, namely, Stock Exchange transactions, or "time bargains."

"The Stock Exchange and the operations conducted there to a considerable extent lie on the borderland of the subject of gambling. The chief legal problem which is presented is the difference between speculative sales and purchases on the one hand, and difference transactions on the other." (Coldridge and Hawksford, p. 297.)

It is of great importance to remember in regard to dealings on the Stock Exchange that to constitute a gambling transaction there must be a *consensus ad idem* by both sides to the agreement, and that consensus must relate to an agree-

ment which of itself constitutes a wager. It is not sufficient that one of the parties should have it in his mind to speculate or gamble, terms which are used metaphorically and inclined to be misleading; it is essential that the other party should be privy to and assist in the intent to wager.

In England, Stock Exchange transactions are or are not invalid according to whether they are or are not simple wagers. This depends upon whether there is a *bonâ fide* intention to buy the stock, as distinguished from an intention merely to gain a profit by the rise in price without actually purchasing. If neither party intended to sell or purchase, the contract is a gambling one. (*Jervis, C.J., Grizewood v. Blane*, 11 C. B. 526.) In *Reggio v. Stevens* (4 T. L. R. 326) the crucial test was said to be: Was there any evidence on which the jury might have found, as a fact, that either party had intended that the shares should be taken up?

In addition to the cases already referred to on this subject, *Thacker v. Hardy* (4 Q. B. D. 685) is a very instructive case.

In 1733 an attempt was made in England to check speculation on the Stock Exchange, when the statute known as *Barnard's Act* (7 Geo. II. c. 8) was passed. It was aimed at "the wicked, pernicious, and destructive habit of stock jobbing," and rendered illegal all contracts for the payment of differences only and contracts in the nature of options, and contracts for the sale of stock of which the vendor was not possessed. But the "effect of the statute was soon whittled down by the Courts," and it was repealed in 1860.

Speculation in bank shares is dealt with by *Leeman's Act* (30 & 31 V. c. 29), but apart from this statute transactions on the Stock Exchange are only affected in England by the general wagering statute, 8 & 9 V. c. 109.

In Ontario, until the passing of 51 V. c. 42 (D.), "An Act respecting gaming in stocks and merchandize," such transactions were perfectly valid, whether they were simple wagers or not, because they did not come within the statute of Anne, not being in connection with games or pastimes. They were thus legal here, wager or no wager. This was decided in *Bank of Toronto v. McDougall*, (28 C. P. 345), an action on a bill of exchange in respect of what was really

gambling in differences. The law is discussed there by Harrison, C.J., in a very elaborate judgment. This state of the law is altered by the above statute, the provisions of which are re-enacted in the Criminal Code (s. 201), which makes guilty of an indictable offence liable to be punished with five years' imprisonment and a fine of \$500, any one "who with the intent to make gain or profit by the rise or fall in price of any stock in any incorporated or unincorporated company . . . without the bonâ fide intention of acquiring any such shares, etc., or of selling the same," makes any contract for the sale or purchase thereof, or for the sale or purchase of any such shares of stock, etc., "in respect of which no delivery of the thing sold or purchased is made or received, and without the bonâ fide intention to make or receive such delivery."

Three essential elements must co-exist in order to constitute an offence under the provisions of this section: (1) having an intent to make gain or profit; (2) making or signing contracts purporting to be for the sale or purchase of certain commodities; (3) absence of a bonâ fide intention to make or receive delivery of such commodities. (*R. v. Dowd*, 4 Can. Cr. Cas. 170.)

The case of *Forget v. Ostigny* (supra) discusses this provision of the Code and its effect upon contracts obnoxious to it, and should be carefully considered.

In the case of *British Columbia Stock Exchange v. Irving* (8 B. C. R. 186), an action by brokers against a customer, claiming payment for stock transactions, it was held that as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transactions were illegal as being a breach of s. 201 of the Criminal Code, and the plaintiffs could not recover.

Toronto.

N. W. HOYLES.

INTRUDERS ON CROWN LANDS.

In the interesting review of the Statutes of Ontario of 1902, by Mr. Hoyles, K.C., published in the July number of this journal, on p. 230, some criticism is offered on the wording of the substitute for the Nullum Tempus Act (9 Geo. III. c. 16), now R. S. O. c. 324, ss. 41-44. This is a part of the work covered by the revision and consolidation of the Imperial statutes heretofore in force in Ontario. It will be seen that the revision practically amounts to an entire re-drafting of the Act, no attempt having been made to preserve the language of the original Act, the only point in common between the revised Act and 9 Geo. III. c. 16, being the sixty-year limitation. A comparison of the revised Act with the Real Property Limitation Act, R. S. O. c. 133, ss. 4, 5, will also reveal that that Act has been taken as the model of the revised Act. Mr. Hoyles takes exception to the use of the word "dispossessed" as applied to the Crown, because he is of opinion that the Crown cannot be "dispossessed." He is evidently of opinion that "dispossession" and "disseisin" are equivalent terms, because he says "dispossession or disseisin means a forcible ouster by a trespasser, and it is difficult to see how this can happen to His Majesty." And he goes on to cite a passage from the judgment of Strong, C.J., in *Webb v. Marsh*, 22 S. C. R. 441, to shew that the Crown cannot be disseised.

With great deference to the learned writer of the paper referred to, it is submitted that this criticism is not well founded, and that dispossession and disseisin are not necessarily equivalent terms; a mere trespasser may dispossess, but he does not necessarily disseise. Disseisin undoubtedly involves dispossession, but all dispossession does not necessarily involve disseisin, or the legal consequences which flow from disseisin: *Doe d. West v. Howard*, 5 O. S. 462.

Seisin is no doubt possession, but every possession is not seisin, and, e converso, every dispossession is not disseisin.

We have the familiar case of the lessee for years who has possession but not seisin, and who, if he is dispossessed, is not disseised.

In the case of an intruder upon the lands of the Crown, although the common law denied to the intruder the character of a disseisor, no matter with what intention he might take possession, yet the fact remains that he has a visible and actual possession, and has in fact dispossessed the Crown by his intrusion just as effectually as a tenant for years who is turned out of possession is dispossessed; and possession can only be regained, in either case, so long as the intruder remains in possession, by process of law.

Seisin, it has been said, "generates a title to the land;" and even though acquired by the disseisin of another, it is still a good foundation of title as against all except the person disseised. As a consequence, when the possession of the disseisor is called in question, the person who calls it in question can only succeed by shewing that he had a better title, or that he, being in possession, was disseised. The common law rule was that no time runs against the King, and no possession could be adverse to the King in the sense that it could ripen into a title as against that of the Crown: but this principle of the common law was very seriously invaded by 21 Jac. I. c. 14, which was a statutory admission that there might be a possession adverse to the King which, if it endured for 20 years, would be sufficient to entitle the possessor to continue in possession until the Crown had shewn its title. In other words, it shifted the onus of proof, and the Crown, instead of resting on its prerogative right to compel a defendant in an information for intrusion to shew his title, was compelled, when it had been out of possession for 20 years, and the general issue was pleaded, in the first place to shew its own title before it could call on the defendant to shew his. (See per Morrison, J., 27 U. C. R. 542.)

The principle referred to was still further invaded by the so-called Nullum Tempus Act, which virtually abrogated the common law rule of nullum tempus, and put a period of sixty years to the right of the Crown to assert its rights as against an adverse occupant of its lands, and practically

gave to the possession of an adverse occupant of Crown land a possibility of ripening into a title—and practically a disseisin of the Crown.

Under the former law the right of the Crown to recover its land from adverse occupants, was by an information of intrusion. The intruder was regarded in law as a mere trespasser and he could not disseise the Crown, and consequently he could not acquire seisin himself, or the legal rights of a disseisor. He was regarded purely and simply as a trespasser, but he could not be turned out without legal process. and though the primary object of the information was to punish the offender by fine and imprisonment, and to compel him to pay damages for his trespass, yet incidentally the Crown was entitled to a writ of *amoveas manus* upon the judgment, which was tantamount to a writ of *hab. fac. poss.* (See *per Robinson, C.J.*, 9 U. C. R. 86.)

Under the Judicature Act, 1881, Rule 1, the procedure by information for intrusion was virtually abolished, and an action of ejectment, as between subject and subject, is practically substituted for the old procedure by way of information for intrusion. This Rule is not repeated in the present Consolidated Rules, but the change it wrought in the procedure remains in force. The tendency of modern legislation is to put the Crown on the same footing as subjects, and to abolish special and prerogative rights in such matters.

The effect of the legislation above referred to would therefore appear to be to modify the old technical rules of the common law, and to enable a subject to acquire a title by possession even against the Crown; but whereas ten years' possession will confer a title as between subject and subject, it will take a sixty years' possession before the Crown is disseised.

It appears, therefore, no longer correct to say absolutely that the Crown cannot be disseised; until, however, sixty years have matured the possession of an intruder, it is still that of a mere trespasser; the Crown is not disseised, nor has the trespasser the status of a disseisor, nor do the technical rules which result from a disseisin apply. The Crown has not a

mere right of entry, but is still seised notwithstanding the adverse occupation: *Doe d. Fitzgerald v. Finn*, 1 U. C. R. 70.

It will be observed that the revised statute merely speaks of the Crown being dispossessed; it does not speak of its being disseised, and from what has been said it would appear that there is nothing technically inaccurate in the use of the word, the objection to which seems to be based on what, it is submitted, is the erroneous supposition that dispossession and disseisin are the same thing. An intruder may beyond all question dispossess the Crown to this extent, that the Crown cannot regain possession without legal process; and also to the extent of acquiring a title in himself if he can maintain his possession for sixty years; but an intruder on the lands of the Crown stands in a different position from the intruder on the lands of a subject; in the latter case the mere fact that he is in possession is sufficient *primâ facie* title of ownership or seisin, whereas in the case of an intruder on Crown lands he cannot rely merely on his possession, but must affirmatively establish a better title as against that of the King, who will, *primâ facie*, be presumed to be entitled.

Mr. Hoyles also takes exception to the use of the word "discontinued" as applied to the possession or receipt of rents and profits, as inappropriate. It may be observed that if this objection is well founded, it applies equally to the Real Property Limitation Act (R. S. O. c. 133), s. 5 (1). It is suggested that an acknowledgment in writing of the title of the King cannot be given; and also that the King can have no agent; but, as no reasons are offered for these suggestions, I am fain to confess that they present legal puzzles beyond my poor powers of comprehension.

GEO. S. HOLMESTED.

Since the foregoing was written, I have come across a note in Hale's *History of the Common Law*, by Serjeant Runnington, in which the learned editor discusses at some length the learning relating to disseisin. Inter alia he says: "Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin differed from a possessor by wrong.

Bracton De Assisa Nova Disseysinæ puts many cases of possession wrongfully taken, which he calls intrusive because there is no disseisin. . . . Nobody can disseise the King: neither can anyone be disseised to the use of the King. The King may be wrongfully dispossessed; but the intruder's injurious possession is *sine aliquo vestimento*, and called intrusion. The King cannot be made a disseisor, not because it is wrong, for he may in fact withhold the possession of land from a subject contrary to right. But the reason seems, according to the feudal system, to be this: A subject never could stand in the King's seisin or tenure; and the King never could be in the feudal relation of a subject. By that policy, all real property was held mediately or immediately of the King. In the King himself, all real property was allodial." (Hale. His. C. L., 6th ed., p. 203.)

It is improbable that a subject who obtains a title by possession to Crown lands under the Statute of Limitations will ever be held to have acquired the allodial title of the Crown; possibly by fiction of law a lost grant will be presumed in order to maintain the theory of the common law that all lands are held mediately or immediately of the Crown.

G. S. H.

EDITORIAL REVIEW.

Changes in Legal Offices.

We regret to have to record the sudden death of Mr. James Fleming, Inspector of Legal Offices for Ontario, and the removal for grave cause of Mr. Alfred McDougall, solicitor to the Treasury. Mr. John A. McAndrew, junior registrar of the High Court, succeeds Mr. Fleming as inspector, and Mr. Frank Ford, private secretary to the Attorney-General, becomes solicitor to the Treasury, or principal officer under the Succession Duties Act. Mr. A. F. Maclean, clerk of the Weekly Court, is promoted to the office of junior registrar, and Mr. G. M. Lee, junior taxing officer, is made clerk of the Weekly Court. These are all excellent appointments. The promotion of deserving officers is highly to be commended. Mr. Lee is succeeded as taxing officer by Mr. M. J. McNamara, clerk of records and writs. This gentleman has been diligent and faithful in the discharge of his duties at Osgoode Hall for a considerable number of years. The office to which he is appointed is a difficult one to fill satisfactorily. No doubt Mr. McNamara's ambition will lead him to make a close study of the law and practice in regard to costs. These promotions involve some further changes among the younger officials, and we are glad to see that those of them who are slated for advancement are all members of the Bar.

Contempt of Court in Nova Scotia.

Mr. W. F. O'Connor, of Halifax, a member of the Nova Scotia Bar, writes to us as follows with reference to the recent case of contempt of Court at the court house in Sydney, Cape Breton:—

All the trouble is attributable in the first instance to the appointments of Sydney's new court house. There is, or was, no separate entrance and exit for the Judge. Such, as I understand it, are devised to prevent such things as really occurred.

After the Court arose at noon on the day in question, suitors, witnesses, barristers, and the general public found the main, and only, exit to the street blocked by the congregation on the steps of about one hundred members of the Maritime Board of Trade and others. It ought to be unnecessary to state that the court house is a public building, and, moreover, it contains, besides the court rooms, all the various county offices. Under the circumstances the members of the Board of Trade were there on sufferance, and, it may be suggested, were, for the time being, collectively a public nuisance. The exit had been blocked for five minutes or more and all efforts to find egress had been fruitless, when the sheriff appeared preceding the Judge (Mr. Justice Meagher), as was his duty. At this moment an intoxicated individual at the foot of the steps was insisting upon a prominent place in a projected photograph, whilst some of the merrier spirits on the steps, with others on the sidewalk, were endeavouring, amid catcalls and facetiæ, to cajole him into retirement by promises of more drink. It is said, and I believe it, that this individual was not one of the Board of Trade, but be it remembered that the occupants of the steps had not announced their identity, and that from the inside of a blocked hallway overlooking a flight of twenty steps of stairs it is difficult, with merely a rear view of many rows of very ordinary looking craniums, to distinguish whether the latter are or are not set upon the shoulders of members of the Maritime Board of Trade. It is a fact that, with convincing unanimity, the occupants of that hallway on that day contend that they did not know that those on the steps were members of the Board of Trade, and surely it may be asked, even if they, including Judge Meagher, had known it, what then? It was certainly the duty of the step incumberers, there on sufferance, to allow the public a clear passage up and down. The Judge and sheriff waited in turn with the others, and patience ceased to be admirable just when it ceased to exist. The sheriff pushed his way through the hallway, out upon the steps, and pursuing his duty, called "make way for the Judge." The altercation below continued, probably because of the noise he was not clearly heard, but at any rate nobody moved. The

sheriff called in all three times, and, making no headway, without any direction seized two of those nearest to him by the shoulders to push them aside. Those on the steps resented this, and refused to move. Judge Meagher, unwilling that the sheriff should get into trouble with the crowd on his behalf, interposed, saying that he thought he would have no difficulty in getting through, requested passage, and proceeded down the steps. He was severely jostled on the way and every effort made to retard his progress and that of those who followed him. Some of the offenders say that they didn't know (they were strangers) that he was a Judge. Is that an excuse for bad manners? When the Judge reached the sidewalk some of those on the steps hissed, and later as he walked away, some law abiding, law respecting, gentlemanly and witty member of the board called loudly to him to return and get into the picture. "Come back, Meagher," was the manner of his introductory remarks. That this sort of conduct on such an occasion was immediately resented by the Judge is surely to his credit as a man, if a Judge in these "strenuous" times is permitted to be a man. Put me down for that opinion at any rate.

Referring for a moment to the incident of the afternoon resulting in the arrest of one of the members of the Board of Trade for an insult and threatening language towards the Judge within the precincts of the Court, I have only a few words to say, but they will be to the point. Here are the facts. The insult (the charge that the Judge was a disgrace to the Bench) was thrice repeated, first near the court room, next in the hallway, again on the steps. The Judge twice cautioned the offender before ordering his arrest, which order was only given after the arrested one had threatened to and started to follow the Judge to his residence and "have it out with him there." He was even then given an opportunity to apologize, but did not do so, though he did subsequently and was released. After his release I myself heard him acknowledge the apology and justify it because, as he said, he had been "wrong from beginning to end."

Aside altogether from the question as to the legality of the arrest as based upon the law of contempt, upon which

question nevertheless I deferentially submit there is room for a difference of opinion, I would suggest a graver problem arising out of s. 27 of the Criminal Code. Had the Judge any power to release? The person in custody had been arrested by a peace officer while committing an offence. Surely this is so.

If it is assumed, as it seems to be, that the Judge could have attached the offender, the whole case is given away in the former's favour. Such attachment would be *ex necessitate* for an offence indictable at common law, whence it follows from s. 552 of the Criminal Code, as amended in 1895, that the sheriff, a peace officer, might arrest without warrant a person whom he found committing a criminal offence. It did not need a Judge's order; anybody else could have given the same order, and the sheriff would be bound to proceed as pointed out by ss. 27 and 552 of the Code, or be answerable for neglect of duty. As a matter of fact, under the circumstances, is not the arrested one in contemplation of law an escaped prisoner at this moment? If the case was not one in which the Judge could immediately commit, and if it is one where a legal arrest could and ought to have been made, whence came the jurisdiction to release? I may be suffering from confusion of thought; if so, enlighten me.

The Alaska-Canada Boundary Dispute.

The article by Mr. Thomas Hodgins, K.C., on the above subject, to which we referred in our last issue, has evoked answers in the *New York Evening Post* and *Nation*, and other journals. We make the following extracts from the *Nation* :

"A process of myth-making by reiteration has for several years been in progress in Canada regarding the question of the Alaskan boundary, and bids fair to produce, sooner or later, serious consequences. The subject is one on which very few persons are well informed; it is difficult to obtain accurate information about it, and partisan spirit may expend itself on it under the mask of patriotism with little fear of discovery. It is unquestionable that the public in Canada, including many of the more intelligent and influential classes, has been for several years assiduously supplied with articles

on the boundary which, notwithstanding their essential falsity, have created a body of opinion with which, mistaken as it is, it will be difficult to deal. . . .

"An excellent example of the literature above alluded to is a recent publication, in the *Canadian Law Review* for September, of an article by Thomas Hodgins, K.C., of Toronto, which is also printed in the *Contemporary Review*. It is well written, gives evidence of much familiarity with international law, and of just enough acquaintance with the facts not to disturb the flow of a grave and apparently weighty argument. Regarded as the effort of counsel to represent the case of his client, it is admirable, and, with the intelligent public who cannot hear the argument for the other side, it will necessarily be influential. . . . All the argument about "ocean" and "mer," and territorial jurisdiction, and boundary lines skipping across navigable arms of the sea, sinks into ineptitude when confronted with the fact that Great Britain accepted a limitation of the right of navigation of the inlets to ten years, and the Hudson Bay Company afterwards paid an annual rent for many years for the privilege. These facts are sedulously ignored and left unmentioned by Mr. Hodgins and other Canadian writers, who do not even quote the part of the treaty in which the first is set forth. . . ."

What some of the other arguments of the writer are may be gathered from the reply which Mr. Hodgins has addressed to some of his American critics as follows :

(1) Your charge of my mistranslating *fleuves* as waters, will not, I think, be sustained by experienced French translators, nor authorities on International law. Further, in the negotiations the British positively stipulated for the free use of all rivers, seas, straits, and *waters* within the strip of coast that might be assigned to Russia, to which Russia replied offering *assuré li!res d'!bouchés*. And in writing the two words "waters (*fleuves*)," I gave the French, and the equivalent generic English word which seemed to convey the true meaning of the negotiators. I may add that if your correction were allowable, it should have been "great rivers." In the French Academy Dictionary, *fleuve* is interpreted: grand

cours d'eau qui conserve ordinairement son nom jusqu'à la mer.

(2) The sketchy pictures of mountains on Vancouver's maps are entirely fanciful, for his route discloses that he only obtained an occasional glimpse of the coast line; and they are, as you say, the map-maker's conventional sign for a mountainous country. The late Mr. Secretary Bayard aptly appraised the value of such, and later, maps when he wrote: "The line traced on the Coast Survey Map of Alaska is as evidently conjectural as was the mountain summit traced by Vancouver." Mr. Secretary Canning warned the British Ambassador of the general unreliability of mountain tracings on maps—instancing the "troublesome discussions" respecting the north-eastern, or Maine, boundary.

(3) You say that "all the arguments about ocean and *mer* and territorial jurisdiction sink into ineptitude when confronted by the fact that Great Britain accepted a limitation of a right of navigation of the inlets for ten years." Evidently you rely upon Article VII., which contracted for a reciprocal suspension for ten years of their respective navigation laws, so as to give the subjects of each the mutual right to fish and trade within their respective territorial waters along the coast; and as to their separate portions of such waters in the strip, or *lisière*, of coast, the Article gave Russian ships and subjects the right to fish and trade within the upper, or British, portion of such territorial waters; and British ships and subjects an equal right within the lower, or Russian, portion of the same territorial waters, and for the period stipulated. If these reciprocal limitations affected the treaty rights of Great Britain, they must also be held to have equally affected the treaty rights of Russia, and, therefore, those of the United States. as the assignee of Russia.

(4) The subject-Hudson's Bay Company was never in any sense the authorized agent, or representative, of the British Crown; and could not by its lease from, or payment of rent to, the subject-Russian-American Company, or by any tracings on maps, bind or affect the sovereign territorial rights of Great Britain.

(5) But, apart from the contentions you have raised, it is claimed by Canadians that the Treaty Conventions of 1892 and 1895, which have been approved by the Senate, are new and direct contracts between the United States and Great Britain by which they agreed to collect facts and data to enable them to establish "the boundary line in accordance with the spirit and intent of the existing treaties in regard to it between Great Britain and Russia, and the United States and Russia."

(6) These Treaty-Conventions have re-affirmed and rehabilitated the boundary line of 1825, without any conditions, or reservations; and have, therefore, diplomatically buried all contentions as to waiver of the original treaty-line. And, as new international contracts, the presumption seems reasonable (as in ordinary litigation), that there were no territorial rights, or equities, as to settlements made, or towns located, by the United States on the British portion of the disputed territory, down to 1895, claimable against Great Britain under any rule of International law, or any alleged acquiescence in occupation, or settlements, or waiver of the original treaty-line of 1825, on the part of either Great Britain or Canada.

(7) If such is the effect of these Treaties, may not the United States accept the late Mr. Secretary Blaine's official interpretation of the Treaty of 1825, given by him on behalf of the United States to Great Britain in 1890, that "a strip of land, at no point wider than ten marine leagues, running along the Pacific Ocean, from 54° 40', was assigned to Russia by the third Article of Russia's treaty with Great Britain;" and also his evidence that "it is the same strip of land which the United States acquired in the purchase of Alaska, and the same strip of land which gave to British America, lying behind it, a free access to the Ocean?"

(8) Congress, in 1890, invited "negotiations from any Government with which the United States has, or may have, diplomatic relations, to the end that any differences or disputes arising between their two Governments which cannot be adjusted by diplomatic agency, may be referred to Arbitration, and be peaceably adjusted by such means." Great Britain responded that "Her Majesty's Government will lend

their ready co-operation to the Government of the United States upon the basis of the foregoing resolutions." And the President thereupon expressed to Congress his "sincere gratification that the sentiment of two great and kindred nations was thus authoritatively manifested in favour of the rational and peaceable settlement of international quarrels by honourable resort to Arbitration.

(9) At the Hague Peace Conference in 1899, the United States joined with Great Britain and other nations in declaring that "in the interpretation of international conventions Arbitration is recognized by the signatory powers as the most effective, and at the same time most equitable, means of settling disputes which diplomacy has failed to settle." Diplomacy has tried and failed to settle this boundary dispute, because it proposed what an ex-President denounced in another case as "extensive spoliation." And now for over thirty-five years neither neighbour-nation knows where the territorial sovereignty of the United States ends, and that of Great Britain begins, in the Alaska-Canada disputed territory.

The editor of the *Post* rejoins in these words:—

(1) An examination of Littré's and other standard dictionaries of the French language fails to reveal any other definition of fleuve than "river"—that is to say, a large river reaching the sea. The waters, by which Mr. Hodgins translated it, to have any value for his argument, must have meant "territorial waters of the sea," which is incorrect. (2) The attempt to define what Great Britain got from Russia in the treaty by what she said she wanted to get before the treaty was agreed upon, seems to us naive in the extreme. (3) The remainder of Mr. Hodgins's remarks appear to us aside from the points at issue, and useful only in obscuring them. We should certainly not select the late Secretary Blaine as an international lawyer, or his expressions of opinion as having other than a pious interest.

Recent American Decisions.

Bills and Notes.—The rule that a drawee is presumed to know his drawer's signature, and hence cannot recover back money paid through a mistake of fact upon a bill to which

the drawer's signature was forged, is held, in *Woods & Malone v. Colony Bank (Ga.)*, 56 L. R. A. 929, not to be available in favour of a holder who by his own negligence contributed to the success of the fraud practised, and whose conduct had a tendency to mislead the drawee, who was himself free from fault.

Carriers.—A regular full-rate non-coupon railroad ticket is held, in *Louisville & N. R. Co. v. Klyman (Tenn.)*, 56 L. R. A. 769, in the absence of an agreement to the contrary, to be good for a continuous passage to destination only, and if the journey necessitates a change of trains it is held that it must be continued on the next available train.

A stipulation by a common carrier, in consideration of a reduced freight rate, for exemption from liability for damage by wet to the property carried is held, in *Mears v. New York N. H. & H. R. Co. (Conn.)*, 56 L. R. A. 884, to be valid.

Cheque.—The maker of a cheque given, after full opportunity for investigation, in accordance with a storage contract requiring a return of the property, or "if it is destroyed to pay its value," under the belief that the property had been stolen, is held, in *State Savings Bank v. Buhl (Mich.)*, 56 L. R. A. 944, to have the right to stop payment and avoid the settlement as made under a mutual mistake of fact, where the property is discovered in the storehouse the day after the cheque is given.

Company.—The organizers of a corporation are held, in *Vermont Marble Co. v. Declez Granite Co. (Cal.)*, 56 L. R. A. 728, to be liable to pay in for the benefit of creditors the face value of the stock issued to them, although they made no written subscription, but agreed orally that the stock should be sold to them as fully paid upon payment of a fraction only of its face value.

A majority of the stockholders of a corporation are held, in *Maynard v. Looker (Mich.)*, 56 L. R. A. 947, to have no vested right to elect the directors, which will be infringed by a statute giving the minority stockholders the power by cumulative voting to elect a representative membership in the board of directors:

Evidence.—A street-car conductor's trip report as to fares taken is held, in *Calihan v. Washington Water Power Co.* (Wash.), 56 L. R. A. 772, to be admissible in evidence in corroboration of his testimony that he received no transfer on a trip, for alleged injuries during which an action had been brought against the company by one claiming to have ridden on that trip and to have paid fare with a transfer, where it was made before he knew of the accident, or that any question as to his having taken a transfer would arise.

Insurance.—An insured building which is so injured by fire as to be insecure and a menace to life, and which is condemned by the city authorities and an attempt to repair prohibited by them, is held, in *Monteleone v. Royal Ins. Co.* (La.), 56 L. R. A. 784, to be a constructive total loss; and the fact that the condition after the fire is due in part to causes existing before, is held to make no difference.

Master and Servant.—An engineer operating a blow-off cock designed to clean the boiler, for the purpose of frightening children, is held, in *Alsever v. Minneapolis & St. L. R. Co.* (Iowa), 56 L. R. A. 748, not to depart from his employment so as to relieve his employer from liability for injuries caused by his act.

Mines and Minerals.—Where a secondary or accidental vein crosses a common side line between two mining locations at an angle with an apex of such width that for a distance it is partly within each claim, it is held, in *St. Louis Min. & Mill. Co. v. Montana Min. Co.* (C. C. A. 9th C.), 56 L. R. A. 725, that for the purpose of determining the right to such portion, together with the right to follow its dip, the apex will be regarded as exclusively within the older location.

Solicitor and Client.—Independent advice is held, in *Kidd v. Williams* (Ala.), 56 L. R. A. 879, not to be necessary to enable a client to effect a binding settlement with his attorney concerning services already rendered, where the client is in a position to form an entirely free and unfettered judgment, independent altogether of any sort of control.

BOOK REVIEW.

Willis's Contract of Sale of Goods.—The Law relating to Contract of Sale of Goods, six lectures delivered at the request of the Council of Legal Education, by William Willis, K.C., Judge of County Courts. London : Stevens & Haynes : 1902.

In these lectures Judge Willis deals in an interesting and even entertaining way with a familiar subject. His object in delivering the lectures, and in afterwards revising and preparing them for the press, was to facilitate the study of the Sale of Goods Act, 1893. He sets forth the general principles of this branch of the law attractively and accurately. The little book may easily be read in a couple of hours, and every lawyer ought to read it.

THE CANADIAN LAW TIMES.

DECEMBER, 1902.

JURISDICTION OF INFERIOR COURTS IN ACTIONS FOR LIQUIDATED DEMANDS.

ONE of the most troublesome questions of practice with which a solicitor has to deal is as to whether a money claim for an amount between \$200 and \$600 should be sued in the County Court or in the High Court. Claims within the increased jurisdiction of the Division Court must be "ascertained by the signature of the defendant," whereas it is sufficient under the County Courts Act, if claims between the above amounts are "liquidated or ascertained by the act of the parties or by the signature of the defendant." Probably on no point of practice has there been such a marked difference of opinion among the Judges of the Court of Appeal and of the High Court, a difference which still exists, as will be shewn hereafter, and which, apparently, can be removed only by legislation.

For a reason which will appear at the end of this article, the writer will not go back to the older decisions, where cases which were to all intents and purposes exactly similar, have been overruled or distinguished by different Judges. One may, however, take the two decisions of the Court of Appeal in *Robb v. Murray* (1889), 16 A. R. 503, and *Ostrom v. Benjamin* (1894), 21 A. R. 467, and also the two more recent decisions of the High Court in *Thompson v. Pearson* (1899), 18 P. R. 308 and 420, and *Evans v. Chandler* (1900), 19 P. R. 160, as striking examples of the lack of judicial agreement as to the meaning of the words "act of the parties."

In *Robb v. Murray* the plaintiff's claim was for "\$271.03, the return of moneys received by the defendant belonging to

the plaintiff, being proceeds from sales of goods in plaintiff's shop," setting forth the sums received on each day by the defendant. The Court held that the sum was not ascertained by its receipt by the defendant and the bringing of the action by the plaintiff for the sum so received. Osler, J.A., who delivered the judgment of the Court, said (at page 506): "In my opinion, a case of this kind . . . is not within the scope of the section, the intention of which was to give the larger jurisdiction only in the comparatively plain and simple cases where, by the act of the parties or the signature of the defendant, the amount was liquidated or ascertained as being due from one party to the other on account of some debt, covenant, or contract between them." And further on he said: "The ascertainment of the amount by the act of the parties is merely another way of saying that there is an account stated between them." This decision was followed by Boyd, C., in *Plummer v. Coldwell* (1893), 15 P. R. 144, and also, though doubtingly, by Rose, J., in *Re McKay v. Martin* (1890), 21 O. R. 104.

Then came the decision of the Court of Appeal in *Ostrom v. Benjamin* above mentioned. The action was brought in the High Court to recover \$237.50 for services rendered as pension agent, and the plaintiff succeeded, but the taxing officer allowed him only County Court costs. This ruling was affirmed by the Master in Chambers, but was reversed by Galt, C.J., who in turn was reversed by the Queen's Bench Division. The Court of Appeal affirmed the latter decision, Hagarty, C.J.O., and Maclellan, J.A., laying down the general principle that the fact of the liquidation was sufficiently proved by the verdict, and that denial of the contract and price did not avail to oust the jurisdiction. The Court did not nominally overrule *Robb v. Murray*, but Osler, J.A., in his very brief judgment, says (at page 471): "I was under the impression, an erroneous one as it seems, that I had expressed the judgment of the Court in *Robb v. Murray*, 16 A. R. 503. The result of the present decision is that that case must be taken to be overruled."

The next decision, in point of time, was *Thompson v. Pearson*, 18 P. R. 308 and 420. In that case the defendant employed the plaintiffs as his brokers to sell on his account

200 shares of a certain stock at a named price, the plaintiffs undertaking that, in the event of loss, the defendant's liability should not exceed \$200. The contract involved the making by the plaintiffs of a contract for the future delivery of the shares at the price named, and their acquiring the stock when it became necessary, by the rules of exchange, to complete the transaction. The plaintiffs recovered \$200 upon this contract, with an additional sum for interest, and the taxing officer allowed them only County Court costs, but on appeal to Meredith, C.J., this ruling was reversed. On a further appeal to the Queen's Bench Division, however, the ruling of the taxing officer was restored, Street, J., agreeing with Armour, C.J., but Falconbridge, J., dissenting, the two former holding that the amount was ascertained by the act of the parties, and the latter holding that it was not.

The following year the same point came up for decision in *Evans v. Chandler*, 19 P. R. 160. The action was for goods sold and delivered according to a price list previously agreed on, and the plaintiff obtained judgment for \$290. Rose, J., who tried the action, distinguished *Thompson v. Pearson*, and held that the plaintiff was entitled to High Court costs. *Robb v. Murray* is not referred to in the judgment, but the principle of that decision is apparently adopted.

On the 14th February, 1901, the case of *Mercier v. Hogan* was decided by the King's Bench Divisional Court, but the decision is not reported, so far as the writer has been able to ascertain. The action was to recover \$587, for a certain number of dozens of bottles of ale bought by the plaintiff from a brewery, and subsequently sold by her to the defendant at "the invoice prices of the same as purchased by her from the brewing companies." The plaintiff recovered judgment for this amount, and the taxing officer allowed her costs on the High Court sale, but the District Judge of Thunder Bay reopened the taxation, and directed the costs to be taxed on the County Court scale, following *Ostrom v. Benjamin*, and distinguishing *Evans v. Chandler*. On appeal, the Divisional Court (Falconbridge, C.J., and Street, J.) reversed this order, on the ground that the amount was not ascertained by the act of the parties.

The latest decision on this point was given in July of this year, in the case of *Minerva Mfg. Co. v. Roche*, reported in 1 O. W. R. at page 530. The action was to recover \$282.10, the price of goods sold and delivered, comprising a great many items. The defendant's solicitor had, before action, and in order to obtain a desired delay, given the plaintiff's solicitor a written admission of liability for the goods, but not of their value. After judgment for the full amount, the costs were taxed on the High Court scale, and on appeal to Falconbridge, C.J., the taxation was affirmed. A further appeal to the Common Pleas Division was dismissed, MacMahon, J., who delivered the judgment of the Court, holding that the case did not come within the increased jurisdiction of the County Court.

One would naturally suggest that the best remedy for this unfortunate and persistent difference of opinion as to the meaning of the words "act of the parties," would be to strike these words out of the statute, so as to assimilate the section to the corresponding section of the Division Courts Act. No doubt such a course would remove that particular difficulty, but another serious one would still remain, namely, as to the meaning of liquidation "by the signature of the defendant." Although no cases are reported in which the proper interpretation of these latter words in the County Courts Act has directly come in question, there is a long list of conflicting decisions as to the meaning of the corresponding words in the Division Courts Act.

The writer will, in this case also, pass over the older decisions, which are neither reconcilable nor satisfactory, and will deal only with those from *Petrie v. Machan* (1897), 28 O. R. 642, to the present. In that case the defendant, by an instrument signed by him, authorized the plaintiff to dispose of the goods mentioned therein for the sum of \$1,000 net to the defendant, the latter reserving to himself the right to dispose of the goods without plaintiff's assistance, and agreeing in such case to pay the plaintiff a commission of 10 per cent. on the above mentioned sum. The defendant, unassisted by the plaintiff, afterwards disposed of the goods for \$350, and the plaintiff then sued in the Division Court for 10 per cent. com-

mission on \$1,000 and interest. The Judge gave the plaintiff only \$35, and the latter appealed to the Queen's Bench Divisional Court, where the question of jurisdiction was fully argued, all the cases pro and con being cited. The Court held that the claim was within the jurisdiction of the Division Court, the original amount thereof being ascertained by the signature of the defendant, and gave judgment for the full amount claimed.

The day following this decision judgment was delivered by Robertson, J., in *Re Sawyer v. Parkin*, 28 O. R. 662. Under a written agreement for the sale of a machine, signed by the defendant, he was to send to the plaintiffs, within ten days after the machine was started, a promissory note, with approved indorsation, for \$125, the price thereof, and, in default, the price was to become forthwith due and payable. The machine was received and used by the defendant, and shortly after, it was returned to the plaintiffs. The Judge in the Division Court refused to try the action, on the ground that that Court had no jurisdiction, and an application was made to Robertson, J., for a mandamus. After an exhaustive review and comparison of all the cases (not, however, including *Petrie v. Machan*, as the judgment had, no doubt, been prepared before that decision was given), the learned Judge came to the conclusion that the Division Court had no jurisdiction, as the plaintiffs, in order to succeed, would have to prove, not only the signature of the defendant, but also the performance of the condition precedent on their part. On appeal, however, the Queen's Bench Divisional Court reversed the order and granted the mandamus, following their own decision in *Petrie v. Machan*.

In *Kreutziger v. Brox* (1900), 32 O. R. 418, the action was brought in the County Court for \$37.50, balance due on a building contract of \$475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff. The County Court Judge held the Division Court had jurisdiction, following the two last mentioned cases, and gave the plaintiff only Division Court costs with a set-off. From this decision the plaintiff appealed to a Divisional Court composed of Boyd, C., and Ferguson and

Robertson, J.J. The judgment was delivered by Boyd, C., who said (at page 421): "The Queen's Bench Divisional Court, in *Re Sawyer-Massey Co. v. Parkin* (1897), 28 O. R. 662, have reverted to the doctrine of *Graham v. Tomlinson*, but that is no reason why we should undertake to disregard the uniform trend of decisions for so many years observed in the reported cases." The appeal was allowed and County Court costs ordered to be taxed.

The next and last case reported is *McCormick Harvesting Machine Co. v. Warnica* (1902), 3 O. L. R. 427, and, as usual, the decision immediately preceding is not followed. The defendant gave two notes for \$75 and \$62 respectively, on a form which contained an undertaking to give further security, and in the event of default in giving the security, that the notes might be treated as due. Plaintiff demanded further security, and not receiving same, brought an action in the Division Court on the notes, before the time mentioned in them for their maturity had expired. The Judge, relying on the decision in *Kreutziger v. Brox*, held that the Division Court had no jurisdiction. On appeal, however, the King's Bench Divisional Court followed their previous decision in *Petrie v. Machan*, and directed a new trial in the Division Court.

The above is a brief outline of the decisions on these two simple sets of words during the past few years, and the record cannot be said to be creditable to the administration of justice in this Province. In 1894, after the two contradictory decisions of the Queen's Bench Division in *Stevens v. Grout*, 16 P. R. 210, and of the Common Pleas Division in *McDermott v. Grout*, 16 P. R. 215, were given, the following amendment to the Judicature Act was passed, and it is now s.-s. 2 of s. 81 of that Act:

"(2) It shall not be competent for the High Court or any Judge thereof in any case arising before such Court or Judge, to disregard or depart from a prior known decision of any Court or Judge of co-ordinate authority on any question of law or practice, without the concurrence of the Judges or Judge who gave the decision; but if a Court or Judge deems the decision previously given to be wrong and of sufficient

importance to be considered in a higher Court, such Court or **Judge** may refer the question to such higher Court."

The writer understands that this amendment was passed for the express purpose of preventing a recurrence of just such a state of things as is shewn by the decisions above referred to, with regard to the jurisdiction of the County and Division Courts. This appears, however, to be one of the cases where a positive statutory enactment is conveniently ignored. It is to be hoped that the Legislature will be able to find some speedy and more certain remedy for a condition of affairs which is a crying injustice to unfortunate litigants.

M. J. GORMAN.

Ottawa.

ESTATES TAIL.

In the third volume of the Revised Statutes the celebrated statute De Donis, the foundation of estates tail, is preserved as R. S. O. c. 330, s. 1.

Originally enacted in the reign of Edward I. (1285), it has stood over six hundred years upon the statute book of England, and still stands there unrepealed. It was not till two hundred years after its enactment that a way was found for frustrating its provisions. It was apparently designed as a means of keeping estates in families by preventing the alienation of entailed estates. Its operation for two hundred years had probably convinced enlightened men that its provisions were highly detrimental to the best interests of the community at large, and in the reign of Edward IV. it was judicially decided that the tenant in tail who went through the process of a fictitious action in which he suffered what was called "a common recovery," effectually barred the entail, and what was for many long years done by means of a fictitious action at law, was at last in the reign of William IV. authorized to be done by means of a simple conveyance. The main purpose and object of the statute was thus defeated. But why the Legislature has not gone farther and repealed the statute De Donis, and with it the possibility of creating estates tail, is one of those questions it is somewhat hard to answer. Was not the common law which declared such limitations to be merely conditional fees, the better law? What advantage is there to anybody in perpetuating estates tail, except it be for raising nice questions of law as to the rule in Shelley's case, and the rules in other cases in which the highly technical rules and distinctions respecting estates tail are to be found. That may be of some indirect benefit to a small part of the legal profession, but what practical benefit the public derive from paying lawyers to solve these intricate questions as to whether a given limitation is or is

not an estate tail, and whether it is general or special, it is hard to see.

The propriety of repealing the statute De Donis is, like a good many other legal questions, involved in a certain amount of technicality and difficulty, and one that lay legislators would fear to touch, lest in trying to make things more simple they should make them more difficult. Besides, a statute which has stood unrepealed on the statute book over six hundred years seems to have acquired in the eyes of ordinary men a right to perpetual existence.

Even lawyers are timid about approaching such a question. It is in all our text books on real property law, and involves a good deal of nice technical learning which those who have acquired possibly feel loath to consign to the legal dust bin.

But what good purpose does the Act serve? It was intended to make estates tail inalienable. Its real purpose has wholly failed for hundreds of years, and yet in spite of the obvious futility of the statute, it has stood for centuries, and still stands upon the statute book.

It is entirely opposed to the policy of the land laws of Ontario, and should be repealed.

GEO. S. HOLMESTED.

EDITORIAL REVIEW.

Judicial Changes.

On the 17th November some highly important changes were made in the personnel of the Bench.

Sir Henry Strong resigned the Chief Justiceship of Canada and was appointed chairman of the commission to revise and consolidate the Dominion statutes. Mr. Justice Taschereau, senior puisne Judge of the Supreme Court of Canada, became its fourth Chief Justice. The Chief Justice of Ontario went to Ottawa as a puisne Judge of the Supreme Court, and will henceforth be known once more as Mr. Justice Armour. Mr. Justice Moss was promoted to the position of Chief Justice of the Court of Appeal, with the title of Chief Justice of Ontario. Mr. J. J. MacLaren, K.C., took the vacant place in the Court of Appeal.

Sir Henry Strong has been a long time on the Bench as Vice-Chancellor and Judge of Appeal in Ontario and as Judge and Chief Justice of the Supreme Court of Canada. He is without doubt a sound and learned lawyer, and has rendered distinguished service to his country.

Sir Henri Taschereau is *persona grata* to the Bar, and is deemed the best lawyer in a weak Court, which will now, however, be strengthened by the addition of Mr. Justice Armour.

The elevation of Mr. Justice Moss to the Chief Justiceship was rather a surprise to the rank and file of the Bar, who naturally supposed that, if there was to be promotion, Mr. Justice Osler would be the Judge promoted. No one, however, has found fault with the appointment. The new Chief Justice had an unusually large and successful practice at the Bar, and his five years on the Bench have shewn him to be even a better Judge than he was an advocate. There is a precedent, too, in his own family for just such a promotion, his brother, the late Thomas Moss, having been the junior Judge of the same Court when elevated to the

chief place. There is a curious similarity in the careers of the two able brothers. Each at different periods was lecturer for the Law Society, each was a Benchler, Vice-Chancellor of the University of Toronto, Judge and Chief Justice of Appeal. In spite of the striking similarity of their careers, and the obvious fitness of both for the various important offices mentioned, there are equally striking dissimilarities in their characters and mental equipment, which all who knew both will recognize.

The Court of Appeal, while it has lost an able head, is still a strong Court, perhaps a better one than we have any right to expect, when we consider the absurd system of payment of Judges' salaries and allowances, which practically prevents the Judges of the High Court from going up to the Court of Appeal, unless under exceptional circumstances. Of the five Judges who now constitute the appellate Court, only one ever sat in the High Court.

Mr. Justice Maclaren.

The following is taken from the *Toronto Globe*:—"John James Maclaren, K.C., the new Appeal Judge, is a son of the late John Maclaren, a native of Callander, Scotland. He was born at Lachute, P.Q., in 1842. He obtained the degree of B.A. at Victoria University, taking the Prince of Wales gold medal in 1862; M.A., 1866; LL.B., 1868; LL.D., 1888; and graduated B.C.L. at McGill University in 1868. He obtained his D.C.L. in course in 1888. The new Judge began practice in 1868 in Montreal, being a partner for a time of N. W. Trenholme, K.C. Subsequently he was head of the firm of Maclaren, Leet, and Smith. He was called to the Ontario Bar in 1884, and came to Toronto. Here he succeeded Mr. Justice Rose in the long-established firm of Rose, Macdonald, Merritt, and Shepley. He was created a Q.C. by the Quebec Government in 1878 and by the Ontario Government in 1890. He was secretary of the British and American joint commission on Hudson Bay claims, 1867 to 1869, and a member of the commission on the code of civil procedure of Quebec in 1887. Mr. Maclaren is a member of the governing bodies of many educational institutions. His publications include 'Roman Law in English Jurisprudence,'

'Bills, Notes, and Cheques,' and 'Banks and Banking.' He has always been an active worker in religious, educational, and temperance movements, and is Chairman of the Executive of the Dominion Prohibition Alliance. In 1895 he represented Ontario before the Imperial Privy Council in the appeal from the decision of the Supreme Court of Canada in reference to the Provincial power to grant prohibition. He represented the Liberals of Huntington in the Legislature of Quebec during the term following the election of 1874, and was subsequently President of the Montreal Young Men's Liberal Association."

The new Judge has had two careers at the Bar. He had an established reputation in the other Province before he was called to the Bar of Ontario in 1884, and his eighteen years of practice here have sufficed to make him as familiar with the law of Ontario as if he had been bred to it. He has not been prominent as an advocate, but he is a sound commercial lawyer, and an accomplished civilian. His wide experience of men and affairs will stand him in good stead on the Bench.

Swearing-in of the Judges.

The new Chief Justice of Ontario was sworn in before the Lieutenant-Governor of Ontario on Tuesday the 25th November. On the following day the Court of Appeal sat, and Mr. Justice Maclaren at the opening took and subscribed the oaths of allegiance and office. By the express desire of the Chief Justice and Judge Maclaren, there were no congratulatory addresses from the Bar. The business of the Court was at once proceeded with.

The Official Guardian.

Another change, though not a radical change, in an important department of the administration of justice in Ontario, is caused by the retirement of Mr. John Hoskin, K.C., LL.D., from the position of Official Guardian of infants, which he has most successfully filled since the office was created. Long before that, indeed, he was the guardian ad litem ordinarily appointed by the Court of Chancery in litigation in which infants were interested, and before that again, as a law student in the office of Mr. Strong, and as the partner

of Mr. Gwynne, he was in close touch with infants and their estates. He has been a wise and faithful guardian, and the interests, very often most important interests, committed to his care, have been carefully and jealously guarded. He has come in contact with every lawyer in the Province, and no one ever found him other than wide awake to the true interests of his wards. To conduct the multitude of varied affairs which have got into the Guardian's office during the past thirty years, and to conduct them successfully, has been no easy task. Dr. Hoskin brought to it tact, courtesy, and business methods, as well as the learning and ability of a trained lawyer. He made the office, laid down for the Province the lines on which it should be conducted, and established a practice which, though not written in any book, is well understood and followed. Now that he has resigned, there will be no change. He will continue his connection with the office by acting as advisory counsel to the new Official Guardian, and that guardian is his pupil and friend of many years, Mr. Frederick Weir Harcourt, who is well known throughout the Province as Deputy Official Guardian, and who will undoubtedly preserve the traditions of the office. We congratulate Mr. Harcourt on his promotion, which he has fully merited.

Death of Mr. Clarke Gamble.

Mr. Clarke Gamble, K.C., who passed away on the 24th November last, was so old a man and so old a barrister that to many of the present generation of lawyers and business men he was not known at all. It is many years since he was in active practice, though until his death he was the nominal head of a Toronto firm. He was born in 1808, so that he was 94 at the time of his death. He was called to the Bar in 1832, elected a Bencher of the Law Society in 1840, and created a Queen's Counsel in 1867. He was for many years solicitor for the corporation of the city of Toronto, and was solicitor also for several other public bodies and corporations. He was regarded in his day as an excellent lawyer and man of affairs. No better man, or truer gentleman, ever lived.

Revision of the Dominion Statutes—A Suggestion.

Now that the Commissioners for the revision of the Dominion statutes have been appointed, is it not a fitting time to suggest that some practical steps be taken towards having notes of decided cases in the various Provinces incorporated with the statutes as revised, when printed? It would not be desirable to have an extensive annotation of the statutes, but a memorandum might be prepared by some competent person or persons in each Province of all cases bearing on the construction and effect of Dominion statutes, including of course cases in the Supreme Court of Canada and the Judicial Committee of the Privy Council, and furnished to the Commissioners for insertion in the revision under the sections dealt with by such cases. This could be authoritatively done by the Law Societies in the respective Provinces at an insignificant cost to each. If this suggestion meets with approval, active steps should be taken without delay. Statutes with such references would certainly be a very great convenience to the profession at large. For instance, there are numerous decisions in all the Provinces on the Insurance Laws, the Railway Acts, the Bank Act, Bills of Exchange Act, Criminal Code, and Election Acts, not to mention others. This would be in line with the efforts of those gentlemen who on two or three occasions have assembled themselves as a Dominion Bar Association. It may also be advocated as a step in the direction of the ultimate uniformity of laws in Ontario, Nova Scotia, and New Brunswick, under s. 94 of the B. N. A. Act. This is an important matter, and we should be glad to have an expression of opinion on it from some of our readers.

The King's Supremacy.

It can hardly be pretended by any Roman Catholic that the drinking of the Pope's health is any part of the Roman Catholic religion, or that the religious liberty of Roman Catholics would in any way suffer if they never performed that festive act.

It appears, however, that some Roman Catholics in Canada on festive occasions give the Pope precedence of the King.

This might be regarded as an impugning of the King's supremacy. While, however, the doctrine of the papal supremacy is a theory which anybody in Canada is at liberty to deny, the King's supremacy is a constitutional fact which no British subject can get over, no matter what form of religion he professes. Those who put the Pope before the King probably find it convenient to forget that the Act which guaranteed to Roman Catholics the free profession and exercise of their religion in Canada is in these terms:—

"5. And for the more perfect security and ease of the minds of the inhabitants of the said province, it is hereby declared that His Majesty's subjects professing the religion of the Church of Rome of and in the said Province of Quebec" (which we may remark at that time included Ontario), "may have, hold and enjoy the free exercise of the religion of the Church of Rome SUBJECT TO THE KING'S SUPREMACY declared and established by an Act made in the first year of the reign of Queen Elizabeth over all the dominions and countries which then did or thereafter should belong to the Imperial Crown of this realm; and that the clergy of the said church may hold, receive, and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion." 14 Geo. III. c. 83, s. 5: R. S. O. 1897, vol. 3, p. 1.

We make these remarks because one of the Judges of the High Court of Justice for Ontario recently set the example of toasting the Pope before the King at a quasi public banquet to a Roman Catholic dignitary at which both the Premier of the Province of Ontario and the Mayor of the City of Toronto were invited guests. It is to be hoped the example may not generally be followed, as we can hardly suppose Roman Catholics wish to exclude their fellow citizens from their festive gatherings.

Succession Duty Act Regulations.

The following regulations have been made by order of the Lieutenant-Governor in Council for carrying into effect the Succession Duty Act:—

1. On *all* applications for letters probate or letters of administration made to any Surrogate Court in Ontario the

applicant or applicants shall make and file with the Surrogate Registrar, at the time of filing the papers required by the practice of the Surrogate Courts, two duplicate original affidavits of value and relationship, with schedules annexed, in the form numbered 1 hereunder.

2. Such affidavits shall be made and filed in all cases without regard to the nature or value of the property of the deceased.

3. The Surrogate Registrar shall forthwith on receipt thereof forward one of such duplicate original affidavits to the Solicitor to the Treasury at the Succession Duty Office, Toronto, and shall at the same time forward to the Provincial Treasurer of Ontario, Toronto, a notice in the form numbered 2 hereunder.

4. The Solicitor to the Treasury shall upon receipt of the said affidavit of value and relationship with schedules annexed determine whether, in his opinion, the property of the deceased is liable or may become liable to succession duty, and in case he considers the same to be so liable, or likely to become liable, require security to be given, which security may be given by bond in the form numbered 3 hereunder.

5. In cases where a bond is required to be given under the next preceding regulation, such bond shall be in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable, or which may become liable, to succession duty, and shall be executed by the applicant, or all the applicants in case there is more than one, each of whom shall be bound in the whole amount of such bond, and two sureties to be approved by the Surrogate Registrar, who shall justify each in an amount equal to the sum for which he is to be liable, and the aggregate shall equal the amount of the penalty of the bond, and such bond shall be conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant or applicants may be found liable.

6. This bond is to be filed in the office of the Registrar of the Surrogate Court to which application is made, and a certified copy thereof sent forthwith to the Solicitor to the Treasury at the Succession Duty Office, Toronto.

7. No letters probate or letters of administration shall issue without the consent in writing of the Solicitor to the Treasury or some one deputed by the Treasurer to act for him.

8. In cases where security has been given for the payment of succession duty as aforesaid notice of any appointment for the passing of the accounts of the executor or administrator shall be served upon the Solicitor to the Treasury by the executor or administrator or his solicitor, together with a copy of the accounts.

9. One week's notice of valuation and appraisement under section 7 of the Act to all the parties interested or their solicitors or agents before proceeding therewith, shall *prima facie* be considered sufficient notice.

10. The fees payable under section 20 of the Act shall be the same as those payable in contentious matters under the Surrogate Courts Act.

11. The subjoined forms are to be followed as nearly as the circumstances of each case allow.

The form of affidavit of "value and relationship," is very lengthy and is designed to afford by its contents and schedules the most complete knowledge of all estates and of the dealings of the testators or intestates therewith by way of gift, trust, settlement, purchase of annuities, etc., and of the persons to whom the estate passes.

Before these regulations the Treasury depended upon the Surrogate Registrars for information as to dutiable estates, and these officers had to exercise their judgment in indicating such estates. The effect of the regulations is to impose upon all applicants for letters the duty of making under oath statements, to be forwarded to the Solicitor to the Treasury, such as will enable him to pick out the dutiable estates for himself.

The regulations are reasonable and necessary for the working out of the Act; it is remarkable that they were not devised earlier in its history.

The Patent Act.

A recent decision of the Judicial Committee of the Privy Council is of considerable interest, inasmuch as it will doubtless lead to certain legislation during the next session of Parliament.

The case referred to is *Dominion Cotton Mills Co. and American Stoker Co. v. General Engineering Co. of Ontario*. The facts are briefly as follows:

On the 1st March, 1892, an American named Jones obtained a patent in the United States for certain improvements in furnaces. On the same day he applied in Canada for a Canadian patent and in England for a British patent. The latter was granted on the 12th July, 1892, for 14 years from the date of application, its continuance for that length of time, however, being dependent upon the due payment of the necessary fees. On the 15th October, 1892, the Canadian patent was granted for 18 years from that date. On the 1st March, 1897, the British patent expired because certain fees which had fallen due had not been paid. About a year later, the owners of the Canadian patent (the respondents) brought an action against the appellants for an alleged infringement of that patent. The defendants pleaded that before the commencement of the action the Canadian patent had expired because the British patent, and also an Italian patent which had been taken out, had previously expired.

The case turned wholly upon the construction of the last portion of s. 8 of the Patent Act (R. S. C. 1886 c. 61), as amended by s. 1 of 55 & 56 V. c. 24. This section as amended reads as follows: "Any inventor who elects to obtain a patent for his invention in a foreign country before obtaining a patent for the same invention in Canada may obtain a patent in Canada, if the same be applied for within one year from the date of the issue of the first foreign patent for such invention; and if within three months after the date of the issue of a foreign patent the inventor gives notice to the Commissioner of his intention to apply for a patent in Canada for such invention, then no other person having commenced to manufacture the same device in Canada during such period of one year shall be entitled to continue the manufacture of

the same after the inventor has obtained a patent therefor in Canada, without the consent or allowance of the inventor; and, under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires."

Referring to the concluding words of this section their Lordships said that "they were unable to discover any sufficient reason for putting any more restricted meaning on the words. The language was clear and imperative. Their Lordships could only understand it as declaring that, under all circumstances, as soon as any foreign patent for the same invention expires, the Canadian patent, if then existing, should expire also. They could find no limit as to time except that the foreign patent must both exist and expire after the Canadian had been granted, and before it had ceased from any other cause."

There is no need to point out the decidedly diminished value which any Canadian patent must have if its existence is dependent entirely upon every foreign patent which has ever been taken out for the same invention being kept in force. Under such conditions the Canadian patent can hardly be considered a very valuable asset. Apparently, the present state of affairs can only be remedied by retroactive legislation. At the same time the incident may possibly be useful as further evidence of the fact that statute drafting is a science, and that as such it should only be intrusted to the hands of those who are skilled in such work.

Contempt of Court in Nova Scotia

In our last issue we published a letter from a Nova Scotia barrister describing certain events at the court house in Sydney, Cape Breton, which led to the arrest of a member of the Halifax Board of Trade for an alleged insult to Mr. Justice Mcagher within the precincts of the Court. The member referred to now writes to us that the barrister's statements are inaccurate, and requests us to publish another version of the facts. He also intimates that "the whole matter is to be brought to the attention of the House of Commons at Ottawa during its ensuing session." That being so, we do

not think it necessary to publish his letter. He takes issue with our former correspondent, not only as to the proper inference to be drawn from what was said and done, but as to what actually was said and done. To go at length into the circumstances would only weary the readers of the *LAW TIMES*. But it is fair to ask them to note that many of the statements made last month by Mr. O'Connor are now denied, apparently in good faith and in temperate language, by a party in interest. We cannot pretend to say which is right. Perhaps a committee of the House of Commons will be able to make the matter clear.

Capital Punishment in Scotland.

According to *Scottish Notes* in the *Law Times*, the first case in which a sentence of death has been pronounced in Scotland since 1898 occurred at the extra Glasgow Circuit held on the 22nd of October, when a man named Leggett was found guilty of murdering his wife and sentenced to be executed. During the six years since 1896, only two capital sentences have been pronounced in all, but it must not be concluded from this fact that Scotland is practically free from cases of murder. On the contrary, there have of late been an unusually large number of murder trials, but juries have been exhibiting a marked reluctance to bring in a verdict of guilty as libelled in such cases, and have almost invariably, on one pretext or another, returned a verdict of guilty of culpable homicide. A series of cases tried in September afforded instances of this tendency, and the unfortunate result of such leniency is exemplified in Leggett's case, where it came out in the evidence that when friends had attempted to dissuade him from his avowed intention of killing his wife, he replied: "There's no hanging now. I will (sic) only get fifteen years." The fate which has befallen him will go far to remove so dangerous a misapprehension. The case also has its lesson as an argument against the abolition of capital punishment. Penal servitude is doubtless a terrible punishment, but it requires imagination to realize its true character, and imagination is precisely what persons who commit brutal crimes generally lack. To such evil-doers nothing but the terror of the gallows is an efficient deterrent ;

their imaginations can realize only physical punishment. for the mental sufferings which to finer natures constitute the worst horror of penal servitude are beyond the reach of their apprehension.

Recent American Decisions.

Action—Bar by Judgment.—A judgment for plaintiff in an action for injury to his vehicle through negligent obstruction of a highway is held, in *Reilly v. Sicilian Asphalt Pav. Co.* (N. Y.), 57 L. R. A. 176, to be no bar to another action for injury to his person, arising out of the same accident.

Bailment.—For the deterioration of goods while in cold storage the warehouseman is held, in *Marks v. New Orleans Cold Storage Co.* (La.), 57 L. R. A. 271, to be responsible notwithstanding a stipulation, in the receipt issued for the goods, to the effect that he will not be responsible for "damage" to the goods.

The value of wheat stored in a public warehouse at the owner's risk of fire is held, in *Moses v. Teetors* (Kan.), 57 L. R. A. 267, not to be recoverable by the owner from the warehouseman in case of a subsequent fire, where the identical wheat stored was sold according to the custom of the warehouseman, known to the owner, to commingle grain so deposited for storage with like quality belonging to him, and from such mass to sell from time to time and replenish with such other grain as should be brought to him for storage or he should buy, and when the warehouse burned it contained enough wheat of the quality stored to replace the same, and the warehouseman had at all times kept on hand sufficient in quantity and quality to replace all wheat stored with him.

Carriers.—A carrier is held, in *United Railways and Electric Co. v. Hardesty* (Md.), 57 L. R. A. 275, not to be obliged to honour a coupon from a commutation book of tickets intended for passage between designated points, and which provide that they are not "good unless detached by the conductor," when the coupon has been detached by the commuter and the book left with a member of his family, so that it is not present when he tenders the coupon in payment of fare.

A carrier is held, in *Homans v. Boston Elev. R. Co.* (Mass.), 57 L. R. A. 291, to be liable for nervous shock to a passenger, resulting from a jar to the nervous system, which accompanies a blow to the person caused by being thrown from the seat through the carrier's negligence; and it is held not to be necessary to show that the shock is the consequence of the blow.

Damages.—The measure of damages for breach of warranty of the capacity of a kiln for drying lumber, when there is no kiln of the agreed capacity on the market, is held, in *Huyett-Smith Mfg. Co. v. Gray* (N. C.), 57 L. R. A. 193, not to be the difference between the value of the kiln sold and one of the required capacity, but the difference between the value of the apparatus delivered and the contract price. A note to this case reviews the authorities as to damages for breach of contract on sale of article that has no market price.

Damages for the death of the child are held, in *Lathrope v. Flood* (Cal.), 57 L. R. A. 215, not to be allowable in an action by husband and wife for the physician's abandonment of the wife during her confinement.

The owner of an apartment house is held, in *Aldrich v. Metropolitan West Side Elev. R. Co.* (Ill.), 57 L. R. A. 237, to have no right to recover damages from an electric elevated railway company whose tracks cross the highway within nineteen feet of his property, where the injury differs from that suffered by the general public only in the proximity of the tracks.

Evidence.—A declaration by a motorman running an electric car, in regard to the cause of the accident, made while the car was still on the body of a child whom it had run down, is held, in *Sample v. Consolidated Light and R. Co.* (W. Va.), 57 L. R. A. 186, to be admissible in evidence as a part of the *res gestæ*, in an action for the injury.

BOOK REVIEWS.

Phipson's Law of Evidence.—The Law of Evidence, by Sidney L. Phipson, M.A., of the Inner Temple, Barrister-at-Law. Third edition. London : Stevens and Haynes : 1902.

Among new editions none will be found more welcome than this. It is in every way an admirable work. The young and ambitious barrister finds the greatest difficulty in the way of his acting as counsel at the trial of an action to be his consciousness that, however well he may be up in the law of his case, perplexing questions as to the reception of evidence may suddenly arise at the trial for which he is not prepared. Let him read and re-read Phipson, and, while he cannot expect at once to be upon an equality with an old hand, he will find that he has at least laid a solid foundation upon which to build his experience. This new edition brings the cases down to July, 1902, and there are 700 more of them than in the second edition. The Criminal Evidence Act, 1898, and the various decisions thereunder, have, of course, been incorporated, and all the Irish cases are included.

Carter's Elements of Contract.—Elements of the Law of Contract, by A. T. Carter, of the Inner Temple, Barrister-at-Law, one of the Readers to the Inns of Court. London : Sweet and Maxwell, Limited : 1902.

An excellent little book, concise, lucid, and simple. It is not a students' text book, nor yet an exhaustive scientific treatise, but a successful attempt to set forth first principles in an easy way for beginners in professional practice.

Butterworth's Bankers' Advances.—Bankers' Advances on Mercantile Securities other than Bills of Exchange and

Promissory Notes, by Arthur Reginald Butterworth, of the Inner Temple and Western Circuit, Barrister-at-Law. London: Sweet and Maxwell (Limited): 1902.

This work (208 pages including index) is founded on a course of lectures delivered before the Institute of Bankers in London and at Newcastle-on-Tyne. It deals with bills of lading, dock warrants, delivery orders, warehouse-keepers' certificates, stock exchange securities, et hoc genus omne, and contains clear and concise definitions and explanations, suited to the lay comprehension, of pledge, hypothecation, lien, stoppage in transitu, usury, estoppel, good faith, and other like terms of the law, as applied to these securities. If carefully read by lawyers and bankers this book will enable each class to understand better the methods and mental processes of the other. The author has been careful to interpret mercantile terms and mercantile usages for lawyers, and legal terms and legal doctrines for merchants, and so has produced something of genuine value to both.

Harvard Law Review.—Boston: The Harvard Law Review Association: November, 1902.

Articles on Municipal Contracts and the Regulation of Rates, by Herbert Pope; Legitimacy and Marriage, by Joseph Cullen Ayer jun.; Contracts for the Benefit of a Third Person in the Civil Law, by Samuel Williston: are contained in this number.

Columbia Law Review.—New York: The Columbia University Press: November, 1902.

The Right of Privacy is treated of by Denis O'Brien; The Enforcement of Attorney's Lien, by Henry S. Redfield; and What is the Law Merchant? by Francis M. Burdick.

INDEX OF SUBJECTS.

[Ed., following a title, indicates that the article or item will be found in the EDITORIAL REVIEW; L. A., that it is a LEADING ARTICLE; Corr., that it is a letter to the Editor.]

A.

- Actions for Liquidated Demands, Jurisdiction of Inferior Courts in, L. A., 419.
- Advertising King's Counsel, Ed., 43.
- Affidavits—Before Whom Taken, Oaths and, Corr., 190.
- Alaska—Canada Boundary Dispute, The, Ed., 368, 411.
- American Decisions, Ed., 44, 76, 112, 145, 187, 218, 276, 302, 337, 369, 415, 439.
- Amusing Reporters' Errors, Some, Ed., 44.
- Attachment of Moneys in Hands of Police, Ed., 187.
- Authority of Counsel to Compromise, L. A., 292.
- Authority of Counsel to Compromise, Ed., 333.

B.

- Bar Anecdotes, Selected, Ed., 76, 145, 187, 218, 270.
- Bar, The Bench and the Outer, Ed., 274.
- Bench and the Outer Bar, The, Ed., 274.
- Bench, The Provincial Cabinet and the, Ed., 141.
- Bills and Notes, Irregular Forms of, L. A., 119.
- Book Reviews and Notices—American Bar Association, 116.
- Bowie's Succession Duty in Canada, 153.
- Best on Evidence, 150.
- Blyth's Analysis of Snell's Equity, 117.
- Butterworth's Bankers' Advances, 441.
- Carter's Elements of Contract, 441.
- Chitty's Forms, 191.
- Clarke's Magistrates' Manual, 193.
- Columbia Law Review, 442.
- Comprehensive Criminal Digest, The, 192.
- Condon and Forbes on The Law of Waters, 374.

Book Reviews and Notices—Continued.

- Cyclopedia of Law and Procedure, 375.
- Danaher's Courses of Study for Law Clerks, 374.
- Digest, The, 374.
- General Digest American and English, 118, 342.
- Harvard Law Review, 442.
- Indermaur's Manual of Equity, 152.
- Legislation in the United States in 1901, 226.
- Lindley on Companies, 305.
- Macer's Conditions of Contract Relating to Building Works, 149.
- Maclean's Law of Interpleader, 223.
- Minton-Senhouse's Accidents to Workmen, 306, 340.
- Phipson's Law of Evidence, 441.
- Punjab Law Reporter, The, 375.
- Ross's Procedure as to Firms and Corporations, 149.
- Safford and Wheeler's Privy Council Practice, 80.
- Smith's Law of Master and Servant, 224.
- Taswell-Langmead's Analysis of English Constitutional History, 224.
- Watson's Law Relating to Cheques, 191.
- Williams and Bruce's Admiralty Practice, 376.
- Willie's Contract of Sale of Goods, 418.
- Wyatt Paine on Bailments, 79.
- Boundary Dispute, The Alaska-Canada, Ed., 368, 411.
- Boyd, Sir John, Illness of, Ed., 43.
- Breach of Condition by Insurance Companies, Waiver of, L. A. 124, 155.
- Brief Digest, The, Ed., 42.
- British Columbia, Contempt of Court in, Ed., 339.
- British Columbia, The New Chief Justice of, Ed., 142.

- Burton, Sir George, Life and Work of, L. A., 195.
 Bystanders, The Testimony of, Ed., 111.

C.

- Capital Punishment in Scotland, Ed., 438.
 Chancellor, Trinity's New, Ed., 42.
 Changes in Legal Offices, Ed., 408.
 Changes, Judicial, Ed., 428.
 Charitable Uses Act, The Mortmain and, Ed., 273.
 Chief Justice McColl, Death of, Ed., 109.
 Chief Justice of British Columbia, The New, Ed., 142.
 Company Law, Ed., 41.
 Compromise, Authority of Counsel to, L. A., 292.
 Compromise, Authority of Counsel to, Ed., 333.
 Compulsory Retirement of County Judges, Ed., 107.
 Consolidation of Imperial Statutes in Force in Ontario, L. A., 62.
 Contempt of Court in British Columbia, Ed., 330.
 Contempt of Court in Nova Scotia, Ed., 408, 437.
 Contracts, Wagering, L. A., 377.
 Coroner, The Court of the, L. A., 307.
 Counsel, New King's, Ed., 267.
 County Judge of Halton, Ed., 75.
 County Judges, Compulsory Retirement of, Ed., 107.
 County Law Associations, The, Ed., 302.
 County of Carleton Law Association, Ed., 75.
 County of York Law Association, The, Ed., 109.
 Court, New Rules of, Ed., 331.
 Court of the Coroner, The, L. A., 307.
 Criminal Code, Section Five of The, L. A., 170.
 Crown Lands, Intruders on, L. A., 403.

D.

- Damages for Nervous Shock, Ed., 334.
 Deaf Judge is Regarded, How a, Ed., 275.
 Death of Chief Justice McColl, Ed., 109.
 Death of Mr. Chadman Jones, Ed., 110.
 Death of Mr. Clarke Gamble, Ed., 431.
 Death of Mr. Justice Gwynne, Ed., 74.
 Death of Mr. Justice Lister, Ed., 103.
 Denne, Dover v., Ed., 269.
 Digest of Ontario Cases, Half-Yearly, Ed., 366.
 Digest, The Brief, Ed., 42.

- Discovery of Telephone Messages, Ed., 44.
 Dismissal of Domestic Servants, Hiring and, Ed., 142.
 Domestic Servants, Hiring and Dismissal of, Ed., 142.
 Dominion King's Counsel, New, Ed., 333.
 Dominion Statutes, Revision of The—A Suggestion, Ed., 432.
 Donationes Mortis Causa, Ed., 186.
 Dover v. Denne, Ed., 269.

E.

- Employees, Publication of Libel Through, L.A., 321.
 Estates, Lunatics and their, L. A., 47, 81.
 Estates Tail, L. A., 426.

F.

- "Faithful Fisherman, Ye," Ed., 144.
 Foreign Law Affecting Life Insurance Contracts, L. A., 1.
 Forms of Bills and Notes, Irregular, L. A., 119.
 French Canadian Law, The Origins of The, Ed., 217.

G.

- Gamble, Death of Mr. Clarke, Ed., 431.
 Garrow, Mr. Justice, Ed., 141.
 Garrow, Swearing in of Mr. Justice, Ed., 185.
 Gaynor-Greene Case, The, Ed., 366.
 Goods Sold for Particular Purpose, Implied Condition where, Ed., 144.
 Guardian, The Official, Ed., 430.

H.

- Half-yearly Digest of Ontario Cases, Ed., 366.
 Halton, County Judge of, Ed., 75.
 Hamilton Law Association, The, Ed., 109.
 Hiring and Dismissal of Domestic Servants, Ed., 142.
 Holmes Mr. Justice, Ed., 334.
 How a Deaf Judge is Regarded, Ed., 275.

I.

- Illness of Sir John Boyd, Ed., 43.
 Imperial Statutes in Force in Ontario, Consolidation of, L. A., 62.
 Implied Condition Where Goods Sold for Particular Purpose, Ed., 144.

INDEX OF SUBJECTS.

vi

Inferior Courts, Jurisdiction of, in Actions for Liquidated Demands, L. A., 419.
Insurance Companies, Waiver of Breach of Condition, L. A., 124, 155.
Intruders on Crown Lands, L. A., 403.
Irregular Forms of Bills and Notes, L. A., 119.

J.

Jones, Mr. Cadman, Death of, Ed., 110.
Judges, Swearing in of the, Ed., 430.
Judges, The Salaries of, Ed., 274.
Judicial Changes, Ed., 428.
Jurisdiction of Inferior Courts in Actions for Liquidated Demands, L. A., 419.

K.

King's Counsel, Advertising, Ed., 43.
King's Counsel, New, Ed., 186.
King's Counsel, New Dominion, Ed., 333.

L.

Law Association, County of Carleton, Ed., 75.
Law Associations, The County, Ed., 302.
Law Association, The County of York, Ed., 109.
Law Association, The Hamilton, Ed., 109.
Law, Company, Ed., 41.
Law Journal, The Philippines, Ed., 335.
Law Lexicon, Moonshine, Ed., 336.
Law School, A Southern, Ed., 112.
Legal Offices, Changes in, Ed., 408.
Libel, Through Employees, Publication of, L. A., 321.
Life and Work, Sir George Burton's, L. A., 185.
Life Insurance Contracts, Foreign Law Affecting, L. A., 1.
Liquidated Demands, Jurisdiction of Inferior Courts in Actions for, L. A., 419.
Liquor Act of Manitoba, The, Ed., 40.
Lester, Mr. Justice, Death of, Ed., 103.
Lunatics and Their Estates, L. A., 47, 81.

M.

MacLaren, Mr. Justice, Ed., 429.
Manitoba, The Liquor Act of, Ed., 40.
McColl, Chief Justice, Death of, Ed., 109.
Mills, Mr. Justice, Ed., 105.
Minister of Justice, The New, Ed., 107.
Moneys in Hands of Police, Attachment of, Ed., 187.

Moonshine Law Lexicon, Ed., 336.
Mortis Causa Donationes, Ed., 186.
Mortmain and Charitable Uses Act, The, Ed., 273.

N.

Nervous Shock, Damages for, Ed., 334.
New Chancellor, Trinity's, Ed., 42.
New Chief Justice of British Columbia, The, Ed., 142.
New Dominion King's Counsel, Ed., 333.
New Judicial Privy Councillors, Ed., 43.
New King's Counsel, Ed., 186, 267.
New Minister of Justice, The, Ed., 107.
New Rules of Court, Ed., 331.
New Solicitor-General, The, Ed., 107.
Nova Scotia, Contempt of Court in, Ed., 408, 437.

O.

Oaths and Affidavits — Before Whom Taken, Corr., 190.
Official Guardian, The, Ed., 430.
Ontario Cases, Half-yearly Digest of, Ed., 386.
Ontario Statutes, 1902, The, Ed., 217.
Ontario Supreme Court, The, Ed., 332.
Ontario, 1902, 2 Edw. VII., The Statutes of, L. A., 228.
Origins of the French Canadian Law, The, Ed., 217.
"Our Sovereign—The People," L. A., 344.
Outer Bar, The Bench and The, Ed., 274.

P.

Patent Act, The, Ed., 436.
Police, Attachment of Moneys in Hands of, Ed., 187.
Privacy, The Right of, L. A., 281.
Privy Councillors, New Judicial, Ed., 43.
Provincial Cabinet and the Bench, The, Ed., 141.
Publication of Libel Through Employees, L. A., 321.
Punishment in Scotland, Capital, Ed., 438.

R.

Recent American Decisions, Ed., 44, 76, 112, 145, 187, 218, 276, 302, 337, 369, 415, 439.
Recent Cases from the Times Reports, Ed., 20, 67, 91, 133, 174, 206, 263, 294, 326, 361.

Regulations, Succession Duty Act, Ed., 433.
 Reporters' Errors, Some Amusing, Ed., 44.
 Revision of the Dominion Statutes—A Suggestion, Ed., 432.
 Right of Privacy, The, L. A., 281.
 Rules of Court, New, Ed., 331.

S.

Salaries of Judges, The, Ed., 274.
 Scotland, Capital Punishment in, Ed., 438.
 Section Five of the Criminal Code, L. A., 170.
 Selected Bar Anecdotes, Ed., 76, 145, 187, 218, 276.
 Solicitor-General, The New, Ed., 107.
 Some Amusing Reporters' Errors, Ed., 44.
 Southern Law School, A., Ed., 112.
 Statutes of Ontario, 1902, 2 Edw. VII., The, L. A., 228.
 Statutes, 1902, The Ontario, Ed., 217.
 Succession Duty Act Regulations, Ed., 433.

Supremacy, The King's, Ed., 432.
 Supreme Court Bench, The, Ed., 107.
 Supreme Court, The Ontario, Ed., 332.
 Swearing-in of Mr. Justice Garrow, Ed., 185.
 Swearing-in of the Judges, Ed., 430.

T.

Telephone Messages, Discovery of, Ed., 44.
 Testimony of Bystanders, The, Ed., 111.
 Times Reports, Recent Cases from, Ed., 20, 67, 91, 133, 174, 206, 263, 294, 326, 361.
 Trinity's New Chancellor, Ed., 42.

U.

Universities and the Legal Profession, The, Ed., 42.

W.

Wagering Contracts, L. A., 377.
 Waiver of Breach of Condition by Insurance Companies, L. A., 124, 155.

TABLE OF ENGLISH CASES

Referred to in "Recent Cases from the Times Reports."

A.	PAGE.	PAGE.	
Abrahams v. Bullock, 18 T. L. R. 701	298	Bayley v. Pearks, Gunston, and Tee, 18 T. L. R. 567	206
Acanthus, The, 18 T. L. R. 100	71	Beddington v. Beddington, <i>In re</i> Moses, 18 T. L. R. 147	73
Aerators Limited v. Tollet, 18 T. L. R. 637	294	Bedwell v. Golding and Sons, 18 T. L. R. 436	176
Aldam's (William) Settlement, <i>In re</i> , 18 T. L. R. 83, 579	36, 265	Beeley v. Waterhouse, <i>In re</i> Sidebottom, 18 T. L. R. 602	299
Alfin v. Hewlett, 18 T. L. R. 664	300	Berry v. South Eastern, etc., Railway Co., 18 T. L. R. 159	67
Almeda, <i>In re</i> , 18 T. L. R. 414	177	Bickmore v. Dimmer, 18 T. L. R. 416	178
Amble and Sons v. Corporation of Bradford, 18 T. L. R. 758	365	Biggar v. Rock Life Assurance Company, 18 T. L. R. 119	29
Anderson v. Berkley, 18 T. L. R. 531	216	Birch v. Birch, 18 T. L. R. 151, 485	70, 211
Andrews, <i>In re</i> , 18 T. L. R. 646	296	Blackburn and Sopsten v. Liverpool Brazil and River Plate Navigation Company, 18 T. L. R. 121	37
Anger v. Vassier, 18 T. L. R. 596	265	Boardman v. Scott and Whitworth, 18 T. L. R. 57	31
Anna, The, 18 T. L. R. 25	36	Bond v. Barrow Hematite Steel Co., 18 T. L. R. 249	93
Armitage v. Lancashire and Yorkshire R. W. Co., 18 T. L. R. 648	298	Bozzelli's Settlement, <i>In re</i> , 18 T. L. R. 365	139
Attorney-General for the Province of Manitoba v. Manitoba License Holders' Association, 18 T. L. R. 94	23	Brabham v. Wookey, 18 T. L. R. 99	25
Attorney-General v. Stewards and Co. (Limited), 18 T. L. R. 131	23	Bradford, Corporation of v. Ferrand, 18 T. L. R. 830	365
Attorney-General v. Winans, 17 T. L. R. 94	26	Brand v. Sandground, 18 T. L. R. 96	34
B.		Bright (Charles), <i>In re</i> , 18 T. L. R. 37	36
Bacon v. Callow Park Dairy Co., 18 T. L. R. 573	206	Bristol City, The, 18 T. L. R. 101	37
Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., 18 T. L. R. 161	68	Britain v. Hanks Brothers and Co., 18 T. L. R. 525	208
Bailey v. Clark, Son, & Morland, Limited, 18 T. L. R. 364	139	British Homes Assurance Corporation v. Patterson, 18 T. L. R. 676	299
Balfour v. Grace, <i>In re</i> Grace, 18 T. L. R. 321	138	British Workman Assurance Co. v. Cunliffe, 18 T. L. R. 425, 502	179, 210
Bank of New South Wales v. Goulburn Valley Butter Factory, 18 T. L. R. 735	326	Brooks, Jenkins, and Co. v. Mayor, etc., of Torquay, 18 T. L. R. 139	72
Barnes v. Richards, 18 T. L. R. 328	126	Brown, Brough, and Co. v. National Bank of India, 18 T. L. R. 669	294
Barnett's Trusts, <i>In re</i> , 18 T. L. R. 454	179	Brown v. Skirrow, 18 T. L. R. 59	39
Bartholomew v. Menzies, <i>In re</i> Weston, 18 T. L. R. 326	135	Browne v. Brandt, 18 T. L. R. 399	178
Bass Hatcliff and Grotton (Limited) v. John Davenport and Son's Brewery (Limited), 18 T. L. R. 108, 785	38, 364	Budd-Scott v. Daniel, 18 T. L. R. 675	297
Baxendale v. North Lambeth Liberal Club, 18 T. L. R. 700	301	Bull v. Mayor, etc., of Shoreditch, 18 T. L. R. 171	70
		Burbidge, <i>In re</i> , 18 T. L. R. 347	187
		Burland v. Earl, 18 T. L. R. 41	21

	PAGE.
Burrows v. Bedford School Board, 18 T. L. R. 292	96
Burton (Joseph) and Sons v. Mat- tinson, 18 T. L. R. 545	206
Byng v. Tufnell, <i>Re</i> Tufnell, 18 T. L. R. 705	328
Bynoe v. Bank of England, 18 T. L. R. 276	99

C.

Canadian Pacific R. W. Co. v. Roy, 18 T. L. R. 200	101
Carr v. Anderson, 18 T. L. R. 128, 206	95
Cash, (J. and J.), (Limited) v. Cash, 18 T. L. R. 299	139
Catal New Mines, Limited, <i>In re</i> , 18 T. L. R. 640	295
Chapman v. Browne, 18 T. L. R. 482	215
Charrington and Co. (Limited) v. Camp, 18 T. L. R. 152	70
Chattel v. Daily Mail Publishing Co., 18 T. L. R. 165	69
Chetwynd, <i>In re</i> , 18 T. L. R. 348	139
Consolidated Properties Company v. Chilvers, 18 T. L. R. 59	27
Cotton v. Soumes, 18 T. L. R. 456	174
Cowardin, <i>In the goods of</i> , 18 T. L. R. 220	92
Crabtree v. Fern Spinning Company (Limited), 18 T. L. R. 91	27

D.

Dalley v. Phillips and Marriott (Limited), 18 T. L. R. 18	30
Davies v. Jones, 18 T. L. R. 367	137
Davis v. Stoddart, 18 T. L. R. 585	263
Delaney, <i>Re</i> , 18 T. L. R. 741	329
Deverges v. Sandeman Clark and Co., 18 T. L. R. 375	139
Doswell v. Norton, 18 T. L. R. 228	91
Dunham v. Clare, 18 T. L. R. 645	298
Dunlop v. Cadell and Co., 18 T. L. R. 229	101
Dunn v. Donald Currie and Co., 18 T. L. R. 807	361
Dupont v. British Africa Company, 18 T. L. R. 24	36

E.

East Fremantle, Mayor of, v. Annois, 18 T. L. R. 199	101
Eastern and South African Telegraph Co. v. Cape Town Tramways Co., 18 T. L. R. 523	212
Edelstein v. Schuler, 18 T. L. R. 597	264

Edwards v. Barrington, 18 T. L. 169	
Elliott v. Garrett, 18 T. L. R. 408	
Evans v. Penwyllt Dinas Silica Company, 18 T. L. R. 58	
Evans Williams v. Byron, 18 T. L. 172	
Ewart v. Fryer, 18 T. L. R. 590	

F.

Farquharson Brothers and Co. v. King and Co., 18 T. L. R. 603	
Feyericks v. Hubbard, 18 T. L. 381	
Fitzpatrick v. Richard Evans Co., 18 T. L. R. 290	
Fleming v. Lee, 18 T. L. R. 736	
Foerster v. Newlands Diamond Min- 18 T. L. R. 497	
Ford, <i>In re</i> , Ford v. Ford, 18 T. R. 809	
Ford and Bemrose, <i>In re</i> , 18 T. L. 443	
Forman v. Bank of England, 18 L. R. 339	
Foulger v. Arding, 18 T. L. R. 423	
Frangopulo and Co. v. Lomas Co., 18 T. L. R. 461	

G.

Gattward v. Knee, 18 T. L. R. 163	
General Accident Assurance Corpo- ration v. Noel, 18 T. L. R. 164	
Gentel v. Papps, 18 T. L. R. 72	
Giblan v. National Amalgama- Labourers' Union, 18 T. L. 500	
Gilbertson and Co. v. Anderson Coltman, 18 T. L. R. 224	
Glamorgan Coal Company v. Soc- Wales Mines' Federation, 18 T. R. 810	
Glasscock v. London, Tilbury, Southend R. W. Co., 18 T. L. 295	
Goodhart v. Woodhead, <i>In re</i> Gr- wood, 18 T. L. R. 530	
Gophir Diamond Company v. Wo- 18 T. L. R. 492	
Gordon v. London City and Mid- Bank (Limited), 17 T. L. R. 1	
Grace, <i>In re</i> , Balfour v. Grace, 18 L. R. 321	
Graves v. Heinemann and Armist- 18 T. L. R. 115	
Great Western R. W. Co. v. Soli- Rural District Council, 18 T. R. 707	

	PAGE.
Greenwood, <i>In re</i> , Goudliart v. Woodhead, 18 T. L. R. 530.....	216
Griffin, <i>In re</i> , Griffin v. Griffin, 18 T. L. R. 142.....	67
Grove v. Portal, 18 T. L. R. 319.....	137
Gunn v. Showell's Brewery Company, Limited, 18 T. L. R. 659.....	300

H.

Hall v. Fairweather, 18 T. L. R. 58.....	24
Hamlyn v. John Houston and Co., 18 T. L. R. 631.....	265
Harborg India Rubber Comb Co. v. Martin, 18 T. L. R. 428.....	182
Hardie v. Balmait, 18 T. L. R. 539.....	208
Haslam and Evans, <i>In re</i> , 18 T. L. R. 461.....	182
Hawke v. Mackenzie, 18 T. L. R. 550.....	200
Hayes v. Rule and Law, 18 T. L. R. 535.....	200
Helyar, <i>In re</i> , 18 T. L. R. 207.....	97
Herdman v. Wheeler, 18 T. L. R. 190.....	91
Hilder v. Dexter, 18 T. L. R. 800.....	361
Hill, <i>In re</i> , 18 T. L. R. 267, 487, 496.....	210
Hoare v. Trotman, 18 T. L. R. 349.....	136
Hobbs v. Turner, 18 T. L. R. 235.....	92
Holland v. Bennett, 18 T. L. R. 510.....	213
Holland, <i>In re</i> , Gregg v. Holland, 18 T. L. R. 563.....	214
Holloway Brothers v. Hill, 18 T. L. R. 745.....	327
Hope v. P'Anson, 18 T. L. R. 201.....	94
Hopkins v. McBride, 18 T. L. R. 53.....	36
Hough v. Guardian Fire and Life Assurance Co., 18 T. L. R. 273.....	97
Hughes v. Pump House Hotel Co., 18 T. L. R. 645.....	294
Hull Electric Co. v. Ottawa Electric Co., 18 T. L. R. 344.....	134
Hunt v. Luck, 18 T. L. R. 265.....	96
Hussey v. London Electric Supply Corporation, 18 T. L. R. 296.....	134
Hussey v. Gas, Light and Coke Co., 18 T. L. R. 299.....	134
Hutchison, <i>In the Goods of</i> , 18 T. L. R. 706.....	328

I.

Ireland v. Hart, 18 T. L. R. 253.....	93
Irving v. Callow Park Dairy Co., 18 T. L. R. 573.....	206
J.	
Jacob v. Gaviller, 18 T. L. R. 402.....	178
Jacobs v. Morris, 18 T. L. R. 384.....	181

Janson v. Driefontein Consolidated Mines, 18 T. L. R. 796.....	363
Jared v. Walke, 18 T. L. R. 569.....	214
Jarrah Wood Paving Co. v. Samuel, 18 T. L. R. 674.....	299
John v. Albion Coal Company (Limited), 18 T. L. R. 27.....	31
Jones v. Humphreys, 18 T. L. R. 54.....	21

K.

Keatinge v. Parings Consolidated Mines, 18 T. L. R. 266.....	93
Kelly's Directories v. Gavin, 18 T. L. R. 346.....	135
Kensington, Lord, <i>In re</i> , Earl of Longford v. Lord Kensington, 18 T. L. R. 89.....	39
Key (W.) and Son, <i>In re</i> , 18 T. L. R. 263.....	93
Kidstone and Co. v. Monceau Ironworks Co., 18 T. L. R. 320.....	138
Kingdom and Wilson, <i>In re</i> , 18 T. L. R. 588.....	265
Krell v. Henry, 18 T. L. R. 823.....	362

L.

Labouchere, <i>In re</i> , 18 T. L. R. 208.....	98
Lambert v. Goodbody, 18 T. L. R. 394.....	183
Land Securities Company v. Commercial Gas Company, 18 T. L. R. 405.....	180
Langrish v. Watts, 18 T. L. R. 658.....	297
Lawford v. Billericay Rural District Council, 18 T. L. R. 507.....	208
Leas Hotel Company, <i>In re</i> , 18 T. L. R. 236.....	93
Legge v. Byns Mosley and Co., 18 T. L. R. 137.....	71
Leigh v. Taylor, 18 T. L. R. 293.....	136
Lennox v. Stoddart, 18 T. L. R. 585.....	293
Leonard v. Leonard, 18 T. L. R. 747.....	329
Lavi v. Anglo-Continental Gold Reefs, 18 T. L. R. 720.....	328
Line v. Royal Society for the Prevention of Cruelty to Animals, 18 T. L. R. 634.....	297
Lisle v. Reeve, 18 T. L. R. 61, 767.....	32, 364
Lloyd v. Woolland Brothers, 18 T. L. R. 578.....	264
Loeffler v. Donna Theresa Christina Railway Company (Limited), 18 T. L. R. 149.....	68
Loftus v. Roberts, 18 T. L. R. 532.....	208
London v. Peters, 18 T. L. R. 509.....	211
London Electric Supply Corporation (Limited) v. Priddis, 18 T. L. R. 64.....	23

	PAGE.		PAGE.
London and Globe Finance Corporation v. Montgomery, 18 T. L. R. 661	298	Neale v. Gordon-Lennox, 18 T. L. R. 390, 494, 791	174
London and Globe Finance Corporation, <i>In re</i> , 18 T. L. R. 679	207	Nesbitt v. Parrett, 18 T. L. R.	
London and North Western R. W. Co. v. Mayor, etc., of Westminster, 18 T. L. R. 74	34	Netherlands South African R. Co., Limited v. Fisher, 18 T. L. R. 116	
London and Northern Bank (Limited), <i>In re</i> , 18 T. L. R. 130, 206, 320, 403, 536	207	Neville v. Benjamin, 18 T. L. R.	
Longford, Earl of, v. Lord Kensington, <i>In re</i> Lord Kensington, 18 T. L. R. 89	39	Nonkes and Co. v. Rice, 18 T. L. R. 196	
Louise, The, 18 T. L. R. 19	30	Northey v. Trevillion, 18 T. L. R.	
M.		O.	
McDonald v. Hughes, 18 T. L. R. 79	24	Oliver v. Bank of England, 18 T. L. R. 341	
McDowall v. Great Western R. W. Co., 18 T. L. R. 340	137	Owen v. Gibbons, 18 T. L. R. 341	
Mackenzie v. Hawke, 18 T. L. R. 550	209	P.	
Manchester Liners (Limited) v. British and Foreign Marine Ins. Co., 18 T. L. R. 183	72	Palmer v. Birmingham Manufacturing Co., 18 T. L. R. 552	
Marais Case, 18 T. L. R. 185	98	Parish v. Mayor, etc., of the City of London, 18 T. L. R. 63	
Master v. Fraser, 18 T. L. R. 31	26	Pearks, Gunston, and Tee v. Houston, 18 T. L. R. 362	
Maxwell v. British Thomson-Houston Co., 18 T. L. R. 278	99	Pearks, Gunston, and Tee v. Houston, 18 T. L. R. 78	
May v. May, 18 T. L. R. 184	73	Pearks, Gunston, and Tee v. Houston, 18 T. L. R. 538	
Mayhew v. Sutton, 18 T. L. R. 52	28	Perceval v. Wright, 18 T. L. R.	
Mayor of East Fremantle v. Aunols, 18 T. L. R. 199	101	Phillips v. Hess, 18 T. L. R. 400	
Mee v. Cruickshank, 18 T. L. R. 271	96	Philp v. Bennett and Co., 18 T. L. R. 129	
Mellor's Trustee v. Maas and Co., 18 T. L. R. 40	22	Pidgeon v. Great Yarmouth Works Company, 18 T. L. R. 9	
Michael v. Hart and Co., 18 T. L. R. 254	94	Pitt-Rivers, <i>In re</i> , Scott v. Pitt-Rivers, 18 T. L. R. 272	
Moffatt and Palge v. George Gill and Sons, 18 T. L. R. 547	209	Plummer v. Johnson, 18 T. L. R.	
Mollineux v. London, Birmingham, and Manchester Ins. Co., 18 T. L. R. 753	361	Pollard, <i>Re</i> , Pollard v. Pollard, 18 T. L. R. 717	
Molling and Co. v. Dear and Son, 18 T. L. R. 217	100	Port Victoria, The, 18 T. L. R. 16	
Montgomery and Co. v. Indemnity Mutual Marine Ins. Co., 18 T. L. R. 479	209	Pretty v. Child, 18 T. L. R. 409	
Morel Brothers v. Westmorland, 18 T. L. R. 599	263	Q.	
Marrell v. New London Discount Co., 18 T. L. R. 507	207	Quicke v. Chapman, 18 T. L. R. 8	
Moses, <i>In re</i> Beddington v. Beddington, 18 T. L. R. 147	73	R.	
Mumford v. Walker, 18 T. L. R. 80	30	Radcliffe v. Price, 18 T. L. R. 406	
N.		Randall v. British and American Shoe Co., 18 T. L. R. 611	
Nash v. Finlay, 18 T. L. R. 92	25	Randt Gold Mining Co. v. New British Ersteling, 18 T. L. R. 218	
		Rattee v. Norwich Electric Tramway Co., 18 T. L. R. 562	
		Read v. Friendly Society of Operative Stonemasons, 18 T. L. R. 5	
		Redfern and Son v. Rosenthal Brothers, 18 T. L. R. 718	

PAGE.	PAGE.
<i>Beck v. Kynoch (Limited)</i> , 18 T. L. R. 34..... 31	<i>Spurrier v. LaClosche</i> , 18 T. L. R. 606..... 263
<i>Bramington v. Broadwood</i> , 18 T. L. R. 270..... 97	<i>Stedall v. Houghton</i> , 18 T. L. R. 126..... 35
<i>Bar v. Archbishop of Canterbury</i> , 18 T. L. R. 388..... 175	<i>Stephens v. Mysore Reefs Mining Co.</i> , 18 T. L. R. 327..... 134
<i>Bar v. Bros.</i> , 18 T. L. R. 39..... 37	<i>Stevenson v. Brown</i> , 18 T. L. R. 268..... 92
<i>Bar v. Dix</i> , 18 T. L. R. 231..... 96	<i>Stoddart v. Hawke</i> , 18 T. L. R. 22..... 27, 263
<i>Bar v. D'Eyncourt</i> , 18 T. L. R. 53..... 21	<i>Stuart v. Freeman</i> , 18 T. L. R. 511..... 210
<i>Bar v. French</i> , 18 T. L. R. 440..... 176	<i>Surtees v. Woodhouse</i> , 18 T. L. R. 222..... 98
<i>Bar v. Hadwen and Ingham</i> , 18 T. L. R. 555..... 209	<i>Sutton v. English and Colonial Produce Co.</i> , 18 T. L. R. 647..... 295
<i>Bar v. Jones</i> , 18 T. L. R. 156..... 68	
<i>Bar v. Judge of Birmingham County Court</i> , 18 T. L. R. 698..... 206	T.
<i>Bar v. Kennedy</i> , 18 T. L. R. 557..... 209	<i>Taylor v. Holland</i> , 18 T. L. R. 287..... 97
<i>Bar v. Kershaw</i> , 18 T. L. R. 357..... 135	<i>Thomas v. Smith</i> , 18 T. L. R. 69..... 28
<i>Bar v. Krause</i> , 18 T. L. R. 238..... 94	<i>Thompson v. City Glass Bottle Company (Limited)</i> , 18 T. L. R. 69..... 32
<i>Bar v. Lindsay</i> , 18 T. L. R. 761..... 362	<i>Thurston v. Nottingham Permanent Benefit Building Society</i> , 18 T. L. R. 135..... 29
<i>Bar v. Plummer</i> , 18 T. L. R. 659..... 296	<i>Tolhurst v. Associated Portland Cement Manufacturers</i> , 18 T. L. R. 827..... 362
<i>Bar v. Pope</i> , 18 T. L. R. 717..... 327	<i>Torkington v. Magee</i> , 18 T. L. R. 703..... 294
<i>Bar v. Tibbits</i> , 18 T. L. R. 49..... 33	<i>Tredegar Iron Co. v. Hawthorn</i> , 18 T. L. R. 718..... 326
<i>Bar v. Tristram</i> , 18 T. L. R. 406..... 182	<i>Tufnell, Re. Byng v. Tufnell</i> , 18 T. L. R. 705..... 328
<i>Richard Holden (Limited) v. Bosnick and Company (Limited)</i> , 18 T. L. R. 317..... 135	<i>Turnbull and Co. v. Duval</i> , 18 T. L. R. 521..... 215
<i>Alford v. Green</i> , 18 T. L. R. 709..... 326	<i>Twist v. Tye</i> , 18 T. L. R. 211..... 94
<i>Blumer v. Webster</i> , 18 T. L. R. 548..... 212	
<i>Roberts v. James</i> , 18 T. L. R. 777..... 365	U.
<i>Byland v. Jackson</i> , 18 T. L. R. 574..... 215	<i>Union Lighterage Co. v. London Graving Dock Co.</i> , 18 T. L. R. 754..... 364
S.	V.
<i>Beck v. Henderson</i> , 18 T. L. R. 382..... 183	<i>Van Praagh v. Everidge</i> , 18 T. L. R. 593..... 266
<i>Beard v. Nichols</i> , 18 T. L. R. 513..... 215	<i>Vaughan v. Clerk</i> , 18 T. L. R. 704..... 300
<i>Beilish Equitable Life Assurance Society, In re</i> , 18 T. L. R. 210..... 99	<i>Vinters v. Freedman</i> , 18 T. L. R. 77..... 37
<i>Bely v. Tandy</i> , 18 T. L. R. 38..... 29	
<i>Bellotum, In re, Beeley v. Waterhouse</i> , 18 T. L. R. 682..... 209	W.
<i>Bellotum v. Hooton Park Club</i> , 18 T. L. R. 453..... 175	<i>Walter v. Ashton</i> , 18 T. L. R. 445..... 177
<i>Benson v. Teignmouth and Shaldon Bridge Company</i> , 18 T. L. R. 104..... 214	<i>Walter v. Yalden</i> , 18 T. L. R. 668..... 297
<i>Bent, In the goods of</i> , 18 T. L. R. 413..... 300	<i>Warburton v. Taff Vale R. W. Co.</i> , 18 T. L. R. 420..... 180
<i>Smith, In re, Smith v. Thompson</i> , 18 T. L. R. 432..... 184	<i>Warren v. Brown</i> , 18 T. L. R. 55..... 20
<i>Smith v. Kynnersley</i> , 18 T. L. R. 508..... 206	<i>Warren v. Whittingham</i> , 18 T. L. R. 508..... 211
<i>Smith v. Northleach Rural District Council</i> , 18 T. L. R. 30..... 35	
<i>Smith v. Thompson, In re Smith</i> , 18 T. L. R. 432..... 184	
<i>Smith v. Wisden</i> , 18 T. L. R. 92..... 20	
<i>Metrol Globe (Limited), In re The</i> , 18 T. L. R. 154..... 68	

	PAGE.		PAGE.
Wernher Beit and Co. v. Markham, 18 T. L. R. 143, 763	71, 364	Wood, <i>Re</i> , Wood v. Wood, 18 T. L. R. 710	329
Weston, <i>In re</i> , Bartholomew v. Men- zies, 18 T. L. R. 326	135, 296	Worcester Royal Porcelain Co. v. Locke & Co., 18 T. L. R. 712 ...	328
White v. Harrow, 18 T. L. R. 129, 228	30, 97	Worcester Royal Porcelain Co. v. Rhodes, 18 T. L. R. 712	328
Whitehead v. Watt, 18 T. L. R. 465.	180	Worthington and Co. v. Belton, 18 T. L. R. 438	183
Willis v. Barron, 18 T. L. R. 602..	265	Wright v. Berry, 18 T. L. R. 370...	133
Willox v. Pearson, 18 T. L. R. 220..	102	Wright v. Carter, 18 T. L. R. 256..	101
Wimbledon Park Golf Club v. Im- perial Insurance Company, 18 T. L. R. 815	363	Wright v. Glyn, 18 T. L. R. 404....	180
Winding up Petitions, <i>In re</i> , 18 T. L. R. 503	207		
Winkfield, The, 18 T. L. R. 178.....	70		
Wise v. Dunning, 18 T. L. R. 85	24		

Y.

Yates v. Terry, 18 T. L. R. 262....	91
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THE CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.]

[1ST OCTOBER, 1901.

HARGROVE v. ROYAL TEMPLARS OF TEMPERANCE.

Appeal—Special leave—Amount in controversy.

H., a member of the Order of Royal Templars, held a benefit certificate entitling him, if he reached the age of seventy years or became entirely disabled, to receive a sum of money based on the membership of the Order. On reaching the age stated, he demanded the amount, and, on the Order refusing to pay, brought an action therefor, the defence to which was, that he had stated his age incorrectly in his application for membership, and violated certain conditions, which, however, the Court held were not set out nor referred to in the certificate. A judgment for H. at the trial was affirmed by the Court of Appeal, and, the amount recovered being under \$1,000, the defendants moved the Supreme Court for special leave to appeal under 60 & 61 V. c. 34, s. 1 (e).

Held, that the questions involved not being of public importance, and the judgment of the Court of Appeal (2 O. L. R. 79, 21 Occ. N. 372) appearing to be well founded, the leave would not be granted.

Fisher v. Fisher, 28 S. C. R. 494, followed.

See, also, *Hargrove v. Royal Templars of Temperance*, 2 O. L. R. 126, 21 Occ. N. 432.

W. D. Hogg, K.C., for the motion.

R. V. Sinclair, contra.

[29TH OCTOBER, 1901.]

JAMES v. GRAND TRUNK R.W. Co.

Railways—Fences—Culvert—Negligence—Cattle on track.

A railway company are under no obligation to erect and maintain a fence on each side of a culvert across a water-course.

Where cattle went through a culvert into a field and thence to the highway and straying on to the railway track were killed, the company were *held*, not liable to their owner; TASCHEREAU, J., dissenting.

Judgment of Court of Appeal, 1 O. L. R. 127, 21 Occ. N. 110, affirming the decision at the trial, 31 O. R. 672, 20 Occ. N. 278, reversed.

Wallace Nesbitt, K.C., and *Glyn Osler*, for the appellants.

J. V. Teetzel, K.C., and *George C. Thomson*, for the respondent.

[31ST OCTOBER, 1901.]

ROBINSON v. MANN.

Chattel mortgage—Indorsement of promissory note—Consideration.

Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note, not indorsed by the payee, is liable as an indorser to the latter.

Judgment of the Court of Appeal, 2 O. L. R. 63, 21 Occ. N. 375, on this point reversed.

The provisions of the Ontario Bills of Sale Act requiring the consideration of a chattel mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration, and then sets out the note. Only the facts need be stated, not their legal effect.

Judgment of the Court of Appeal on this point affirmed.

E. B. Ryckman and *A. T. Kirkpatrick*, for the appellant.

I. F. Hellmuth and *D. W. Saunders*, for the respondent.

[11TH NOVEMBER, 1901.]

WILSON v. HOTCHKISS.

Company—Promoters—Agent to solicit subscriptions—False representations—Ratification—Benefit.

Promoters of a company employed an agent to solicit subscriptions for stock, and W. was induced to subscribe, on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters:—

Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 261, 21 Occ. N. 493, that the latter, having benefited by the sum paid by W., were liable to repay it, though they did not authorize and had no knowledge of the false representations of their agent.

Per STRONG, C.J., that neither express authority to make the representations, nor subsequent ratification or participation in benefit, were necessary to make the promoters liable; the rule of *respondeat superior* applies as in other cases of agency.

G. F. Shepley, K.C., for the appellants.

A. B. Aylesworth, K.C., and *J. M. McEvoy*, for the respondent Wilson.

R. V. Sinclair, for the respondent company.

[12TH NOVEMBER, 1901.]

ASH v. METHODIST CHURCH.

Church—Discipline—Expulsion of minister—Domestic forum—Appeal.

Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference.

Judgment of the Court of Appeal, 27 A. R. 602, 21 Occ. N. 21, affirmed.

W. R. Riddell, K.C., for the appellant.

J. J. Maclaren, K.C., for the respondents.

QUEBEC.]

[29TH OCTOBER, 1901.]

SCHWOB v. FARNHAM.

Peremption—Retrospective legislation.

Where the period of peremption commenced after the promulgation of the new Code of Civil Procedure of the Province of Quebec, the exceptions declared by the fourth paragraph of its first Article do not prevent the peremption of a suit pending at the time it came into force under the limitations provided by Art. 279 of the new Code.

Lafleur, K.C., for the appellants.

Racicot, K.C., and *Duffy*, K.C., for the respondent.

GAREAU v. MONTREAL STREET R.W. CO.

Nuisance—Operation of electric railway—Power-house machinery—Vibration, smoke, and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact.

Notwithstanding the privileges conferred upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city by its Act of incorporation, the company is responsible in damages to the owners of property adjoining its power-house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned.

Drysdale v. Dugas, 26 S. C. R. 20, followed.

In an action by the owner of adjoining property for damages thus caused, the evidence was contradictory, and the Courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality.

Held, TASCHEREAU, J., dissenting, that, notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.

In reversing the judgment appealed from the Supreme Court deemed it expedient, in the interest of both parties, to assess damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present, and future, resulting from the nuisance complained of,

should she elect to accept the amount so estimated in full satisfaction thereof; otherwise the record to be transmitted to the trial Court to have the amount of damages determined.

De Bellefeuille, K.C., for the appellant.

Lafleur, K.C., and *F. Meredith*, K.C., for the respondents.

DOMINION CARTRIDGE CO. v. McARTHUR.

Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workmen—Employer's liability—Presumptions—Findings of jury sustained by Courts below.

As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise, and consistent, that the employer is chargeable with negligence which was the immediate, necessary, and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate Court to relieve the employer of liability in a case where there is want of evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff have been sustained by two Courts below.

TASCHEREAU, J., dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both Courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *George Matthews Co. v. Bouchard*, 28 S. C. R. 580, and *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152, those findings ought not to be reversed on appeal.

Asbestos and Asbestic Co. v. Durand, 30 S. C. R. 285, discussed and approved.

In re TWO MOUNTAINS DOMINION ELECTION.

Parliamentary elections—Petition—Status of petitioner—Voters' list—Affidavit—Preliminary objection.

A list appearing on its face to be an imprint emanating from the Queen's printer, certified by the clerk of the Crown in Chancery to be a copy of the voters' list used at an election, and upon which the name of the petitioner against the return at such election appeared as a person

having a right to vote thereat, is sufficient proof of his status.

The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne."

Held, per GWYNNE, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition.

Judgment of the Court below affirmed.

Belcourt, K.C., and *Perron*, for the appellant.

Beaudin, K.C., for the respondent.

In re BEAUHARNOIS DOMINION ELECTION.

Parliamentary elections—Petition—Status of petitioner—Franchise Acts.

The principal contention raised on preliminary objections to an election petition was, that the petitioner had been guilty of corrupt practices before, during, and after the election, and that, by the effect of 61 V. c. 14 and 63 & 64 V. c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act regulating the franchise in the Province of Quebec substituted therefor, so as thereby to deprive the petitioner of a right to vote under s. 272 of the Quebec Elections Act, 59 V. c. 9, and being so deprived of a vote, that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—

Held, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.

Per GWYNNE, J.—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by Provincial legislation.

Judgment of the Court below affirmed.

Belcourt, K.C., for the appellant.

Bisaillon, K.C., and *Laurendeau*, for the respondent.

MONARQUE v. LA BANQUE JACQUES-CARTIER.

Title to land—Legal warranty—Description—Plan of sub-division—Change in street line—Accession—Troubles de droit—Eviction—Issues on appeal.

A vendor of land described according to an existing plan of sub-division, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line.

A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from the trial Court judgments maintaining both the principal action and the action in warranty, although he may have refused to do so in the Court of first instance, but, should the appellate Court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action.

Mignault, K.C., and *Beaudin*, K.C., for the appellant.

Brousseau, K.C., for the respondent.

[16TH NOVEMBER, 1901.]

HAMELIN v. BANNERMAN.

Deed—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate Court.

A deed of sale of lands bordering on a stream, with the privilege of constructing dams, etc., therein, provided that, in case of damages being caused through the construction of any such works, the seller or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators, and the purchasers should pay the amount awarded.

Held, that, under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of Art. 5535, R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused.

having a right to vote thereat, is sufficient proof of his status.

The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne."

Held, per GWYNNE, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition.

Judgment of the Court below affirmed.

Belcourt, K.C., and *Perron*, for the appellant.

Beaudin, K.C., for the respondent.

In re BEAUHARNOIS DOMINION ELECTION.

Parliamentary elections—Petition—Status of petitioner—Franchise Acts.

The principal contention raised on preliminary objections to an election petition was, that the petitioner had been guilty of corrupt practices before, during, and after the election, and that, by the effect of 61 V. c. 14 and 63 & 64 V. c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act regulating the franchise in the Province of Quebec substituted therefor, so as thereby to deprive the petitioner of a right to vote under s. 272 of the Quebec Elections Act, 59 V. c. 9, and being so deprived of a vote, that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—

Held, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.

Per GWYNNE, J.—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by Provincial legislation.

Judgment of the Court below affirmed.

Belcourt, K.C., for the appellant.

Bisailon, K.C., and *Laurendeau*, for the respondent.

MONARQUE v. LA BANQUE JACQUES-CARTIER.

Title to land—Legal warranty—Description—Plan of sub-division—Change in street line—Accession—Troubles de droit—Eviction—Issues on appeal.

A vendor of land described according to an existing plan of sub-division, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line.

A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from the trial Court judgments maintaining both the principal action and the action in warranty, although he may have refused to do so in the Court of first instance, but, should the appellate Court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action.

Mignault, K.C., and *Beaudin*, K.C., for the appellant.

Brousseau, K.C., for the respondent.

[16TH NOVEMBER, 1901.]

HAMELIN v. BANNERMAN.

Deed—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate Court.

A deed of sale of lands bordering on a stream, with the privilege of constructing dams, etc., therein, provided that, in case of damages being caused through the construction of any such works, the seller or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators, and the purchasers should pay the amount awarded.

Held, that, under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of Art. 5535, R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused.

having a right to vote thereat, is sufficient proof of his status.

The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne."

Held, per GWYNNE, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition.

Judgment of the Court below affirmed.

Belcourt, K.C., and *Perron*, for the appellant.

Beaudin, K.C., for the respondent.

In re BEAUHARNOIS DOMINION ELECTION.

Parliamentary elections—Petition—Status of petitioner—Franchise Acts.

The principal contention raised on preliminary objections to an election petition was, that the petitioner had been guilty of corrupt practices before, during, and after the election, and that, by the effect of 61 V. c. 14 and 63 & 64 V. c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act regulating the franchise in the Province of Quebec substituted therefor, so as thereby to deprive the petitioner of a right to vote under s. 272 of the Quebec Elections Act, 59 V. c. 9, and being so deprived of a vote, that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—

Held, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.

Per GWYNNE, J.—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by Provincial legislation.

Judgment of the Court below affirmed.

Belcourt, K.C., for the appellant.

Bisaillon, K.C., and *Laurendeau*, for the respondent.

MONARQUE v. LA BANQUE JACQUES-CARTIER.

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A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from the trial Court judgments maintaining both the principal action and the action in warranty, although he may have refused to do so in the Court of first instance, but, should the appellate Court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action.

Mignault, K.C., and Beaudin, K.C., for the appellant.

Brousseau, K.C., for the respondent.

[16TH NOVEMBER, 1901.]

HAMELIN v. BANNERMAN.

Deed—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate Court.

A deed of sale of lands bordering on a stream, with the privilege of constructing dams, etc., therein, provided that, in case of damages being caused through the construction of any such works, the seller or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators, and the purchasers should pay the amount awarded.

Held, that, under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of Art. 5535, R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused.

Held, also, that an objection as to arbitration and award being a condition precedent to an action for such damages, which have been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Superior Court.

On a cross-appeal, the Supreme Court refused to interfere with the amount awarded for damages in the Court below upon its appreciation of contradictory evidence.

Appeal and cross-appeal dismissed with costs.

J. A. N. MacKay, K.C., and *Alfred MacKay*, for the appellants.

Atwater, K.C., and *Beauchamp*, K.C., for the respondent.

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CANADIAN FIRE INSURANCE CO. v. ROBINSON.

Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.

The *lex fori* must be presumed to be the law governing a contract, unless the *lex loci* be proved to be different.

The appointment of a local agent of a fire insurance company is one in the nature of a *delectus personæ*, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent.

Summers v. Commercial Union Assurance Co., 6 S. C.R. 19, followed.

The local agent of a fire insurance company was authorized to effect interim insurances by issuing interim receipts, countersigned by himself, on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt countersigned by him (the canvasser) as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium.

Held, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority.

Held, further, that, even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurances.

Appeal allowed with costs.

Foran, K.C., and *Lafleur*, K.C., for the appellant.

Aylen, K.C., for the respondents.

NOVA SCOTIA.]

KAULBACH v. ARCHBOLD.

Will—Capacity of testator—Undue influence.

A codicil to a will, executed shortly before the testator's death, increasing the provision for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece.

Held, reversing the judgment of the Supreme Court of Nova Scotia, *TASCHEREAU* and *SEDGEWICK*, JJ., dissenting, that, as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece, even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence.

Held, also, following *Perera v. Perera*, [1891] A.C. 354, that, even if there was ground for saying that the testator was not at the time capable of making a will, the codicil would still have been valid.

Newcombe, for the appellant.

Harrington, K.C., and *Drysdale*, K.C., for the respondent.

MANITOBA.]

SINCLAIR v. PRESTON.

Interest—Written contract—Debt and time certain—3 & 4 Wm. IV. c. 42, s. 28.

One Charlebois was contractor for building the Great North-West Central Railway, and Preston was a contractor with him for the fencing. Preston and Sinclair entered into an agreement by which the latter was to do the work of fencing, the agreement containing the following provision:

"Estimates for the said work shall be made monthly by the company's engineer, or at such other times as the

said engineer shall deem reasonable and proper, and such estimates, less ten per cent. rebate, shall be paid forthwith upon same being paid to said Preston and Musson by said company, and the said ten per cent. rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company."

Preston obtained judgment, which by consent was entered against the railway company direct, for the price of his work, and received satisfaction therefor by assigning it to other persons. Sinclair was paid the price of his work, but demanded interest, claiming that his right to payment attached, under the above clause, on the judgment being assigned. He sued for the interest, which the trial Judge allowed, but the full Court reversed his judgment, holding that interest could not be recovered under the statute in force, 3 & 4 Wm. IV. c. 42, s. 28.

Held, affirming the latter decision, 12 Man. L. R. 223, 21 Occ. N. 97, that under said statute it must appear by the written instrument that there is a debt certain, payable at a time certain, before interest will be allowed, and it did not so appear by the contract in this case.

A. B. Aylesworth, K.C., for the appellant.

C. Robinson, K.C., and G. A. Elliott, for the respondent.

BRITISH COLUMBIA.]

In re BURRARD DOMINION ELECTION.

Parliamentary elections—Petition—Deposit of copy—Preliminary objections.

Where a copy of an election petition was not left with the prothonotary when the petition was filed, and, when deposited later, the forty days within which the petition had to be filed had expired:—

Held, GWYNNE, J., dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. L. R. 65, 210 Occ. N. 252).

Lisgar Election Case, 20 S. C. R. 1, followed.

Per GWYNNE, J.—The Supreme Court is competent to overrule a judgment of the Court differently constituted, if it clearly appears to be erroneous.

J. Travers Lewis, for the appellant.

J. Lorne McDougall, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[6TH NOVEMBER, 1901.

In re ARMY AND NAVY CLOTHING CO. OF TORONTO.*Company—Winding-up—Liquidator's bond—Money received as assignee—
Finality of certificate.*

After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds, he was appointed liquidator under the Winding-up Act and gave security by a bond which recited all the proceedings and orders, and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay liquidator.

Held, that the security applied to the funds received by the liquidator as assignee, and that the sureties were responsible upon his subsequent misappropriation thereof.

The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties, and should form a valid and binding charge against them.

Held, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court.

Judgment below affirmed.

James Bicknell, for the appellants.

J. A. MacIntosh, for the respondents.

[19TH DECEMBER, 1901.

WILSON v. SHAVER.

Sale of goods—Future delivery—Destruction before measurement—Property passing.

Whether the property in goods contracted to be sold has or has not passed to the purchaser, depends in each case

upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained.

The property in the cordwood in question in this case was held to have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision.

Judgment of a Divisional Court, 1 O. L. R. 107, 21 Occ. N. 141, affirmed.

F. A. Magee, for the appellant.

W. H. Blake, for the respondent.

FALCONBRIDGE, C.J.]

[6TH NOVEMBER, 1901.

JACKSON v. GRAND TRUNK R. W. CO.

Trial—Jury—Verdict—Weight of evidence—Railways—Fire.

In an action against a railway company to recover damages because of fire caused by sparks from an engine, two witnesses called on behalf of the plaintiff—men without much practical experience—testified that, in their opinion, the engine in question was defectively constructed in a certain particular: while eleven witnesses called by the defendants, all men of practical experience, testified that the engine was constructed in accordance with the best prevailing practice. The jury found for the plaintiff.

Held, that in a case of this kind, depending upon the weight to be given to scientific and expert testimony, and not upon questions of credibility and demeanour, such a verdict could not stand, and it was set aside and the action dismissed.

Judgment below reversed; ARMOUR, C. J. O., dissenting.

Wallace Nesbitt, K.C., and *H. E. Rose*, for the appellants.

E. F. B. Johnston, K.C., and *J. D. Montgomery*, for the respondent.

10TH DECEMBER, 1901.

COYNE v. RYAN.

Domicil—Origin—Change—Intention—Proof of residence—Permanency of.

Judgment noted 21 Occ. N. 498 affirmed on appeal.

E. F. B. Johnston, K.C., and *H. T. Kelly*, for the appellants.

W. Laidlaw, K.C., and *J. Bicknell*, for the respondent.

FERGUSON, J.]

[20TH DECEMBER, 1901.]

BRANTFORD ELECTRIC AND OPERATING CO. v.
BRANTFORD STARCH WORKS.

Deed—Description—Falsa demonstratio—Water rights.

By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises." The "present wheel" was forty inches in diameter.

Held, that the governing words were "not exceeding forty-four inches in diameter," and that the subsequent words "being the size of the present wheel upon the premises," should be rejected as *falsa demonstratio*.

Judgment of FERGUSON, J., reversed; MACLENNAN, J.A., dissenting.

E. D. Armour, K.C., and *E. Sweet*, for the appellants.

G. F. Shepley, K.C., and *W. T. Henderson*, for the respondents.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., 16TH NOVEMBER, 1901.]

ARMSTRONG v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.

Life insurance—Application for—Completed contract—Date of policy—Due date of premiums.

A. applied in Toronto for a policy in the defendant company, and his application was received in the defendants' head office in New York on the 23rd August, 1897, and was initialled by certain officers of the company, indicating acceptance of the risk, but this was not communicated to A.

Held, that no contract with A. was completed by such initialling.

The defendants prepared a policy, in accordance with the application, and dated it the 23rd August, 1897, the premiums being expressed to be payable on the 23rd February and 23rd August in each year, which policy on the 28th August, 1897, reached the defendants' agent, who notified

the plaintiff, the beneficiary named in the application and the policy, all being according to the ordinary course of the defendants in like cases.

Held, that this sending of the policy was the first and only acceptance of the application constituting a contract between the parties, and could not be considered as a counter-proposal.

Semble, also, that the policy was properly dated the 23rd August, 1897.

Both the policy and the application contained a clause that the insurance should not be binding on the defendants, or the policy go into effect, until the first premium had been paid to the defendants. This was not done until the 4th October, 1897, and the policy was not in fact delivered till then. The plaintiff, acting for A., paid this premium, and received a receipt dated the 23rd August, 1897, which she made no objection to, and which stated that the payment was up to the 23rd February, 1898. On the 26th February, 1898, she paid the second premium, for which she received a similar receipt stating it was the premium due the 23rd February, 1898, which she also retained and kept without objection. On the 17th October, 1898, the third premium was tendered and refused by the defendants, on the ground that it was too late, as it should have been paid on the 23rd August, 1898, or within the thirty days of grace. A. died on the 20th October, 1898. The policy provided that failure to pay any premium as specified when due would terminate the policy.

Held, that the defendants were not liable under the policy, and the plaintiff's contention that the third premium did not fall due until the 4th October, 1898, could not be sustained.

J. K. Kerr, K.C., for the plaintiff.

A. H. Marsh, K.C., for the defendants.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 2ND DECEMBER, 1901.]

In re HAWKINS v. BATZOLD.

Prohibition—Division Court—Order for committal—Previous order for payment—Affidavit.

Decision of MEREDITH, C.J., 21 Occ. N. 597, affirmed.

G. C. Campbell, for the plaintiff.

W. J. Tremear, for the defendant.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 2ND DECEMBER, 1901.

In re TORONTO PUBLIC SCHOOL BOARD AND CITY
OF TORONTO.

Public schools—Expenditure—Annual estimates—Revision—Powers of municipal council—Salaries of teachers—Contracts with—Repairs—Furnishing of board room and offices—Discretion of board as to amount—Medals for pupils—Liabilities of previous year—"Miscellaneous"—Furniture of school rooms—Rent of school rooms.

An application by the school board for a mandamus to the city corporation to levy certain sums of money alleged by the board to be required for school purposes for the year 1901. The council of the corporation had received the estimates of the board of the amounts required, and had struck off certain items in whole, and reduced others, upon various grounds.

1. At the end of the year 1900 all the teachers who were engaged or re-engaged for 1901 signed a contract in writing with the board, which was also duly executed under the seal of the board, by which the teachers were employed by the board "in the school and at the yearly salary set opposite his and her name respectively . . . or at such salary and in such school or division of the same as they may from time to time appoint, for the term of one year, beginning on the 1st January, 1901, and ending on the 31st December, 1901;" and the board further thereby agreed "that they . . . would pay such salary to the said teacher monthly;" and it was further agreed that the board and the teacher might, at their option respectively, terminate the engagement by giving notice in the manner provided by the school regulations. The salary payable to each teacher under this agreement was set opposite his or her name in a schedule attached to it. On the 21st March, 1901, the board passed a resolution increasing the salaries of all the teachers who had been employed during 1900, the result being that the aggregate salaries of the teachers for 1901 who had signed the agreement at the end of 1900 were increased by about \$41,000 beyond the amount payable to them under the terms of that agreement. The city corporation refused the request of the board to levy the sum required to pay these additions to the salaries of the teachers, upon the ground that they were voluntary and unauthorized.

The provisions of the Public Schools Act, 1 Edw. VII. c. 39 (O.), which are applicable, are s. 65, s.-ss. 5 and 9; s. 71; s. 74; and s. 81.

Held, that it is only when it is made to appear that an expenditure would be clearly an illegal one, or *ultra vires* the school board, that the council is justified in refusing to raise the sum required by the board. It was by no means clear that, after the resolution of March, 1901, the board was not under a legal obligation to pay the larger salaries; and it was not intended that the council should inquire into the validity of contracts entered into in good faith between the board and teachers, and treated and acted on by them as valid. All that the council has a right to ask is, that what the Legislature has termed an "estimate" shall shew that the board has in good faith estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the board has the right to expend the money of the ratepayers, and, when that has been done, the duty is imposed upon the council of raising by taxation (except in the special case for which provision is made by s. 74) the sums required according to the estimate.

Semble, that, even if an action by a teacher for salary on the basis of the March resolution would fail, if it were set up in answer that the agreement sought to be enforced was not in writing, signed by the parties to it, and under the seal of the corporation, the board could not be compelled to set up such a defence, and if they refused to do so and wished to pay the salary in accordance with the resolution, the council would not be justified in refusing to provide the money.

2. For repairs, the estimate submitted by the board was: "Ordinary yearly repairs and alterations to school property under the Act, based on expenditure of the past ten years, \$25,000."

Held, a sufficient estimate to cast upon the council the duty of levying and collecting the whole \$25,000; more especially as it was supplemented, upon a request being made for further information, by a detailed statement of repairs to be made, shewing the nature of repairs to be made on each building, but not the probable cost of the repairs separately; the word "alterations" used in the estimate might have covered additions to school-houses (s. 76, s.-s. 1), but the detailed statement shewed that repairs only were intended.

3. Another item was: "Dais and railing in board rooms, and counters, partitions, screens, etc., in office, \$6,000—to carry out plans approved by the city council of last year, for which they included the item in a money by-law." The

board rented from the city corporation a part of a building for use as a board room and for offices, and the \$6,000 was for the fittings and furnishings thereof.

Held, having regard to the fact that plans and an estimate of the cost were approved by the council of 1900, and a by-law in that year provisionally passed and submitted to the electors for borrowing \$6,000 to defray that cost, that the estimate was sufficient.

Held, also, that it did not provide for expenditure of the class dealt with by s.-s. 1 of s. 76.

Held, also, that, although there is no direct authority in the Public Schools Act for the expenditure of money in furnishing board rooms and offices, such authority may be implied from ss. 56 and 65, and from s. 8 (25) of the Interpretation Act, R. S. O. 1897 c. 1.

Held, also, that neither the council nor the Court could deal with the question whether the amount was extravagant, nor, where there is good faith on the part of the board, call upon it to give reasons for the exercise of its discretion.

4. *Held*, that an item of \$50, part of the sum asked for medals and certificates for pupils, should not have been disallowed by the council. It is within the general powers of school boards to provide such recognitions of standing and merit, at the expense of the ratepayers.

5. *Held*, that items intended to provide for liabilities incurred in 1900, the payment of which was deliberately held over until 1901, were properly disallowed by the council as not forming part of the expenses of the schools under the charge of the board for 1901.

6. Under the head of "miscellaneous, based on the yearly expenditure of past years," the board asked for \$1,000. The council asked for no details of this, but struck it out *in toto*.

Held, that the estimate was sufficient, and that the item should not have been struck off without particulars being asked for, when they were asked for in other cases.

7. The council struck off \$4,250 from an estimate of \$11,750 for new furniture in new school rooms, and renewing the furniture in certain existing school rooms where it is worn out, and for repairs to old furniture.

Held, that this estimate, with the details given at the request of the council, was sufficient, and should have been accepted. The cost of the furniture of a school room is not part of the cost of the erection of a school house under s. 75 of the Act.

8. *Held*, that the item of \$220 for rent of school rooms to be used by the children taken care of by "The Girls' Home" should not have been struck out: s. 65, s.-ss. 3 and 4, and s. 67.

F. E. Hodgins, for the school board.

J. S. Fullerton, K.C., for the city corporation.

[STREET, J., BRITTON, J., 4TH DECEMBER, 1901.

In re CANADIAN CAMERA AND OPTICAL CO.

A. R. WILLIAMS CO.'S CLAIM.

Company—Winding-up—Claim against assets—Lien on goods sold—Right of liquidator—Conditional Sales Act—Bills of Sale Act.

The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company, one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it to H., subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only.

Held, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act, nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale to H., and they were entitled to recover the full amount due under the terms of the order out of the estate.

By the Conditional Sales Act, the title of a purchaser in good faith and for valuable consideration from the bailee of goods under a contract such as that in question is entitled to prevail against the bailor unless certain requirements of the Act are complied with, but the rights of creditors of the bailee are not increased, and remain as if the Act had not been passed. The liquidator as representative of the creditors is not helped by the Act, because the creditors

never had a right to treat the bailee as owner, nor as representative of the company, because the contract of the company with the bailee stands good both against the company and the liquidator.

A conditional agreement such as that in question is not affected by the Bills of Sale Act at all; it is not a mortgage, nor intended to operate as a mortgage within the meaning of that Act; nor is there anything in any statute affecting its validity.

W. E. Middleton, for the claimants.

G. H. Watson, K.C., for the liquidator.

In re MERCHANTS LIFE ASSOCIATION OF TORONTO.

VERNONS' CLAIMS.

Life insurance—Proof of claim on unmatured policy—Present value of reversion in sum assured—Mode of calculating—Statute—Amendment—Declaration as to former law—Effect on rights declared by judgment.

By an order of a Divisional Court made on the 5th February, 1901, upon appeal from a certificate of the Master in Ordinary in proceedings for the winding-up under the Ontario Insurance Act of a friendly society carrying on the business of life insurance, it was declared that the amount for which the holder of an unmatured policy payable at the death of the insured was entitled to rank upon the assets should be ascertained, as at the date of the commencement of the winding-up, by calculating, first, the present value of the reversion in the sum assured by the policy at the decease of the life assured, and, second, the present value of a life annuity of an amount equal to the future premiums which would have become payable during the probable duration of the life assured, and allowing the difference in favour of the first calculation as the sum for which the claimant should rank, and the claim was referred back to the Master to make the calculation: 1 O. L. R. 256, *note* 232.

Held, on appeal from a subsequent certificate of the Master shewing the result of his calculation, that the sum to be arrived at was a matter of simple calculation from the ordinary life insurance tables. The line applicable for

the purpose of ascertaining the present value of the reversion in the \$1,000 assured by the claimant's policy was the following:

Age	ax	Ax	Px
45	13.1645	.390044	.027537.

The column ax shews the present value of an annuity of \$1, payable at the end of each year during life. When the annuity is payable yearly in advance, the number before the decimal point is to be increased by 1. The column Px shews the amount of the net annual premium to be charged during life upon an insurance of \$1, in order that a proper fund may be provided to meet the insurance at death. The column Ax is the result of the multiplication of the figures in the column ax, plus 1, by those in Px, and shews the amount to be paid down in advance as a single premium for the insurance of \$1 payable at death. The figures in column ax multiplied by 1,000 furnished an absolute answer to the first calculation required to be made—\$390.04.

The Master took the figures in column ax, plus 1, but multiplied them by the figures actually charged by the insolvent association to a person insuring at the age of 45.

Held, that this was wrong; the fact of the company having undertaken its contract upon an insufficient consideration has nothing to do with this particular question; the arithmetical value of the reversion is not decreased by the fact that the premium stipulated for was too low; the premium paid has nothing to do with this calculation.

It was not disputed that the present value of a life annuity of an amount equal to the future premiums was \$177.54.

Held, therefore, that the claimant was entitled to rank for \$212.50.

By 1 Edw. VII. c. 21 (O.), assented to on the 15th April, 1901, the law as it previously existed was altered in several important respects, notably in the manner of valuing unmaturred policies, and the rights of persons who had entered into contracts with this association were impaired; and, by s.-s. (6) of s. 1, it was enacted that these amendments and additions "declare the law of the Province as it existed on, and has existed since, the 14th April, 1892." without any saving of rights acquired, or contracts entered into, or of actions pending, under the law as it stood.

Held, however, that these amendments did not affect the rights of the claimant, because those rights had been declared by the judgment of the 5th February, 1901, before

the Act was passed, and judgments are not reopened even by such legislation.

Hardcastle on Statutes, 3rd ed., p. 363, *Eyre v. Wynn-Mackenzie*, [1896] 1 Ch. 135, and *Day v. Kelland*, [1900] 2 Ch. 745, specially referred to.

H. T. Beck, for the claimant.

J. H. Hunter, for the liquidator.

In re MERCHANTS LIFE ASSOCIATION OF TORONTO.

HOOVER'S CLAIM.

Company—Winding-up—Creditor's claim—Delay in presenting—Excuse—Merits—Leave to renew application—Statute.

In the winding-up of a life insurance company, the liquidator's list of claimants was filed in the Master's office on the 5th June, 1900, and a proper advertisement was published requiring claims to be delivered to the liquidator on or before the 7th May, 1900. On the 19th April, 1901, the claimant applied to the Master to amend the list of claimants by increasing the amount for which he was entitled to rank.

Held, that the claimant, coming in after the time allowed for filing claims, was bound to shew upon affidavit some *prima facie* case of merit, and to explain the reasons for his delay in coming in with his claim. The claims of creditors should not be shut out so long as there remains unadministered a portion of the fund applicable for their payment. Even where an application is dismissed for want of an affidavit shewing merits and explaining delay, the dismissal may well be without prejudice to a further application upon proper material: but in this case the rights of the claimant had been entirely cut off by an enactment of the Legislature, to which a retrospective effect had been given, and it would, therefore, be of no assistance to the claimant to permit him to renew his application.

H. T. Beck, for the claimant.

J. H. Hunter, for the liquidator.

In re CHATHAM BANNER CO.

BANK OF MONTREAL'S CLAIM.

Banks and banking—Bank Act, s. 46—Inspection of customer's account—Evidence in judicial proceeding—Company—Manager—Private liabilities—Winding-up—Position of liquidator—Promissory notes—Consideration—Impeaching.

Section 46 of the Bank Act, 1890, 53 V. c. 31 (D.), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks.

The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim.

Held, that the liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the company's account with the manager's liabilities.

Held, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no farther.

Held, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the

account, where specific errors in it were charged, to the knowledge of the bank.

G. H. Kilmer, for the liquidator.

A. B. Aylesworth, K.C., for the bank.

[*Moss*, J.A., *FALCONBRIDGE*, C.J., 6TH DECEMBER, 1901.]

HUTTON v. JUSTIN.

Trustee—Lien—Sale of land to enforce—Abortive sale—Foreclosure—Purchase by trustee—Report on sale—Certificate in lieu of—Order—Terms.

An appeal by the plaintiff from an order of *MEREDITH*, C.J., in Chambers. The order was made upon a motion by the defendant for an order for foreclosure after an abortive sale, or for such order as the Court might think proper under the circumstances. The order directed that the Master should advertise for tenders, and if the property could not be sold, that the defendant should be allowed to purchase at \$17,500—a sum less than the claim for the realization of which the property was to be sold. The judgment of the Court of Appeal declared the defendant a trustee, with a lien for advances, and a subsequent judgment directed a sale to realize the amount found due to the defendant.

Held, that the defendant's position as a trustee debarred him from the ordinary remedy of foreclosure, to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate: *Tennant v. Trenchard*, L. R. 4 Ch. 537, 20 W. R. 785: and this was the effect of the order.

Held, also, that it was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master, shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested.

Girdlestone v. Gunn, 1 Ch. Ch. 212, and *Odell v. Doty*, *ib.* 207, referred to.

Held, also, that the property embraced in the order not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept that which was put up for sale in satisfaction of his entire claim.

The defendant offering to submit to terms, the order was varied so as to provide that the defendant should be

allowed to purchase at \$18,500, in the event of \$17,500 not being realized by a sale by tender or private contract.

W. H. McFadden, for the plaintiff.

B. F. Justin, the defendant in person.

[FALCONBRIDGE, C.J., STREET, J., 11TH DECEMBER, 1901.]

In re SOLICITOR.

Solicitor—Taxation of bill of costs—Allowance of lump sum—Work done out of Court—Power of taxing officer.

A solicitor was employed to collect claims aggregating \$82,000, from eleven different insurance companies, which claims were resisted by the insurance companies on the ground that they were gambling policies, while the widow of the insured also contended that the insurance was intended to be a trust for her and her family, subject only to a lien in favour of the insurer for what he had actually expended on premiums, with interest.

The solicitor prepared the necessary proof papers, and then entered into negotiations with the companies, which resulted in nine out of the eleven paying the amounts of their respective policies, aggregating \$70,000, without suit. The solicitor also negotiated a compromise of the widow's claim, which left \$60,000 for his client. The client then placed the claim on the other two policies in the hands of another solicitor, who took legal proceedings to collect them, which were unsuccessful.

The former solicitor then rendered a bill to his client, shewing in detail the negotiations he had conducted, and charging his full disbursements and ordinary costs in connection with an action commenced by the widow, and charging a lump sum to cover the services rendered by him in the negotiations out of Court, which extended over a period of seven months, and entailed much work. The client obtained an *ex parte* order referring the bill to taxation, when the taxing officer allowed \$3,200 as a lump sum to cover the work done in the negotiations, having first, with the acquiescence of the parties, satisfied himself, by conferring with various referees and officers and solicitors, as to what charges were usually made in matters of such a kind, and then determining the matter in the light of his own general knowledge and experience.

Held, affirming the decision of *BOYD, C.*, 21 Occ. N. 561, that the decision of the taxing officer should be affirmed; that *In re Attorneys*, 26 C. P. 495, completely covered the

case; and that the contention that the client was entitled to have the solicitor's remuneration assessed in an action must be disregarded, as he had himself selected the forum by issuing the order for taxation.

D. O'Connell, for the client.

W. E. Middleton, for the solicitor.

[14TH DECEMBER, 1901.]

KIDD v. HARRIS.

Marriage—Widow of deceased brother—Validity—Legitimacy—Presumption—Will.

The testator was married on the 30th June, 1855, to the widow of his deceased brother; she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife.

Held, that the validity of the marriage between the testator and the widow of his deceased brother could not be disputed after the death of the testator; and the presumption arising from the testator's relationship with another woman was rebutted by the fact of his lawful wife being then alive; and the appellants, the children of the testator and the other woman, were not legitimate and had no *locus standi* to appeal from a judgment establishing a document as the will of the testator.

Hodgins v. McNeil, 9 Gr. 305, and *Re Murray Canal*, 6 O. R. 685, approved.

E. H. Smythe, K.C., for the appellants.

G. E. Kidd, for the plaintiffs.

A. Haydon, for the specific legatees.

W. Morris, for other parties.

[BOYD, C., 22ND OCTOBER, 1901.]

SAWERS v. CITY OF TORONTO.

Distress—Taxes—"Owner"—Agreement for purchase—Seal of company—Part performance—"Local improvement" rates—Bailiffs—Withdrawal from possession—Return and resumption of—Abandonment.

In 1898 the plaintiff entered certain premises under an agreement for sale from a mortgagee under the power of sale in the mortgage, agreeing to pay taxes, made some

payments of purchase money thereunder, and remained in possession until the agreement was cancelled by the mortgagee for default in payments, in May, 1901.

In 1898 the premises were assessed by the defendants for 1899, the mortgagor appearing as the owner in the assessment roll for 1899. Notice of the taxes due under this assessment was served on the plaintiff, then in possession, and he paid the first instalment for that year, but neglected to pay the other two instalments, and the defendants distrained on him therefor in February, 1900.

In an action for alleged distress:—

Held, that the plaintiff was an "owner" within the meaning of the Assessment Act, R. S. O. c. 224.

Held, also, that, although the agreement was not under the seal of the company, the mortgagee, there was a part of performance sufficient to entitle the plaintiff to make good the contract against the company.

Held, also, that "local improvement" rates, being grouped with other taxes under the Assessment Act, and included in the collector's roll, are to be deemed "taxes," in the broad sense, which are to be collected and realized by uniform statutory process.

Held, also, that a warrant specifying two bailiffs was not objectionable, as no warrant need be drawn up, and anyone acting as bailiff may be authenticated as such by subsequent recognition.

One of the bailiffs having rightly entered and seized was induced to withdraw from possession by a statement made by the owner that he was a tenant, but, after consultation with the other bailiff, returned and resumed possession.

Held, that it was competent for him to forthwith return and continue the first lawful taking, and that on the facts there was no sufficient evidence of voluntary abandonment by the first bailiff quitting the house to get advice from the other bailiff.

The action was dismissed with costs.

McDougall v. McMillan, 25 C. P. 75, at p. 92, followed.

York v. Township of Osgoode, 21 A. R. at p. 173, 24 S. C. R. 282, referred to.

In re Flatt and United Counties of Prescott and Russell, 18 A. R. 1, distinguished.

John W. McCullough and James McCullough, for the plaintiff.

J. S. Fullerton, K.C., and W. C. Chisholm, for the defendants.

[7TH NOVEMBER, 1901.]

YOUNG v. DENIKE.

Will—Construction—Devise—Rule in Shelley's case.

Action for the recovery of land, into the possession of which the defendants had entered under an agreement of sale made between them and the plaintiff. The plaintiff alleged a title in fee to the land by a conveyance from a devisee under the will of James Roun. The devise was as follows: "I give and devise to my grandson James Hurlburt the last half . . . for the term of his natural life; after his death I devise the same to his children, lawfully begotten, in equal shares; should he die without a child living at the time of his death, then I devise said land to my son George for the term of his natural life, and after his death to his children in equal shares, and if George should die without a child living at the time of his death, then," &c., &c. The first devisee, James Hurlburt, was alive at the time of this action, aged 50, and had one child, a daughter, born after the death of the testator.

Held, that neither the rule in Wyld's case nor that in Shelley's case applied. There were plainly two gifts, one to James for life, and the other to his children in equal shares, which carried the remainder in fee to the child, or children, subject to be divested if he died without a child living at his death: see *Jeffrey v. Haywood*, 4 Mad. at p. 403; *Smith v. Smith*, 8 O. R. 698. The plaintiff, therefore, could not make title. The defendants were entitled to a lien for improvements, and for purchase money paid on account, with interest, less an occupation rent.

R. C. Clute, K.C., and *N. Gilbert*, for the plaintiff.

P. C. Macnee, for the defendants.

[MACMAHON, J., 18TH NOVEMBER, 1901.]

SECOR v. GRAY.

Executors and administrators—Corroborative evidence—Advance of money—Claim of interest.

The plaintiff sued the surviving member of the firm of C. & Co., together with the representatives of a deceased member of the firm, for \$1,000 lent by him, in the lifetime of the deceased, to the firm, for the purposes of the firm. He also claimed interest, alleging that this was spoken of

at the time the money was borrowed, and that the deceased member of the firm had asked him what the interest would be, and he told her five per cent.; the surviving member of the firm denied all recollection of interest having been mentioned.

Held, that, inasmuch as there was corroboration as to the main fact, namely, the borrowing by the firm of \$1,000, this was sufficient to entitle the plaintiff to recover the interest claimed.

W. G. Thurston, for the plaintiff.

G. F. Shepley, K.C., and *J. Baird*, for the defendants, the executors of Jane Cleghorn.

No one for the defendant *T. H. Cleghorn*.

[*STREET, J.*, 29TH OCTOBER, 1901.

BYER v. GROVE.

Devolution of Estates Act—Real representative—Caution—Sale of land—Lapse of year—Injunction.

Mary Grove died intestate on the 19th October, 1900, seized of certain lands.

Letters of administration of her real estate were issued to the defendant on the 14th October, 1901. Prior to such issue the defendant advertised the lands of the deceased to be sold on the 22nd October, 1901, more than a year after the death of the intestate. No caution had been filed under the Devolution of Estates Act; and it appeared that there were no debts.

Held, that the plaintiff was entitled to an injunction restraining the defendant from selling the plaintiff's interest in the lands, under the above circumstances.

Clearly the defendant had no right to sell the lands at the time he proposed doing so, as, by the operation of the Devolution of Estates Act, the property had become vested in the heirs of the deceased.

W. E. Middleton and *C. R. Fitch*, for the plaintiff.

S. B. Woods and *T. H. Lennox*, for the defendant.

[21ST NOVEMBER, 1901.

MIDDLETON v. SCOTT.

Mortgage—Mortgagee's costs—Unnecessary proceedings—Tender—Waiver.

A mortgagee's right to the costs of proceedings taken by him upon a mortgage, as, for example, by service of

notice of exercise of power of sale, does not depend upon the necessity for taking such proceedings. The holder of an overdue debt is entitled to take the promptest proceedings to recover it, and his right to recover the costs of such proceedings does not depend upon his being able to give satisfactory reasons for having taken them. But, if such proceedings are afterwards abandoned by him, he cannot claim the costs of them.

The solicitor of a mortgagor went to the solicitor of the mortgagee, and, finding he was not in, left a letter for him telling him he was prepared to pay the principal and interest due upon the mortgage, naming the right amount, and that the mortgagee's solicitor might have it by calling at his office. The mortgagee's solicitor did not call. Some days later the mortgagor's solicitor wrote to the mortgagee telling her he was prepared to pay the said sum, which letter the mortgagee's solicitor answered by sending a statement of the amount he claimed, in which he included subsequent interest and a certain sum for costs, stating in a letter that the whole matter of dispute between himself and the mortgagor's solicitor hinged upon his right to the costs.

Held, that these latter words were merely descriptive of the question in controversy, and could not be treated as a waiver of a proper tender; and that the mortgagee was entitled to have the actual money unconditionally offered to him by the mortgagor, which had not been done in this case. There had never been the production of the money due the mortgagee to her or her solicitor at any time after it became due, nor had the mortgagee's solicitor at any time done anything to absolve the mortgagor from the necessity of so producing and tendering it.

W. E. Middleton, for the defendant.

M. Wilson, K.C., and *J. B. O'Flynn*, for the plaintiff.

[LOUNT, J., 26TH DECEMBER, 1901.]

HODGINS v. O'HARA.

*Company—Shares—Subscription—Allotment—Failure to organize company
—License—Insurance Act.*

A life insurance company was incorporated by a special Act passed on the 13th June, 1898, which enacted that the Insurance Act and the Companies Clauses Act should be read as forming part thereof. By s. 4, the provisional directors were authorized forthwith to open stock books,

procure subscriptions, and do what was necessary to organize the company. By s. 5, as soon as \$250,000 of the capital stock of the company should be subscribed and ten per cent. of that amount paid into a bank, the provisional directors were to call a meeting of qualified shareholders, who were to elect a board of directors. By s. 6, the company was not to commence the business of insurance until \$65,000 of the capital had been paid in cash. Stock books were opened, and on the 23rd June, 1899, the defendants each subscribed for 100 shares. Efforts to obtain subscribers for stock to the amount required by the Act of incorporation wholly failed, not more than \$75,000 having been subscribed. No payments were made on the stock subscribed for by the defendants. The plaintiff, having an unsatisfied judgment and execution against the company for the recovery of money, sued the defendants as shareholders holding unpaid stock, under the Companies Clauses Act, R. S. C. c. 118, s. 30.

Held, that to constitute a binding contract to take shares in a company, when such contract is constituted by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of the allotment having been made: *In re Scottish Petroleum Co.*, 23 Ch. D. 430; *Nasmith v. Manning*, 5 A. R. 126; *Ward's Case*, L. R. 10 Eq. 659.

The subscription for stock amounted to nothing more than an offer, and required to be completed by an allotment of stock to the subscribers: *Buckley's Companies Act*, 7th ed., p. 64; *Palmer's Company Law*, 3rd ed., p. 69; *Pellatt's Case*, L. R. 2 Ch. 527; *Ritso's Case*, 4 Ch. D. 774; *Hobbs's Case*, L. R. 4 Eq. 9.

The company never was organized; it had no business existence; it never had stock to allot; it never had directors; and therefore it never could make an allotment.

Held, also, that, as no license was obtained by the company from the Minister of Finance within two years from the passing of the Act incorporating the company, such Act expired and ceased to be in force on the 13th June, 1900, and the company ceased to exist: *The Insurance Act*, R. S. C. c. 124, s. 24.

A. Millar, K.C., for the plaintiff.

A. W. Anglin, for the defendants.

IN CHAMBERS.

[MEREDITH, C.J., 16TH DECEMBER, 1901.]

PARENT v. COOK.

Practice—Third parties—Notice—Time—Enlarging—Rules 209, 353.

In an action for damages for trespasses to land and cutting down and removing timber and wood, the defendants in their statement of defence justified the acts complained of under agreements which, they alleged, authorized those acts, and to which the plaintiff's rights in the land were subject. The defendants served notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under whom the plaintiff derived his title.

Held, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances, the time should not be enlarged by virtue of the provisions of Rule 353.

Semble, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209.

J. H. Moss, for the third parties.

W. M. Douglas, K.C., for the defendants.

[23RD DECEMBER, 1901.]

In re YOUNG.

Will—Construction—Devise—Condition—Vested estate subject to be divested
—Application under Rule 938—Executors—Locus standi.

The testatrix devised certain land to her grandson "when he arrives at the age of twenty-five years. Should he not survive till the age of twenty-five years, I give" (the same land) "to my son Andrew, and should he die without heirs of his natural body, I give" (the same land) "to my son Robert, his heirs and assigns forever."

Held, that the land was vested in the grandson, subject to be divested in the event of his not attaining the age of twenty-five years.

Doe dem. Hunt v. Moore, 14 East 601, *Phipps v. Ackers*, 8 Cl. & Fin. 583, and other cases cited in Theobald on Wills, 5th ed., p. 497, referred to.

Semble, that the executors, having no estate in the land given to them by the will, and none under the Devolution of Estates Act, seven years having elapsed since the death of the testatrix, had no *locus standi* to make an application under Rule 938 to have questions arising under the will determined.

W. N. Ferguson, for the executors.

W. E. Middleton, for John T. Young.

W. Proudfoot, for the other parties.

PHILLIPS v. MALONE.

Writ of summons—Service out of jurisdiction—Rule 162 (e)—Contract—Place of performance—Quebec law—Discretion.

An agreement between the plaintiff and defendants provided for the purchase by the defendants, who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff, of certain plant and machinery and stock in trade of a business carried on by him at Montreal. A part of the stock in trade was not at once to be purchased, and provision was made that it was to be held by the defendants on consignment, and sold by them for and on account of the plaintiff, and that if at any time the plaintiff should be willing to sell to the defendants this part of the stock, or any portion thereof, the defendants should purchase the same at the stock price thereof. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants, and had notified them of his willingness to do so, whereupon they became liable to pay him the price.

Held, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicile of the debtor is the place of payment, and therefore the action was not

founded on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (e).

In another view, the obligation to pay did not arise directly from provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and, as notice of the election was given by letter received by the defendants in Montreal, there was another difficulty in the way of the plaintiff.

Having regard to all the circumstances and to the fact that the defendants were not possessed of any property in Ontario which could be reached by process upon a judgment recovered in this action, a proper discretion was exercised in setting aside the order allowing service of the writ out of Ontario.

Comber v. Leyland, [1898] A. C. 524, referred to.

J. A. Worrell, K.C., for the plaintiff.

George Kerr, for the defendants.

[STREET, J., 23RD DECEMBER, 1901.]

BAGSHAW v. JOHNSTON.

Mechanic's lien—Statutory action to realize—Joining other causes of action—Parties—Architect.

In an action begun under s. 31 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, by the filing of a statement of claim, to realize a lien created by the Act, the plaintiff cannot include other causes of action and other matters.

Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out.

Semble, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien.

D. C. Ross, for the plaintiff.

T. T. Rolph, for the defendant Johnston.

James McBride, for the defendant Siddall.

BERTUDATO v. FAUQUIER.

Security for costs—Delay in applying for.

An appeal by the defendants from an order of the Master in Chambers dismissing their motion for security for costs.

The plaintiff sued for damages in respect of injuries received by him in August, 1900, at Sudbury, while in the employment of the defendants, owing to their alleged negligence.

The action was begun on the 12th February, 1901; statement claim delivered on the 10th June, 1901; statement of defence on the 20th June, 1901; and the action was set down for trial at the Toronto sittings beginning on the 16th September, 1901. The trial was, by consent, adjourned until the winter sittings, the defendants desiring to examine a man named Cardomano, who was present when the plaintiff was injured.

On the 25th September, 1901, the plaintiff came from Pittsburgh to Toronto and submitted himself to examination by the defendants for discovery. He then stated that he was living at Pittsburgh, Pennsylvania, that his family were there, and that he did not intend to return. After the injury in August, 1900, the plaintiff was brought to Toronto, where he lived until August, 1901, when he went to Pittsburgh.

After the examination for discovery in September the defendants issued a commission to Montreal to examine Cardomano as a witness, and he was examined thereunder early in December. In the same month the plaintiff examined the defendants for discovery, and gave notice of trial for the Toronto sittings beginning on the 6th January, 1902.

The defendants launched their motion for security for costs on the 19th December, 1901, and it was heard on the 21st December, 1901. The Master declined to order security on the ground of delay in applying after information came to the defendants that the plaintiff had permanently moved out of the jurisdiction, relying upon *Pooley's Trustee v. Whetham*, 33 Ch. D. 76. The defendants appealed.

R. U. McPherson, for the appellants, contended that the defendants were justified in delaying the motion until after the examination of Cardomano, in order that they might be able to swear to a defence on the merits.

G. G. S. Lindsey, K.C., for the plaintiff.

STREET, J., held that the delay in moving, after the information obtained by the defendants on the 25th September, 1901, was not sufficiently accounted for or explained, and dismissed the appeal with costs to the plaintiff in any event.

NOVA SCOTIA.

In the Supreme Court.

[McDONALD, C.J., 18TH DECEMBER, 1901]

CAPSTICK v. HENDRY.

Bankruptcy and insolvency—Assignment for benefit of creditors—Execution after time provided in deed—Originating summons—Costs.

This was a proceeding by originating summons to determine the rights of certain creditors who executed a deed of assignment for the benefit of creditors after the expiration of the time provided in the deed, but before any dividend was paid. Some of the creditors had not learned of the assignment until after the time had elapsed; others had sent instructions and power of attorney to execute within the time, but the same miscarried, and the execution did not take place until after the time had elapsed. The assignment contained no release.

Held, on the authority of *Whitmore v. Turquand*, 3 D. F. & J. 107, *Haliburton v. DeWolfe*, 1 N. S. D. 12, and *Douglas v. Samson*, 1 N. B. Eq. 137, that the creditors who executed after the expiration of the time limited in the assignment but before payment of a dividend were entitled to participate *pari passu* with the creditors who executed within the period.

Held, also, following *Gunn v. Adams*, 8 C. L. J. 211, that the costs of all parties should be paid out of the estate.

C. H. Cahan, for the plaintiffs.

J. B. Kenny, for defendants who signed within the proper time.

J. A. Chisholm, J. M. Davison, and A. G. Troop, for the other defendants.

IN CHAMBERS.

[McDONALD, C.J., 28RD OCTOBER, 1901.]

ROOD v. THOMPSON.

Jury—Application for trial by—Action for equitable relief—Questions of fact.

This was an action brought by a former shareholder in a company against the defendant Thompson, and the said company, the latter being joined as defendant because Thompson and his brother and partner had a controlling interest in the company, and the consent of the company to be joined as plaintiff could not be obtained. It was alleged that Thompson while a director of the company had discovered a valuable bed of gold in areas as to which the company held an option to purchase; that the discovery was concealed; and that Thompson procured a conveyance of the property to himself, and also purchased the shares of the other shareholders, including those of the plaintiff, without disclosing the discovery. These facts were put in issue by Thompson. The relief sought to be obtained was, among other things, a declaration that Thompson held the areas as trustee for the company, and that the company was entitled to a transfer thereof; also that the transfer of the shares by the plaintiff to Thompson should be set aside. The defendant applied for an order to have the issues tried by a jury: O. 34, 2.

Drysdale, K.C., for the applicant contended that the action came within the principle of *Cardinal v. Cardinal*, 25 Ch. D. 722, and that there was only a simple question of fact to be tried.

Ritchie, K.C., contra.

McDONALD, C.J.—It is impossible to read these affidavits without feeling that the admitted relation of the Thompsons with these properties and to their co-owners and co-partners in the transaction was such as to entitle all others interested in the property to the fullest explanation of the dealings of the Thompsons with the officers of the company, and the circumstances under which they became proprietors of the Colonial mine. This inquiry can, I think, be more effectively made in a trial before a Judge, as in other equitable proceedings, then before a jury. The application is dismissed with costs.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 26TH NOVEMBER, 1901.]

BANK OF MONTREAL v. MARITIME SULPHIDE FIBRE CO.

Company—Winding-up—Debenture-holders' action—Covering mortgage—Receiver—Liquidators—Motion to displace receiver—Varying order appointing receiver.

In a suit to enforce a mortgage to secure debentures issued by the defendant company, a receiver was appointed. Subsequently a winding-up order was made against the company, and official liquidators were appointed. The liquidators disputed the validity of the mortgage and the extent of the property covered by it.

Held, that the receiver should not be discharged.

An order appointing a receiver on behalf of debenture-holders secured by the mortgage was varied to be limited to property described in the mortgage.

Pugsley, A.-G., and *Lawlor*, K.C., for the official liquidators.

McLean, K.C., for the debenture-holders.

[17TH DECEMBER, 1901.]

AITON v. McDONALD.

Security for costs—Action for recovery of trust moneys—Assets in hands of defendants—Action against administrator—Estate insolvent.

Security for costs was ordered, where the plaintiff resided out of the jurisdiction, in a suit against an administrator for the payment of a sum of money alleged by the bill to have been received by the intestate as guardian of the

plaintiff, it appearing that the intestate's estate was insolvent, and there also being no satisfactory evidence of the alleged indebtedness.

A. O. Earle, K.C., and A. A. Wilson, K.C., for the application.

C. N. Skinner, K.C., and A. W. MacRae, contra.

SIMPSON v. JOHNSTON.

Trustee—Breach of trust—Relief—61 V. c. 26—Costs.

A testator devised and bequeathed his real and personal estate to his wife "to be hers in such a way that she shall during her natural life have the full use, benefit, and enjoyment thereof." He directed his executors to sell his real estate and to invest any money belonging to his estate in certain specified securities, "so that my said wife may have the interest and income arising therefrom during her life," and appointed his wife and the plaintiffs executors. Proceeds from the sale of real estate came to the hands of the plaintiffs, and were by them remitted to the widow, living in England. The widow invested part of the proceeds in securities in the name of herself and one of the plaintiffs, and disposed of, though in what way did not appear, the balance of the principal moneys. A suit was brought by the plaintiffs after the widow's death to be relieved from liability for the loss of such part of the estate. By 61 V. c. 26, a trustee who has acted honestly and reasonably, and ought fairly to be excused for the breach of a trust, and for omitting to obtain the directions of the Court in Equity in the matter in which he committed such breach, may be relieved by the Court from personal liability for such breach.

Relief granted, but without costs.

A. I. Trueman, K.C., for the plaintiffs.

S. L. Fairweather, for next of kin.

SAGE v. SHORE LINE R. W. CO.

Railways—Bonds—Mortgage—Foreclosure—Receivers—Operating railway—Repairs—Salvage—Receivers' certificates—Priority to bondholders—Jurisdiction.

A railway company issued bonds secured by mortgage of the company's property. In a suit by the mortgagee for foreclosure receivers and managers of the property and business of the company were appointed, with liberty to operate

the railway and to maintain the road and property in good and sufficient repair, either by credit or by cash out of the earnings of the road. Repairs being necessary, and the earnings being insufficient, the receivers were empowered to issue receivers' certificates, made a first charge on the company's property, and on the moneys to be realized from the sale of the company's property, in priority to the bondholders.

H. H. McLean, K.C., for the receivers.

A. O. Earle, K.C., for the plaintiff.

H. F. Puddington, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 7TH MARCH, 1901.]

FAWCETT v. CANADIAN PACIFIC R. W. CO.

Appeal—Interlocutory order—Action decided pending appeal—Costs.

This was an appeal from an interlocutory order, and, pending the appeal, the action had been tried and decided. The full Court ordered that the appeal be struck out of the list, refusing to accede to the request of the appellant's counsel, who wanted the appeal to go on to decide the question of costs.

Davis, K.C., for the appellant.

Wilson, K.C., for the respondent.

[Note.—The same course was followed subsequently on the 19th March, 1901, in *Chisholm v. Le Roi*, and on the 19th November, 1901, in *McCune v. Botsford*.]

[8TH JULY, 1901.]

McKINNON v. PABST BREWING CO.

Contract—Action for extras—Authority of agent—Setting aside findings of jury.

M. contracted to erect a building in Vancouver for the defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. S., who had

intended to occupy the building for the purposes of a bottling company, of which he was a member, ordered extras, but no indorsement thereof was made on the contract. In an action by M. for the price of the extras, the jury found "that S., as authorized agent for the company, ordered the extras for it, and that it did either hold out or permit S. to hold himself out as its agent for the purpose of ordering extras."

Held, that such indorsement on the contract was a condition precedent to the plaintiff's right to recover.

Macdonell, for the plaintiff.

Wilson, K.C., and *Bond*, for the defendants.

[24TH JULY, 1901.]

WILLIAMS v. FAULKNER.

RAYMOND v. FAULKNER.

Yukon law—Order of reference—Jurisdiction of Court to make.

Appeal from the judgment of CRAIG, J., in the Territorial Court of the Yukon. The plaintiffs sued the defendants, who were adjoining placer mining claim-owners, for damages for wrongfully drifting and tunnelling through their claims and taking away pay-dirt. On the plaintiffs' application, DUGAS, J., made an order appointing J. McGillivray to inspect the dump and workings in question, for the purpose of ascertaining: (1) if the said workings encroached on the mining claim of the plaintiffs, the Baker Fraction, and if so, to what extent; (2) if any pay-dirt had been taken from the said mining claim, and if so, what amount; (3) the amount of pay-dirt in the dump in question; and (4) generally the condition and manner of the said workings; and that the said McGillivray report the result of such inspection to the Court, or a Judge, on or before the 1st day of July, 1900, or such further time as the Court or a Judge may appoint; with power to the said McGillivray to take evidence as to the matters referred to him for inspection, and apply to the Court or a Judge at any time for directions as to such inspection.

In his report he answered the questions as follows:

(1) That the defendants have encroached on the mining claim of the plaintiffs, the Baker Fraction, to the extent of forty-four yards on bed-rock; (2) that pay-gravel has been taken from said claim by defendants to the amount of \$7,700, a portion of which has been rocked out in the

mine and a portion put in the dump; (3) I estimate there are about 2,463 yards, and value at \$83,279; (4) that the drifts and tunnels are not made in a miner-like manner, in order to be maintained for permanent use. They should not have been made wider than five feet and should have been made straight on the sides, arched at the top, whereas these drifts and tunnels in instances have been as much as twelve feet in width, flat, and gouged in underneath.

On this report the plaintiffs moved for judgment, and CRAIG, J., after examining McGillivray as to how he arrived at his conclusions, approved and confirmed the report, and entered judgment in pursuance thereof. The defendants on the appeal tendered evidence to shew that McGillivray refused to hear witnesses tendered by them, and also refused to allow counsel to appear before him, saying that he would not be bothered with them.

Held, by the full Court, that the power to make an order of reference in an action is a matter of jurisdiction and not merely a question of "procedure and practice," within the meaning of s. 3* of the Judicature Ordinance, and therefore the Yukon Court had no power under this section to make an order of reference. Appeal allowed with costs and new trial ordered in both cases.

Hunter, K.C., and *Duff*, K.C., for the appellants.

Davis, K.C., and *Cassidy*, K.C., for the respondents.

[18TH NOVEMBER, 1901.]

CLEARY v. BOSCOWITZ.

Mining law—Certificate of work—Impeachment of—Evidence—Mineral Act, s. 28—Amendment Act, 1898, s. 11—Parties—Attorney-General.

Appeal from judgment of McCOLL, C.J., who dismissed the plaintiffs' adverse action. The defendant relied on certificates of work obtained by him in respect of the mineral claims covering the ground in dispute, and the plaintiffs sought to shew that the full amount of work required by the statute as a pre-requisite to such certificates of work being issued had not been performed. The Chief Justice refused to admit the evidence, holding that evidence impeaching a certificate of work could not be received in any proceeding

* (3.) The jurisdiction of the Supreme Court of the North-West Territories shall be exercised so far as regards procedure and practice in the manner provided by this Ordinance and the Rules of Court, and where no special provision is contained in this Ordinance or the said Rules, it shall be exercised as nearly as may be as in the Supreme Court of Judicature in England as it existed on the 1st day of January, 1898.

to which the Attorney-General was not a party. The full Court affirmed the decision, holding that if a certificate of work is to be set aside the Attorney-General must be a party, and until set aside all things are presumed in favour of its holder.

The plaintiffs in making their case admitted that the defendant had obtained certificates of work.

Held, by the full Court, that this in itself was affirmative evidence of the defendant's title, within the meaning of s. 11 of the Mineral Act Amendment Act of 1898.

S. S. Taylor, K.C., for the appellants.

Davis, K.C., for the respondent.

[14TH NOVEMBER, 1901.]

McKELVEY v. LE ROI MINING CO.

Courts—Full Court—Motion for judgment—Reference by trial Judge.

At the conclusion of the trial of an action for damages for personal injuries, the trial Judge did not see fit to enter any judgment on the findings of the jury, but left the parties to move the full Court as they might be advised. Both parties accordingly moved the full Court for judgment, the arguments being confined to the question of the liability of the defendant company.

Held, *per* WALKER, DRAKE, and IRVING, JJ., that the full Court is an appellate court and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge.

Per MARTIN, J. (dissenting), that, as the question of jurisdiction was not raised by counsel nor by the Court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company.

MacNeill, K.C., for the plaintiff.

Hamilton, for the defendant company.

[McCOLL, C.J., 4TH MAY, 1901.]

KING v. MUNICIPALITY OF MATSQUI.

Homestead—Taxes—Municipality.

The plaintiff's husband, in 1892, became the holder of a homestead claim, part of the Dominion railway belt in

New Westminster district, and in October, 1897, a Crown grant was issued to the plaintiff at the instance of her husband and herself. The defendants sought to assess the land for taxes from 1892 to 1897.

Held, on a stated case, that where the fee still remains in the Crown, the interest of the holder of a homestead claim is not subject to taxation by a municipality, although the holder personally is.

Howay, for the plaintiff.

Dockrill, for the defendants.

[MARTIN, J., 24TH JUNE, 1901.]

MACKENZIE v. CUNNINGHAM.

Husband and wife—Libel by wife—Liability of husband—Verdict for \$10—Costs.

Action against a husband and wife for damages for a libel published by the wife. At the trial in Vancouver the jury returned a verdict in the plaintiff's favour for \$10.

Held, by MARTIN, J., following *Seroka v. Kattenburg*, 17 Q. B. D. 177, that the husband was liable; and, also, that the costs should follow the event.

Davis, K.C., and *A. D. Taylor*, for the plaintiff.

Wilson, K.C., and *Reid*, for the defendants.

IN CHAMBERS.

[MARTIN, J., 11TH DECEMBER, 1901.]

In re NEW WESTMINSTER PROVINCIAL ELECTION.

RAE v. GIFFORD.

Parliamentary elections—Petition—Presentation of—Time—Computation of.

Summons by petitioner for an order disposing of the preliminary objections filed by the respondent to the petition filed against the respondent's return as a member of the Legislative Assembly. One of the objections was that the petition was not presented in time. The return was made to the Provincial Secretary on the 21st September, not later

than 9.30 a.m., and the petition was presented to the Registrar about noon on the 12th October. Under the Provincial Elections Act the petition must be presented within twenty-one days after the return has been made.

Held, dismissing the petition, that in the computation of the time the day on which the return is made is not excluded.

A. E. McPhillips, K. C., and *Duff*, K.C., for the respondent.

Martin, K.C., for the petitioner.

[*BOLE*, LOC. J., 25TH NOVEMBER, 1901.]

FOOKS v. COX.

Judgment—Application to set aside—Delay.

The defendant obtained a summons to set aside a judgment signed against the defendant for \$542.68 and costs, in default of appearance, on the 2nd July, 1892, on the grounds that he was never served with the writ of summons and that he did not owe any money to the plaintiff.

BOLE, LOC. J.—Dealing with the points in this order, I have Mr. Fooks, the plaintiff's husband, positively swearing that on the 21st day of June, 1892, he personally served the defendant, with whom he was well acquainted, with the writ of summons in the usual way, in the presence and hearing of the plaintiff's solicitor, and the affidavit of the solicitor shews that he was present on the occasion in question, when the defendant, after being served with the writ of summons, admitted that the amount set out in the indorsement was correct and that he had no defence. In *Holmes v. Russell*, 9 Dowl. 487, the Court refused to set aside a judgment, although the writ had not been served, as an application to set aside the proceedings must be made within reasonable time after the defendant had notice of them.

The defendant, I think, has not explained the delay on his part of nearly nine years, neither has he satisfied me that he has any merits, and the judgment itself was perfectly regular. Vide *Watt v. Barnett*, 47 L. J. Q. B. 329; *Farden v. Richter*, 58 L. J. Q. B. 244. On the question of limitation, see *Doyle v. Kaufman*, 47 L. J. Q. B. 26; *Hewett v. Barr*, [1891] 1 Q. B. 98.

I must therefore discharge the summons with costs.

Supreme Court of Canada.

ONTARIO.]

[16TH NOVEMBER, 1901.

UNION BANK v. MORRIS

UNION BANK v. CODE.

Company—Payment for shares—Equivalent for cash—Written contract.

M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed.

Held, affirming the judgment of the Court of Appeal, 27 A. R. 396, 20 Occ. N. 300, that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash, under s. 27 of the Companies Act, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the company.

G. H. Watson, K.C., for the appellants.

I. F. Hellmuth and D. W. Saunders, for the respondents.

LITTLEJOHN v. SOPER.

Landlord and tenant—Covenant—Forfeiture—Company—Shareholder—Personal liability—Waiver.

A lease to a joint stock company provided that, in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due, and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting thereto.

Held, reversing the judgment of the Court of Appeal, 1 O. L. R. 172, 21 Occ. N. 111, that the lessors and the

company were distinct legal persons, and the individual interests of the former were not affected by the above action.

Salamon v. Salamon, [1897] A. C. 22, followed.

The assignee of the company held possession of the leased premises for three months, and the lessees accepted rent from him for that time, and from sub-lessees for the month following.

Held, also, reversing the judgment appealed from, that, as the lessors had claimed the six months' accelerated rent under the forfeiture clause in the lease, and testified at the trial that they had elected to forfeit, and as the assignee had a statutory right to remain in possession for the three months and collect the rents, and as the evidence shewed that the receipt by the lessors of the three months' rent was in pursuance of a compromise with the assignee in respect to the acceleration, and as the month's rent from the sub-tenants was only compensation by the latter for being permitted to use and occupy the premises and for their accommodation, the lessors could not be said to have waived their right to claim a forfeiture of the lease.

Mortgagees of the premises having notified the sub-tenants to pay rent to them, the assignee paid them a sum in satisfaction of their claim, with the assent of the lessors, against whose demand it was charged.

Held, that this, also, was no waiver of the lessors' right to claim a forfeiture.

Quære: Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee?

C. H. Ritchie, K.C., and *E. B. Ryckman*, for the appellant.

D. E. Thomson, K.C., and *W. N. Tilley*, for the respondents.

QUEBEC.]

PARENT v. QUEBEC NORTH SHORE TURNPIKE TRUSTEES.

Title to land—Trespass—Overhanging roof—Right of view—Evidence—Boundary line—Waiver.

In 1844 the defendants constructed a toll-house close to or on the boundary of their land, with windows overlooking the adjoining lot and a roof projecting over it by

about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the adjoining lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable to his house, and the defendants paid the cost of the necessary alteration. In 1900 the plaintiff instituted the present action against the defendants to have the remainder of the projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties, and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty.

Held, STRONG, C.J., dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute, and consequently that his action could not be maintained.

Held, further, per GIROUARD, J., following *Delorme v. Cusson*, 28 S. C. R. 66, that, as the plaintiff and his auteurs had waived objection to the manner in which the toll-house had been constructed, and permitted the roof and windows to remain there, the demolition could not be required, at least so long as the building continued to exist in the condition in which it had been so constructed.

Judgment below affirmed.

Pelletier, K.C., for the appellant.

Stuart, K.C., for the respondents.

PRICE v. FRASER.

practice—Proceeding taken in name of deceased party—Amendment—Discretionary order—Interference with discretion on appeal.

During the time between the hearing of a case and the rendering of the judgment in the trial Court, the defendant died. His solicitor, by inadvertence, inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to

amend and to be allowed to make a regular *reprise d'instance*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment and *reprise d'instance* applied for, and reversed the trial Court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of Review, on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities.

Held, reversing the judgment appealed from, STRONG, C.J., and TASCHEREAU, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and *reprise d'instance*, and that, as there was no abuse of discretion, the Court of King's Bench should not have interfered.

Stuart, K.C., for the appellants.

Pouliot, K.C., and *J. F. Orde*, for the respondents.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., 20TH DECEMBER, 1901.]

In re TOWNSHIP OF NOTTAWASAGA AND COUNTY OF SIMCOE.

Assessment and taxes—Equalizing of assessments—Appeal—County Judge—Limitation of time within which judgment to be delivered—Directory enactment—R.S.O. 1897 c. 224, s. 88, s.-ss. 1, 7.

There is nothing in the provisions of the Assessment Act, R. S. O. 1897 c. 224, s. 88, s.-s. 1 (which gives a municipality dissatisfied with the decision of the council in respect to the equalization of assessments, the right to appeal to the County Judge, or otherwise as in that section mentioned), necessitating the passing of a by-law by the municipality authorizing such an appeal. It is one of the matters in regard to which the determination of a council may be signified by a resolution.

Heid, also, that the provision at the end of s.-s. 7 of s. 83, providing that where all parties to the appeal have agreed to have a final equalization of the assessment made by the County Judge, the judgment of the latter is not to be deferred beyond the 1st day of August next after such appeal, is directory and not imperative; and the authority of the County Judge who heard the appeal does not come to an end after the date mentioned. A County Judge in such an appeal has power, if necessary, to complete the taking of evidence and deliver judgment even after that date, which is only mentioned as directing him to proceed with all reasonable and possible expedition to determine the matter.

Semble, that the intention of the Legislature is that the county rate should not be struck until appeals against the equalization have been determined, and that they did not foresee the possibility of an appeal being prolonged to an extent to interfere with the machinery for the collection of taxes through the county.

Decision of BOYD, C., affirmed on appeal.

C. E. Hewson and *A. E. H. Creswicke*, for the county corporation

Haughton Lennox, for the township corporation.

[26TH DECEMBER, 1901.]

WALSH v. WALPER.

Execution—Fieri facias—Liquor license—Covenant by lessee to reassign license—Interpleader issue.

A license under the Liquor License Act cannot be seized by a sheriff under a writ of *fieri facias*. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into such a license.

The right to sell liquor at a particular place under such a license is a personal one, and is not assignable by the holder of it unless he obtain the consents and comply with the conditions of s. 37 of the Liquor License Act, R. S. O. c. 245.

A covenant in the lease of an hotel by the lessee, that at the expiration of the lease he will assign to the lessor the license, if any, then held by him, is not a covenant binding

upon the assignee of the term as such. It is a merely personal covenant, having nothing to do with the land or its tenure.

J. Idington, K.C., for the claimant.

W. H. Blake, for the execution creditor.

[80TH DECEMBER, 1901.]

HUNTER v. BOYD.

Executors and administrators—Survival of action—Tort—Power to appoint administrator ad litem—R. S. O. 1897 c. 129, s. 11.

Held, that R. S. O. 1897 c. 129, s. 11, providing that in case any deceased person has committed a wrong to another in respect to his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator *ad litem* merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts, and divide the estate.

Therefore, for this reason, apart from others, the appointment of an administrator *ad litem* should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died pending the action, and whose widow and children refused to administer to the estate, for which an administrator *ad litem* was now sought to be appointed.

Robert McKay, for Maria Boyd and B. et al., solicitors.

G. G. S. Lindsey, K.C., for the plaintiff.

[2ND JANUARY, 1902.]

TRUSTEES OF CARLETON PLACE METHODIST CHURCH v. KEYES.

Church—Power to allot free seats—Power to rent pews.

Under the trusts set out in the schedule to 47 V. c. 88 (O.) and 47 V. c. 146 (D.), the trustees of a Methodist church have no power to allot free seats to particular members of the congregation, although they have the general

power possessed by the officers of any place of public worship, to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during the service. They have, however, the power to rent pews at a reasonable rent to particular members, reserving as many free seats, where and as may be thought necessary or expedient.

J. J. Maclaren, K.C., for the defendant, appellant.

J. A. Allan, for the plaintiffs.

[6TH JANUARY, 1902.]

***In re* THURESSON—McKENZIE v. THURESSON.**

*Mortgage—Mortgagees so dealing with property as to lose power to reconvey.—
Action on covenant—Right of way.*

A mortgagee, being compellable under his mortgage to discharge at any time any portion of the land described in it, having not less than 20 feet frontage, upon payment of a certain sum per foot frontage, not only discharged a certain portion of the land upon payment of a certain sum, but also assented to a right of way across the whole of the property, which right of way had been granted by the owners of the equity of redemption to the purchaser of a portion of the mortgaged lands, and released the right of way from his mortgage.

Held, that in so doing the mortgagee had debarred herself from restoring the estate covered by the mortgage, unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, inasmuch as such reconveyance could now only be subject to the right of way; and therefore, under the equitable principle in that regard, could not sue upon the covenant in the mortgage.

It is proper, however, in such a case that the mortgagee claiming under the covenant should have an opportunity within a limited time to put himself in a position to restore the estate upon payment of the mortgage money; and so in this case twenty days were to be allowed for the mortgagee to bring into the Master's office evidence that this had been done.

E. D. Armour, K.C., and *R. U. McPherson*, for the mortgagee, appellant.

J. D. Montgomery, for the plaintiffs.

[17TH JANUARY, 1902.]

DODGE v. SMITH.

*Estoppel by deed—Privies—Mines and minerals—Reservation in deed—
Action not based on deed set up as estoppel.*

The plaintiffs brought this action to restrain the defendants from trespassing on their rights by working certain mines under the plaintiffs' lands. In 1884 the plaintiffs' predecessor in title granted and conveyed the lands to the defendants' predecessor in title, reserving in the conveyance all mines and minerals and ores in, upon, or under said lands, and free access and egress over the lands for the purpose of mining. This conveyance was not executed by the grantee, who, however, gave a mortgage back to the grantor for \$300, "saving and excepting the mines which said mortgagor has no claim to." It appeared that, as a matter of fact, at the date of this conveyance and mortgage back, the grantee, mortgagor, had acquired title by length of possession of the lands and minerals. The mortgage had been paid off before this action.

Held, that there was nothing in the conveyance of 1881, or in the circumstances of the case, which had the effect of revesting the mines in the then grantor; and that, whatever might be the effect of the words of the exception in the mortgage, if this were an action between the parties thereto, or their privies, upon the mortgage, it was clear that they did not estop the defendants in the present action, which was not based upon the mortgage, but wholly collateral to it. When the grantor reserved the mines from his grant, he reserved something which he did not own, because his title to it had already become barred by the statute, and it was plain that the reservation did not operate as a grant from his grantee.

W. J. McWhinney and S. B. Woods, for the plaintiffs.

G. H. Watson, K.C., for the defendants.

[MEREDITH, C.J., MAOMAHON, J., LOUNT, J., 21ST DECEMBER, 1901.]

DAVIS v. CROWN POINT MINING CO. OF ONTARIO.

Mechanics' Liens—Mining location—Blacksmith—Cook.

A blacksmith, employed for sharpening and keeping in order tools used for the work of mining, is entitled to a

lien for his wages on the mining location, but a cook who does the cooking for the men employed is not.

Adjoining mining locations, even when they are water lots, if "enjoyed with" the mining location on which the mine is situated, are subject to liens for work performed in the mine.

R. C. LeVesconte, for the defendants, appellants.

N. W. Rowell, *W. N. Ferguson*, and *J. H. Spence*, for the respondents.

[STREET, J., BRITTON, J., 3RD JANUARY, 1902.]

In re JONES v. BISSONNETTE.

Practice—Writ of summons—Service out of jurisdiction—Order before action—Parties—Causes of action—Joinder—Rules 120, 128, 162 (g), 164.

The proper practice under the Rules as they stand (Rules of 1897 Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction.

Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec, and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant and taken to Quebec and prosecuted there upon a criminal charge, of which he was acquitted, and that against the fourth defendant, the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario:—

Held, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to with each other.

Held, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (g), and an order should be made for the issue and service of the writ upon the other two in Quebec.

Croft v. King, [1893] 1 Q. B. 419, followed.

But the order should contain a clause providing that in case the action should be dismissed as against the defendant

in Ontario, the plaintiff should consent to its dismissal as against the other defendants as well.

W. R. Riddell, K.C., for the plaintiff.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 6TH JANUARY, 1902.]

In re GEDDES AND COCHRANE.

Landlord and tenant—Lease—Renewal—Increased rent—Arbitration.

In a lease for twenty-one years the rent fixed was, for the first year \$106.88, for the next four years \$130 a year, for the next five years \$145 a year, and for the remaining eleven years \$178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "*at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents.*" The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease.

Held, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; it might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past.

In re Geddes and Garde, 32 O. R. 262, approved.

H. D. Gamble, for the lessor.

John MacGregor, for the lessee.

[MEREDITH, C.J., LOUNT, J., 8TH JANUARY, 1902.]

McGUINNESS v. McGUINNESS.

Execution—Sale of land under—Distribution of proceeds—Costs of execution creditor—Creditors' Relief Act, s. 26.

The appellant, on the 21st February, 1900, placed in the hands of the sheriff for execution a writ of execution against the goods and lands of the execution debtor, issued on a

judgment recovered by the appellant against him, and the writ was indorsed with the usual direction to the sheriff to levy in accordance with its provisions. Later on the same day the respondents placed their writ of execution against the goods and lands of the execution debtor in the hands of the sheriff for execution; it was issued upon a judgment for costs which they had recovered in an action brought by the execution debtor against them. No further steps were taken by the appellant, but the respondents' solicitor directed the sheriff to advertise for sale under their writ certain lands of the execution debtor. The lands were, in pursuance of this direction, duly advertised to be sold under the respondents' writ only, and the sheriff offered the lands for sale pursuant to his advertisement, under the respondents' writ, but no sale was effected for want of buyers. A writ of *ven. ex.* was then issued on the respondents' judgment and delivered to the sheriff, under which he sold the lands.

Held, that the respondents were the creditors at whose instance and under whose execution the seizure and levy were made, within the meaning of s. 26 of the Creditors' Relief Act, R. S. O. c. 78, and they were, therefore, entitled to be paid in full their taxed costs and the costs of their execution, in priority to the other execution debts and claims, out of the residue of the proceeds of the sale in the hands of the sheriff for distribution after deducting his own fees and charges.

W. H. Wallbridge, for the appellant.

H. L. Drayton, for the respondents.

[MEREDITH, C.J., 9TH JANUARY, 1902.]

McCOWAN v. ARMSTRONG.

Limitation of actions—Real Property Limitation Act—Parent and child—Tenancy at will—Accrual of right of entry—Commencement of statute—Caretaker—Effect of entry by consent—Creation of new tenancy—Assessment—Agreement—Concealment of facts—Family arrangement—Will—Devise subject to charge—Election—Mistake.

In the autumn of 1879 the defendant was put by his father in possession of a farm, which the latter had bought for his son, but taken the conveyance to himself. His father told

him that he had bought the farm for him, but the defendant knew that what was done had not the effect of transferring the title to him, and was aware that it must be obtained either by conveyance or devise from his father, and the father did not intend to divest himself of the ownership of the farm, but to leave himself free, in devising it, as he intended, to his son, to charge it with the payment of such sum as he might think it right to require him to pay. The defendant continued in possession of the farm until his father's death, in 1900, occupying it for his own benefit, and having the exclusive enjoyment of the profits; he paid no rent and rendered no service or other return for it, and gave no acknowledgment of his father's title; he also made valuable permanent improvements at his own expense.

Held, that the title of the father had, long before his death, by force of the Real Property Limitation Act, R. S. O. 1897 c. 133, become extinguished. The defendant became, upon his entry with the permission of his father, a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year from the commencement of it, and was barred at the expiration of eleven years.

There was no evidence that the defendant was a caretaker or servant of his father.

Upon the expiration of the tenancy at will the possession of the defendant became that of a tenant at sufferance, and the running of the statute was not stopped by an entry, unless, before the statute had operated to extinguish the title of the testator, a new tenancy at will was created; and this would have been the case even if the tenancy at will had been put an end to in fact, and not merely by force of s. 5, s.-s. 7; the effect of the sub-section is, that it is for the purposes of the statute only that the tenancy at will is to be deemed to be determined at the expiration of a year from the time when it began.

Held, however, that there was no entry by the father sufficient to prevent the running of the statute; a visit made by the father to the son, within eleven years before action, when he lived with him on the farm for a few days, was not an entry on the land and did not put an end to the existing tenancy at will, not being against the consent of the tenant in such a way that but for the determination of the will the landlord would be liable to an action for trespass.

In 1879 and 1880 the farm was assessed in the name of the father as well as of the defendant, to the former as freeholder, and to the latter as owner, and from 1880 to 1899 to both as freeholders, and in 1882 this was done at the instance of the defendant, who also knew of the way in which the assessment was made in each of these years.

Held, that this was not evidence of a new tenancy at will created within eleven years before the commencement of the action.

Doe d. Bennett v. Turner, 7 M. & W. 226, distinguished.

By an agreement in writing made a few days after the death of the father, between the devisees and legatees under the father's will, the defendant admitted and acknowledged that, although the farm was occupied by him, the father was at the time of his death the owner in fee simple of it, and the defendant agreed to abide by the will and to carry out the terms of it. By the will the father devised the farm to the defendant, charged with the payment of \$4,000. This agreement was made before the will had been opened or the contents of it known to the defendant; no doubt existed as to the validity of the will; the agreement was the result of a suggestion made at an interview between one of the executors and the solicitor for the executors, and the object of it was, though this was not known by or communicated to the defendant, to get rid of any difficulty which might arise if the defendant asserted title to the farm under the Real Property Limitation Act, but the defendant did not in fact know of his rights under that statute.

Held, that, in these circumstances, the agreement was not, even when viewed as a family arrangement, binding on the defendant.

Fane v. Fane, L. R. 20 Eq. 698, applied and followed.

Held, also, that if there was any election by the defendant to take under the will, it was made under a mistake as to the defendant's rights; and besides, if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it.

E. D. Armour, K.C., and *W. B. Milliken*, for the plaintiffs.

E. F. B. Johnston, K.C., and *J. D. Montgomery*, for the defendant.

[FALCONBRIDGE, C.J., 9TH DECEMBER, 1901.]

HALL v. HATCH.

BANK OF MONTREAL v. HATCH.

Execution—Seizure of bank notes—Property passing.

A superannuated civil servant had presented his superannuation certificate at the wicket of a bank, which paid superannuation allowances for the Dominion Government. The teller counted out the amount coming to him, and placed the money on the edge of the teller's wicket. Before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against the payee.

Held, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it.

Judgment of local Master at Ottawa affirmed.

J. F. Orde, for the Bank of Montreal, claimants.

Travers Lewis, for Charles R. Hall, execution debtor.

R. V. Sinclair, for Walter Hatch, execution creditor.

[FERGUSON, J., 20TH JANUARY, 1902.]

BEAM v. BEATTY.

Infant—Bond—Void or voidable—Ratification—Breach—Damages—Interest.

To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock at \$10 per share, the defendant gave the plaintiff his bond in the penal sum of \$1,100, conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at \$50 per share, less expenses of sale, not to exceed ten per centum. The defendant was an infant when he executed the bond.

Held, that the bond was not void *ab initio*; that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age.

2. That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was \$495, the price of the 11 shares, less ten per centum.

3. That the recovery was not for a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment.

G. Lynch-Staunton, K.C., and *A. W. Marquis*, for the plaintiff.

C. A. Masten and *F. C. McBurney*, for the defendant.

[ROBERTSON, J., 7TH JANUARY, 1902.]

McDERMOTT v. HICKLING.

Mistake—Recovery of money paid under mistake of fact—Mortgage—Account—Acknowledgment—Laches—Estoppel—Statute of Limitations—Costs.

Upon a mortgage made in 1885 for \$2,750, the mortgagors made payments from time to time to the mortgagee, and after his death, in September, 1892, to his executors. Written receipts were always given to the mortgagors, and an account was kept by the mortgagee in a book, but he failed to credit a payment of \$153 made on the 1st November, 1890, and a further payment of \$25.16 made on the 27th July, 1892. On the 26th November, 1894, the three executors assigned the mortgage to one of themselves in part payment of a legacy to him from the mortgagee. The amount mentioned in the assignment as due upon the mortgage was \$1,159 and interest, but this was made up from the book, and in arriving at it credit was not given for the two payments of \$153 and \$25.16. On the 2nd March, 1895, one of the mortgagors signed a written acknowledgment that the amount due at that date was \$1,159.54 for principal and \$76.49 for interest.

Further payments were made from time to time by the mortgagors, and on the 23rd February, 1901, they made a final payment of \$474.88, which was supposed by them and by the assignee to be the balance due, though the true amount was about \$168 only. On the 23rd August, 1901, this action was brought by one of the mortgagors (who had acquired the rights of the others) to recover \$306.88 and interest from 23rd February, 1901, as money paid under a mistake of fact. The

action was begun against the assignee only, but the plaintiff afterwards added the executors as defendants, and claimed an account and to surcharge, etc.

The mortgagors were uneducated and incapable of keeping accounts or understanding them when made out, and depended entirely on the mortgagee, and after his death upon the active executor, for the keeping of the account, and, although they had the written receipts in their possession, they never had the account checked by them or an independent account made up from them.

Held, that the money paid in excess of the amount due, having been paid in ignorance of the facts, was recoverable, notwithstanding the acknowledgment and notwithstanding laches, the mortgagors not having waived all inquiry, because it would be unconscientious for the assignee to retain it.

Marriott v. Hampton, 2 Sm. L. C., 10th ed., p. 431, *Kelly v. Solari*, 9 M. & W. 54, and *Townsend v. Crowdy*, 8 C. B. N. S. 493, followed.

Held, also, that there was no estoppel, neither the assignee nor the estate of the mortgagee having been placed in a worse position than if the overpayment had not been made.

Held, further, that the plaintiff's claim was not barred by the Statute of Limitations, because no cause of action arose until the 23rd February, 1901, when the mortgagors paid a sum in excess of what was really due.

Held, lastly, that the plaintiff should have only such costs as he would be entitled to had he commenced his action in the first place against the executors.

H. H. Strathy, K.C., and *C. W. Plaxton*, for the plaintiff.

W. A. Boys, for the defendant *G. W. L. Hickling*.

D. M. Stewart, for both defendants as trustees.

[MACMAHON, J., 5TH DECEMBER, 1901.]

LEE v. CANADIAN MUTUAL LOAN AND INVESTMENT COMPANY.

Building society mortgage—Liability of members—Contribution to losses—Redemption—Interest—R.S.O. 1887 c. 169—R.S.O. 1897 c. 205, s. 21.

The plaintiff applied for and obtained twelve shares of ordinary terminating instalment stock in a building society

incorporated under R. S. O. 1887 c. 169. He then applied for an advance of the maturity value on his shares, namely, \$1,200, "repayable in eight years as per the rules, terms, and conditions of the company," and executed a mortgage as collateral security for the advance, which was duly made to him, in which he agreed to pay the monthly instalments or dues upon his stock, the premium for the advance, and interest at six per cent. on the whole amount borrowed; and also agreed to submit to the by-laws and rules of the company, and to assign his shares to the company forthwith. It was estimated by the company that, if these payments were continued for ninety-six months, the stock would mature and the loan be paid off; and they obtained from the plaintiff ninety-six promissory notes accordingly, the last one payable ninety-six months after date.

Subsequently, in 1893, the company sold out all their assets to the defendants.

By this transaction it was intended that the defendants should take the place of the former company, but there was a deficiency in the assets of the former company, which rendered a reduction in the amount to the credit of the plaintiff necessary, he being liable as a shareholder under his contract and the by-laws to pay his proportion or share of such deficiency; and he was in consequence credited on the shares in the books of the defendants, after paying expenses, with only sixty-two per cent. of the amount which he had had to his credit in the former company, the plaintiff having withdrawn his shares from that company, and accepted in lieu thereof a stock certificate of the defendants for twelve shares of their stock. He continued to make his payments until he had retired the last of the ninety-six notes above mentioned, when he claimed to be entitled to the discharge of his mortgage.

In 1896 the defendants passed a by-law which required the borrower to continue to make his monthly payments until his shares matured by reason of them and the accrued profits from time to time credited.

Held, that there had been a complete novation, and a change of membership by the plaintiff from the former company to the defendants.

2. That until the plaintiff had paid his proportion or share of the deficiency resulting from a depreciation of the assets of the former company, he could not compel the defendants to discharge his mortgage.

3. That there had been no violation of what is commonly called the Usury Act, R. S. C. c. 127, s. 3 (embodied in the Loan Companies Act, R. S. O. 1897 c. 205, s. 21), the same having no application to such a building society mortgage as that in question here; and because, apart from that, the rate of interest charged was only six per cent., what was charged more than that being the bonus or premium payable to the loan company for the privilege of receiving the maturity value of the shares in advance, as authorized by R. S. O. 1887 c. 169, s. 38, which bonus or premium is expressly received not as interest but in addition to interest.

G. Ross and W. J. Clark, for the plaintiff.

G. F. Shepley, K.C., and *A. McLean Macdonell*, for the defendants.

[MEREDITH, J., 10TH JANUARY, 1902.]

In re SOUTHWOLD PUBLIC SCHOOL SECTIONS.

Public schools—Union of school sections—Powers of arbitrators—Appeal to county council—I Edw. VII. c. 39, s. 42.

An application was made to a township council to alter the boundaries of school sections 12, 13, and 14, by taking about 1,200 acres from 13 and adding them to 12, and by taking about 2,000 acres from 14 and adding them to 13. The township council refused the application; an appeal was taken to the county council against such refusal; and arbitrators were appointed by the latter council under the authority of s. 42 (3) of the Public Schools Act, 1 Edw. VII. c. 39. The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite sections 12 and 13, and recommended the building of a new school house in a central position in the thus united sections.

Held, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power "to form, divide, unite, or alter the boundaries;" but that means to form, divide, unite, or alter in accordance with the subject-matter of the appeal.

Award set aside without costs.

A. B. Aylesworth, K.C., for the applicants.

J. M. Glenn, K.C., for the township and county corporations.

T. W. Crowthers, amicus curiae.

[LOUNT, J., 7TH JANUARY, 1902.]

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC
R. W. CO.

Way—Road allowance—Obstruction—Railways—Fences—Municipal corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction—Removal of obstruction—Jurisdiction.

An action for an injunction to restrain the defendants from obstructing a highway in the township, by fences on both sides of the defendants' tracks where they crossed the highway, and for a mandatory order compelling the removal of the fences.

Held, that the allowance for the road in question, having been made by a Crown surveyor, was a highway, within the meaning of s. 599 of the Municipal Act, and, although an open public road, used and travelled upon by the public, it was a highway within the meaning of the Railway Act of Canada, 51 V. c. 29.

2. That, although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it was not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council might direct their officers to open the road, and such direction would be sufficient.

3. That the right of the railway company under s. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway was subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality.

4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; s. 11 (h) and (g) of the Railway Act not applying.

5. That the Court had jurisdiction to grant the relief sought.

Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, and *City of Toronto v. Lorsch*, 24 O. R. 227, followed.

6. That the highway, being vested in the township corporation, who desired to open and make it fit for public

travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences.

G. F. Henderson, for the plaintiff.

F. H. Chrysler, K.C., and *C. J. R. Bethune*, for the defendants.

IN CHAMBERS.

[FERGUSON, J., 14TH DECEMBER, 1901.]

In re JELLY—PROVINCIAL TRUSTS CO. v. GAMON.

Vendor and purchaser—Sale under direction of Court—Error in fixing reserve bid—Opening biddings.

A purchaser at a sale under the direction of the Court, having no knowledge of an irregularity in fixing the reserved bid, cannot be affected by such irregularity; and a motion made to set aside a sale and open the biddings, on the ground that in fixing the reserved bid the value of one part of the property was not taken into consideration, was dismissed with costs.

The referee, not having in his report approved of the sale, but having made a special report regarding it, the purchaser, although ready, was unable to pay the balance of his purchase money into Court.

Held, that he should be allowed to pay it in without interest, and without prejudice to his right to object to the title.

James W. Bain, for the plaintiffs.

William Davidson, for the adult defendants.

F. W. Harcourt, for the infant defendants.

J. H. Moss, for the purchaser.

[THE MASTER IN CHAMBERS, 14TH NOVEMBER, 1901.]

CLERGUE v. MCKAY.

Discovery—Production of documents—Letters between party and solicitors—Real estate agents—Privilege.

Where certain letters had passed between a party to a suit and a firm of solicitors, who had also been acting as his real estate agents:—

Held, that an affidavit on production, in which privilege was claimed for the letters, must set forth and distinguish what communications took place between him and his real estate agents and what between him and his solicitors, as the former were not privileged.

Moseley v. Victoria Rubber Co., 55 L. T. N. S. 482, followed.

R. U. McPherson, for the plaintiff.

W. M. Douglas, K.C., for the defendant.

MASTER'S OFFICE.

[THE MASTER IN ORDINARY, 80TH APRIL, 1901.]

In re MERCHANTS LIFE ASSOCIATION OF TORONTO.

VERNONS' CLAIMS.

Life insurance—Proof of claim on unmatured policy—Present value of reversion in sum assured—Mode of calculating.

H. T. Beck, for the claimants.

J. H. Hunter, for the liquidator.

THE MASTER.—The claimants under the policies of life insurance in this matter contend that by the payment of a yearly premium of \$13.10 for four years, in all \$52.40, for an insurance of \$1,000 on the life of P. C. Vernon, the present value of the policy is \$221.12, and that by the payment of a yearly premium of \$12.76, for four years, in all \$51.04, for an insurance of \$1,000 on the life of J. R. Vernon, the present value of the policy is \$212.50: in other words, that payments to a life insurance company aggregating \$103.44 have in four years gained such an enormous profit as to have entitled the insured to the sum of \$433.62. The contention, if correct, is rather startling to all interested in life insurance companies, and especially to all interested in friendly society insurance, as this company is, and especially as being one whose very low rates of premium compelled me, on the evidence of actuaries, to find that such low rates had contributed nothing towards the formation of a reserve fund, which is a financial necessity to ordinary insurance companies.

The order of reference directs me to calculate the present value in the sum assured by each of the above policies at the decease of the life assured, and also the present

value of a life annuity equal to the future premiums which would become payable during the probable duration of the life assured, and to allow the difference.

In ascertaining the respective amounts so directed, reference has been made to the Hm. tables of the Institute of Actuaries of Great Britain, recognized by the Insurance Act, R. S. O. 1897 c. 203, s. 149, s.-s. 2—in so far as the said tables are applicable.

In these tables I find that the figures in the first two columns, x and ax , are absolute and unchangeable, and that the third Ax and the fourth Px are variable. Column x gives the age, which is the governing factor. Column ax gives the discounting factor, which governs the present value of an annuity of \$1 payable at the end of the year; but when the annuity is payable in advance it has to be increased by one. Column Px gives the amount of the usual annual premium for an insurance of \$1. Column Ax gives the product of the multiplication of the discounting factor ax , plus one, by the actual annual premium charged for an insurance of \$1.

The present value in the sum assured (\$1,000) by the policy on the life of P. C. Vernon is found by ascertaining that she is now of the age of 46 years. For that age the discounting factor in the Hm. tables is 12.9267 plus one (equal to 13.9267), as the premium was payable in advance. The annual premium charged by this association for that age is \$15.44. These multiplied together give \$215.028248.

The present value of a life annuity equal to the future premiums which would become payable during the probable duration of life of the said P. C. Vernon is obtained by taking the same discounting factor, fixed by the Hm. tables in this case at 13.9267, and multiplying that by \$13.10, the amount of the annual premium she had been paying for the insurance beginning at the age of 42, of \$1,000 on her life, which gives \$182.439770. The result is as follows:

Present value in the sum assured	\$215.02
Present value of future premiums	182.43
	\$32.59

which would make the amount to be allowed to P. C. Vernon \$32.59, but, as the actuaries make it \$33.28, I allow that sum.

Applying the same mode of computation to the claim of J. R. Vernon on his policy for \$1,000, who was insured at the age of 41 on an annual premium of \$12.76,—he is now of the age of 45, for which the premium is \$14.68—I allow the sum stated by the actuaries, \$32.29.

As the claims made are so largely in excess of the premiums paid for the four years' insurance and of the amounts allowed, I let the claimants bear their own costs.

[This decision was reversed by a Divisional Court — see *ante* 19: but, as the questions involved are of interest to insurance companies, it is now reported as above.]

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 7TH JANUARY, 1902.]

FOREMAN v. SEELY.

*Solicitor—Authority to collect principal and interest under mortgage—
Possession of mortgage securities.*

In the absence of legal proceedings to enforce a mortgage security, there is nothing in the mere relation of solicitor and client from which an authority may be implied to the solicitor to receive interest or principal due the client on the mortgage, even though the solicitor arranged the mortgage loan. The solicitor must have either express authority for the purpose, or the course of dealing between the parties must have been such as to necessarily imply such an authority; and the onus of establishing that is upon the mortgagor. An authority to receive interest confers no authority to receive principal, and the possession of the mortgage securities is no evidence of authority to receive money due on them.

MANITOBA

In the King's Bench.

[FULL COURT, 21ST DECEMBER, 1901.]

REX v. HURST.

*Criminal law—Fraudulent removal and concealment of goods—Indictment—
“On or about” a certain date—Mistrial.*

Crown case reserved. The prisoners were tried before RICHARDS, J., on the 4th and 5th counts of an indictment, as follows:—

4. That S. G. Hurst and S. C. Hurst, on or about the 11th September, 1900, unlawfully removed a quantity of household goods belonging to S. C. Hurst, capable of being stolen, for a fraudulent purpose, to wit, for the purpose of obtaining from the Hartford Fire Insurance Company, in which the goods were insured in favour of S. C. Hurst, insurance moneys upon said goods as if they had been destroyed by a fire, by which the said dwelling was destroyed on said day, and of their keeping the goods for their own use.

5. That S. G. Hurst and S. C. Hurst, on or about the 11th September, 1900, unlawfully concealed a quantity of household goods of S. C. Hurst, capable of being stolen, for the purpose of obtaining from the company, insurance moneys upon said goods as if they had been destroyed by a fire, which occurred on said day, and of their keeping said goods for their own use.

Some of the goods were removed on the 13th August, and some on the 11th September. The fire took place on the 11th September.

In his charge to the jury the Judge did not distinguish between the goods removed on the 13th August and those removed on the 11th September, but left it to them in such a way that they could convict on both counts or on either of them, both as to the goods removed on the 13th August and as to those removed on the 11th September.

The jury found each of the prisoners guilty on both the 4th and 5th counts.

The following questions were reserved:—

1. Could the accused be convicted of the offences charged in the 4th and 5th counts in respect of goods removed on the 13th August?

2. Could the accused be so convicted in respect of the goods so removed on the 11th September?

Held, that the conviction on the 4th count should be quashed. The count charges that the prisoners unlawfully removed goods on or about the 11th September. The expression "or or about" the 11th September could not be applied to an act done at a time as long previous to that date as the 13th August. It did not seem, either, that it could be inferred from the statement of the case that the two removals were shewn to be so connected that they formed but one continuous act or taking.

While the count identified the offence which the accused were called upon to meet as having occurred on the 11th September, at the trial they were called on to meet another distinct charge of an offence, which it was alleged they had committed on the 13th August, and the same count was thus made to apply to two separate transactions: Code, s. 611, s.-ss.4, 6. The result could hardly be otherwise than that the prisoners were placed at a disadvantage on the trial of this count, and, as regards this count, there might not have been a fair trial; therefore the conviction on the 4th count should be quashed.

The conviction on the 5th count should be affirmed.

Howell, K.C., for the prisoners.

Patterson, for the Crown.

[KILLAM, C.J., 10TH JANUARY, 1902.]

WHITLA v. ROYAL INSURANCE CO.

Fire insurance—Authority of agent to give interim receipt—Proposal to abandon prior insurance—Failure to do so—Executory contract—Note given for premium.

Action to recover for damage by fire to a merchant's stock under an insurance contract alleged to have been created by interim receipt.

The plaintiffs sued as assignees of P. E. Bourque, the merchant alleged to have been so insured.

On the 12th July, 1900, Bourque obtained from the Manitoba Assurance Company a policy against loss by fire for \$2,500.

On the 1st January, 1901, Bourque wrote to Dumouchel, an agent of the defendants, stating that he wished to insure in the company; that he had an insurance in the Manitoba Assurance Company, but he was going to abandon it.

Dumouchel subsequently sent Bourque an interim receipt for \$75, the premium, and asked Bourque to send his note for \$50 and a cheque for \$25; on the back were indorsed the statutory conditions, without alteration or addition. Dumouchel discounted the note and had the proceeds and the amount of the cheque placed to his credit; he made a report to the head office, and gave the company credit for Bourque's premium of \$75, less commission.

In January Dumouchel took a printed form of application for insurance and filled in it a number of particulars relating to Bourque's insurance, and in answering the question, "what other insurance have you on the property now to be insured?" he wrote, "None." He forwarded this application, unsigned, to the Montreal office. Bourque never authorized the making of this application, and knew nothing of it. A policy was made out, signed by the assistant manager of the company for Canada, as attorney for the company, but not sealed. It was forwarded to Dumouchel, who retained it, and gave Bourque no notice of its issue. No assent to the prior insurance appeared on the policy or was indorsed thereon.

On the 10th February the store was burned, and Bourque's stock destroyed. He alleged that he did not know until after the fire of the arrival of the interim receipt, but that he found it in a desk which was saved, and explained that the envelope containing it had been opened by his wife, who assisted him in the business.

A condition of the Manitoba Assurance Company's policy was that "the company is not liable for loss . . . if any other subsequent insurance is effected . . . unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected."

The Manitoba company was never notified of the subsequent insurance or of Bourque's intention to effect it, and never consented thereto in any way, and never learned of it until after the fire.

Bourque put in proofs of loss against both companies, and subsequently assigned his claims to the plaintiffs, who sued both companies.

The note was paid by Bourque at maturity, but after the fire.

The statement of claim was based upon the interim receipt alone, entirely ignoring the policy, and alleged that the insurance was subject to no conditions. The material defences were : (1) that the premium was not paid before loss; (2) that the contract of insurance was subject to the 8th statutory condition, namely, "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon," and that the company gave no assent thereto; (3) misrepresentation that the insurance of \$3,000 applied for was to be the only insurance upon the property; and (4) breach of a warranty that the prior insurance would be abandoned.

It was not denied that Dumouchel had power to grant the interim receipt and to bind the company thereby, upon payment of the premium in cash. But, having regard to the terms of his appointment and to the decisions in *London and Lancashire Ins. Co. v. Fleming*, [1897] A. C. 499, and *Canada Fire Ins. Co. v. Robinson*, Supreme Court of Canada (not reported), Dumouchel's authority to issue such a receipt was conditional upon payment of the premium in cash. The knowledge acquired by him in the negotiation must be imputed to the company.

Held, that, while the language of the receipt to some extent imported a present contract of insurance, in reality it was an executory contract only. The case should be treated upon the basis that either there was not to be a contract concluded until the prior insurance had been abandoned, or it was a condition of the executory contract that it should be abandoned; the latter was a preferable view.

If a contract were made, it should be inferred that a part of it was a promise by Bourque to abandon the prior insurance within a reasonable time; its performance should be taken to be a condition of the executory contract. Bourque did not abandon the prior insurance; the policy of the Manitoba Assurance Company remained a subsisting contract; Bourque made a claim and put in proofs of loss under the policy and assigned the claim to the plaintiffs, who sued upon it.

The defence could not succeed upon the ground of non-payment of the premium; Dumouchel realized the amount by negotiation of the note, credited it to the company, and accounted for it in due course. There never was any con-

tract for additional insurance contemporaneous with that under the policy of the Manitoba Assurance Company, which was never abandoned.

Action dismissed with costs.

Haggart, K.C., and *Macdonald*, K.C., for the plaintiffs.
Munson, K.C., and *Hudson*, for the defendants.

WHITLA v. MANITOBA ASSURANCE CO.

Fire insurance—Statutory conditions—Subsequent insurance.

The material facts proved were practically the same as those in the preceding case.

The only defence set up was under the 8th condition indorsed upon the policy:—"The company is not liable for loss . . . if any subsequent insurance is effected in any other company, unless, or until, the company assents thereto," etc.

Held, that the real point was that Bourque and the Royal Assurance Company never agreed upon the insurance which was to run concurrently with the Manitoba company's policy, to which kind of insurance alone the 8th condition appeared to be applicable.

Judgment for the plaintiffs.

Haggart, K.C., and *Whitla*, for the plaintiffs.

Tupper, K.C., and *Phippen*, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 5TH MARCH, 1901.]

LEROY v. SMITH.

Contract—Term of, whether condition precedent or not—Mechanic's lien.

The plaintiff agreed with Smith to do tunnelling in mineral claims in which Smith and McLeod were interested, and the agreement was contained in correspondence, part of which read: "I'll pay you on the completion of each 80

feet of tunnelling. All you need to do is to have McLeod to certify that you have done the work." McLeod did not give a certificate.

In an action by the plaintiff to enforce a mechanic's lien it was held by *BOLE, Co. J.*, and affirmed by the full Court (*IRVING, J.*, dissenting), that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover.

A. D. Taylor, for the appellant.

Davis, K.C., for the respondents.

[8TH MARCH, 1901.]

HARRIS v. HARRIS.

Attachment of debts—Garnishee order—Claimant—Judge by consent trying issue summarily—Appeal—County Court—Practice.

Appeal from the decision of *FORIN, Co. J.* The plaintiffs in County Court proceedings issued several garnishee summonses, and subsequently in Supreme Court actions judgment creditors of the defendants in the County Court actions issued attaching orders against the same garnishees. The judgment creditors in the Supreme Court actions contended that the County Court garnishee summonses were nullities, as they were issued on an affidavit which did not comply with the statute, and all the interested parties agreed that the County Judge might decide the matter in a summary way. He held that the County Court plaintiffs were entitled to the moneys garnished.

Held, on appeal, following *Eade v. Winsor*, 47 L. J. C. P. 584, that the County Judge was in effect an arbitrator; and no appeal lay from his decision.

Per DRAKE, J.—(1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action, and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnished.

L. G. McPhillips, K.C., for the appellant.

Davis, K.C., for the respondent.

[5TH JULY, 1901.]

MANLEY v. O'BRIEN.

In re MACKINTOSH.*Sale of land under Judgments Act—Equitable mortgage—Notice—Right to dispose of timber—Estoppel by course of litigation.*

In 1891 O'Brien pre-empted Provincial Crown land, and in 1898 Manley obtained a judgment against him, which provided that he might cut timber from O'Brien's pre-emption, and apply the proceeds in satisfaction of the judgment, and which restrained O'Brien for six months from cutting or selling timber. Manley registered his judgment in 1899. In January, 1900, O'Brien agreed to sell to Mackintosh the timber for \$1,050, payable at various times, part of the consideration being the fees payable to the Crown for Crown grant; and, on these being advanced by Mackintosh, the Crown grant was delivered to him as security for such advance.

The plaintiff moved for liberty to sell the land under his judgment, and DRAKE, J., made an order for sale, holding that Mackintosh, being an equitable mortgagee, was excluded by the statute.

Held, reversing the decision of DRAKE, J., that the sale should be subject to Mackintosh's interest.

Per MARTIN, J., that, as the plaintiff at the trial induced the Court to grant him a judgment recognizing the defendant's right to timber, he was estopped from afterwards contending that by virtue of certain sections of the Land Act the defendant had no right to dispose of timber.

Duff, K.C., for the appellants.

L. G. McPhillips, K.C., for the respondent.

[7TH NOVEMBER, 1901.]

DRYSDALE v. UNION STEAMSHIP CO.

Ship—Bill of lading—Exceptions in—Matters occurring during voyage—Breach of obligation to provide reasonably fit ship—Clause limiting liability of ship-owners.

Appeal from the judgment of IRVING, J., in favour of the defendant. The plaintiff shipped six cases of dry goods on board the defendants' ship for carriage from Vancouver to Skagway and thence to Dawson, under a bill of lading which provided that all claims for damage to or loss of any

of the merchandise must be presented within one month. The grating on the outside of the hull of the ship and at the mouth of the pipe in which the sea-cock was placed was defective and rendered the ship unseaworthy, the result being that salt water entered the after-hold and damaged the plaintiff's goods. The plaintiff did not present his claim within a month, but subsequently sued for damages.

Held, by the full Court (reversing the decision of IRVING, J.), McCOLL, C.J., dissenting, that the stipulation in the bill of lading to the effect that no claim for loss should be valid unless presented to the company within a month, did not apply to damage occasioned by the defendants not providing a seaworthy ship.

Sir C. H. Tupper, K.C., and Gilmour, for the appellant.
Davis, K.C., for the respondent.

[DRAKE, J., 27TH NOVEMBER, 1901.]

REX v. NICHOL.

Costs—Criminal libel—Depositions not used at trial—Abortive trial—Criminal Code, ss. 833, 835.

Motion by the defendant for an order that certain costs reserved by the order of McCOLL, J., dated the 31st August, 1898, be taxed and paid to the defendant.

The prosecution was for criminal libel, and the defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken, for use at the trial. The order granting the commission provided that the costs of the commission be reserved to be dealt with by the trial Judge. The evidence was used at the first trial, and the jury disagreed. At the second trial the jury again disagreed. At the third trial the defendant was acquitted, but the evidence was not used, owing to the private prosecutor giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner.

Held, that, as the commission evidence was not put in by the defendant as part of his case, the defendant should not have the costs of it.

Held, also, that the defendant was not entitled to the costs of the abortive trials.

Langley, for the defendant.

Cassidy, K.C., for the prosecutor.

IN CHAMBERS.

[BOLE, LOC. J., 16TH DECEMBER, 1901.]

JONES v. GALBRAITH.

Particulars—Patent for invention—Action for infringement—Defence—Want of novelty—Specifications.

Summons obtained by the plaintiffs for particulars of paragraphs 3 and 4 of the statement of defence, shewing the time, place, and manner of user of, and names of persons who used, the appliances referred to in the paragraphs, and for particulars of paragraph 5, shewing in what respect the mechanical devices of the plaintiffs' machine are not covered by the specifications in the plaintiffs' patent.

The action was for infringement of a patent giving the exclusive right within Canada of making and selling a certain improved wood-turning machine for making floats.

Paragraph 3 of the defence: That the appliances making up the machine are all well known mechanical appliances in use for many years prior to the date of the plaintiffs' patent.

4. That there is no specification in the plaintiffs' patent covering a graduated series of fixed chisels or cutters, and that such a series was not, at the date of the patent, either novel or the subject of a patent under the Patent Act of Canada.

5. That the mechanical devices in the plaintiffs' machine alleged to have been infringed, are not covered by the specifications set out in the plaintiffs' patent.

Held, that a greater degree of particularity was required in respect of the defences set up in paragraphs 3 and 4 than in the plaintiffs' particulars of breaches, the object being to limit the expense to the parties, and to prevent patents being upset by some unexpected turn of the evidence: *Fisher v. Dewick*, 4 Bing. N. C. 706.

2. Particulars of the allegation of want of novelty must be given, as they may not be within the knowledge of the patentee: *Ledyard v. Bull*, 11 App. Cas. 648; *Smith v. Greay*, 11 P. R. 169; *Palmer v. Cooper*, 9 Ex. 231.

3. If the defendants knew a particular defect in the specification as to the nature of the invention, and the specification did not sufficiently describe the invention in that regard, they should point it out in order that the plaintiffs might not be taken by surprise: *McIvor's Patents*, 8 R. P. C. 321; *Noxon v. Patterson*, 16 P. R. 40; *Crompton v. Anglo-American Brush Electric Light Corporation*, 35 Ch. D. 283; *Heathfield v. Greenway*, [1893] W. N. 170

Summons absolute.

Supreme Court of Canada.

EXCHEQUER COURT.]

[16TH NOVEMBER, 1901.

THE RELIANCE v. OWNERS OF THE CARRIE E. SAYWARD.

Ship—Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation.

In an action claiming compensation for loss of the fishing schooner *Carrie E. Sayward* by being run into and sunk while at anchor by the *Reliance*, the decision mainly depended on whether or not the lights of the lost schooner were burning, as the Admiralty rules required, at the time of the accident. The local Judge gave judgment against the *Reliance*.

Held, that, though the evidence given was contradictory, it was amply sufficient to justify the judgment, which should not, therefore, be disturbed on appeal.

Harris, K.C., for the appellant.

Burden, K.C., for the respondents.

ONTARIO.]

OTTAWA ELECTRIC CO. v. ST. JACQUES.

Contract—Duration—Right to cancel—Repugnant clauses.

A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. . . . Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer.

Held, reversing the judgment of the Court of Appeal, 1 O. L. R. 73, 21 Occ. N. 105, that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term.

G. F. Henderson, for the appellants.

Hogg, K.C., and *F. A. Magee*, for the respondent.

BROWN v. LONDON STREET R. W. CO.

Negligence—Findings of jury—Contributory negligence.

In an action founded on personal injuries caused by a street car, the jury found that the defendants' negligence was the cause of the accident, and also that the plaintiff had been negligent in not looking out for the car.

Held, reversing the judgment of the Court of Appeal, 2 O. L. R. 53, 21 Occ. N. 369, that, as the charge to the jury had properly explained the law as to contributory negligence, the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence; and he could not recover.

I. F. Hellmuth, for the appellants.

G. C. Gibbons, K.C., for the respondent.

QUEBEC.]

LEBLANC v. ROBITAILLE.

Crown lands—Timber licenses—Sales by local agent—Location ticket—Suspensive condition—Title to lands.

During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown lands agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation therefor under the provisions of Arts. 1269 *et seq.*, R. S. Q., respecting the sale of Crown lands. Subsequently the timber license was renewed, but at the time the renewal license was issued there had not been any express approval by the commissioner of Crown lands of the sales so made by the local agent, as provided in Art. 1269, R. S. Q.

Held, affirming the judgment appealed from, *TASCHEREAU* and *DAVIES*, JJ., dissenting, that the approval required

by Art 1269, R. S. Q., was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown, for which the timber license had been validly issued.

Pelletier, K.C., for the appellant.

Chase-Casgrain, K.C., for the respondent.

DROUIN v. NORISSETTE.

Title to land—Warranty—Construction of deed—Sheriff's deed—Sale of rights in lands—Eviction by claimant under prior title.

By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff of the lands therein mentioned, and of which he was actually in possession, and that "the immovable belonged to him as having been acquired from the sheriff."

Held, reversing the judgment appealed from, *STRONG, C.J.*, and *TASCHEREAU, J.*, dissenting, that the warranty covenanted by the vendor had reference merely to the rights he might have acquired in the lands under the sheriff's deed, and did not oblige him to protect the purchaser against eviction by a person claiming prior title to a portion of the lands.

Ducondu v. Dupuy, 9 App. Cas. 150, followed.

Pelletier, K.C., for the appellant.

Belleau, K.C., for the respondent.

MANITOBA.]

RITZ v. SCHMIDT.

Statute—Amending Act—Retroaction—Sale of land—Judgments and orders—County Courts.

Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under Rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and

in the following year the Legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment."

Held, SEDGEWICK, J., dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments, and not to orders and judgments of the County Court.

Held, further, reversing the judgment of the Queen's Bench, 13 Man. L. R. 419, 21 Occ. N. 396, DAVIES, J., dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force, but not from the date on which they were made.

Held, per SEDGEWICK, J., that the clause had no retroactive operation at all.

A. B. Aylesworth, K.C., and H. Phillips, for the appellant.
J. Stewart Tupper, K.C., for the respondents.

N. W. T.]

TAYLOR v. ROBINSON.

Solicitor—Negligence—Advising on established jurisprudence—Territories Real Property Act—Charging lands—Sale under execution—Indemnity to sheriff—Unregistered conveyance prior to execution—Interpleader—Pleading—Tort—Counterclaim for costs and overcharges—Signed bill of costs.

T. was the sheriff's advocate and also advocate for a judgment creditor. On behalf of the judgment creditor he delivered to the sheriff an execution and a requisition to charge lands then registered in the name of the execution debtor, as the said execution debtor's interest therein might appear. The lands were accordingly charged by the sheriff, under the provisions of the Territories Real Property Act, as amended by 51 V. c. 20, s. 94, and advertised for sale under the execution. Subsequently, transferees of the lands registered deeds of conveyance dated prior to the execution, and served notices upon the sheriff forbidding the sale. T..

following the decision in *In re Rivers*, 1 N. W. T. Reps. pt. 4, p. 66, which had not then been reversed, advised the sheriff to proceed with the sale notwithstanding the notices. Actions were then successively prosecuted by the transferees against the sheriff and execution creditor, and an order obtained restraining the sale proceedings and cancelling the execution as a cloud upon the titles. In these suits T. appeared as advocate for both the sheriff and the execution creditor, and filed a joint defence without interpleading for the sheriff, on the ground that the unregistered transfers were inoperative as against the execution. He also applied, without success, to the trial Court and again to the Court *in banc* to have the sheriff's name struck out as a defendant in these suits. The sheriff did not appeal against the judgment in favour of the transferees, and brought the present action against T. to recover damages for the amount of his costs, on the ground that T. had been guilty of negligence in advising as he did, and in pleading the joint defence without interpleading.

Held, reversing the judgment of the Territories Court, 21 Occ. N. 270, that T. had followed the approved practice in pleading the joint defence; that he was justified in assuming that the decision in *In re Rivers* was correct; and, therefore, that he was not liable in an action for negligence.

Held, also, reversing the judgment appealed from, that neither T. nor the sheriff was liable for tort in charging or advertising the lands for sale, as they were both acting in discharge of their respective duties; that, as the proceeding by T. had been taken to secure to his client the fruits of his judgment, no implied indemnity arose on his part towards the sheriff in consequence of the proceedings taken; and, further, that neither the requisition nor the advice given by the advocate could be construed as an express indemnity by him to the sheriff against costs or damages in respect of the execution.

In the action for damages T. counterclaimed, first, for alleged overcharges made by the sheriff in bills previously paid to him for fees and charges in respect of matters in the sheriff's office, wherein T. had acted as advocate for parties interested, and, secondly, for costs in defending the sheriff in the suits brought by the transferees. In respect to the latter part of the counterclaim, it did not appear that T. had rendered a signed bill of his costs to the sheriff before filing the counterclaim.

Held, that T. could not recover with respect to the first part of his counterclaim, as the moneys, if recoverable, did

not belong to him, but to the clients for whom he had acted, but that he was entitled to recover the reasonable charges in the second part of his counterclaim, notwithstanding the omission to render a signed bill of costs pursuant to the statute.

J. Travers Lewis and J. F. Smellie, for the appellant.

F. H. Chrysler, K.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 2ND DECEMBER, 1901.]

GILBERT BLASTING AND DREDGING CO. v. THE KING.

Crown—Contract—Public work—Breach—Contractor's duty—Repetition of claims—Extra work—Loss of profits—Damages.

By cl. 26 of the suppliants' contract with the Crown for the construction of a public work, it was, in substance, stipulated that, if the contractors had any claims which they considered were not included in the progress certificates, it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by cl. 27 it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reason why, in their opinion, they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions.

Held, that a petition of right for moneys claimed to be so due to contractors could not be sustained.

2. By one of the clauses of the contract it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract.

Held, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have

required the contractor to do, should be given to the contractor; and where this is not done by the engineer, and such outside work is given to others, the contractor is not entitled to the profit that he would have made on the performance of such work.

3. Where, by a change in the plan of the works, certain works are abandoned and others substituted therefor, and the contractor is paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works.

A. B. Aylesworth, K.C., and N. A. Belcourt, K.C., for the suppliants.

E. L. Newcombe, K.C., for the Crown.

[11TH DECEMBER, 1901.]

REX v. HARRIS.

Crown—Expropriation—Possession by officers of the Crown of lands not expropriated—Taking of highway—Rifle range—Damages.

The defendants complained that possession of certain lands not covered by the plan and description filed by the Crown in an expropriation proceeding had been taken by the officers of the Crown, and claimed compensation.

Held, that the right to recover compensation must be limited to lands mentioned in the plan and description filed, and to the injurious affection of other lands held therewith.

2. The defendants' predecessor in title, in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown closed up the roadway, and from the land taken from the defendants opened another in lieu thereof.

Held, that the defendants were not entitled to compensation in respect of the taking of the roadway.

3. Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such

adjacent property, he is entitled to compensation for damages arising from the use of such rifle range.

J. Martin, K.C., for the Crown.

H. D. Helmcken, K.C., and *A. E. McPhillips*, for the defendants.

REX v. YOUNG.

Crown—Expropriation—Lessor and lessee—Covenant to build on demised premises.

Where a lessee is under covenant to build upon the demised premises, and a part of the premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the Court in fixing the amount of compensation to be paid to the lessee.

J. Martin, K.C., for the Crown.

H. D. Helmcken, K.C., and *Luxton*, for the defendants.

REX v. SEDGER.

Crown—Expropriation—Public work—Owner residing on lot taken—Compensation.

Where the owner of certain land taken for a public work had resided thereon up to the time of the expropriation, and had refused to give up possession until he was dispossessed under legal process by the Crown (the cost of which proceedings he was obliged to pay), the Court, in assessing compensation, treated the case as one where the compensation ought to be liberal, and increased the amount offered by the Crown before action brought, although upon the evidence such offer did not appear unreasonable.

J. Martin, K.C., for the Crown.

Jay, for the defendant.

[17TH DECEMBER, 1901.]

WEDDELL v. THE KING.

Contract for improvement of Government canal—Change in works—Breach of contract—Spoiled grounds—Cost of—Allowance for.

The suppliants were contractors for certain works of improvement on the Rapide Plat division of the Williamsburg canal. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them.

Held, that the Crown was not bound to indemnify them for money expended in obtaining the said spoiled grounds.

2. In order to carry on the works in the way contemplated by the contract and specification, the contractors changed certain dump scows into deck-scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck-scows into dump-scows.

Held, that the contractors were not entitled to recover the expense they were put to in respect to the scows from the Crown, because, the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work, under the circumstances in which it was done, as compared with the cost of doing it in the way contemplated by the contract.

A. B. Aylesworth, K.C., and W. M. German, K.C., for the suppliants.

F. H. Chrysler, K.C., for the Crown.

[15TH JANUARY, 1902.]

ALGOMA CENTRAL R. W. CO. V. THE KING.

Constitutional law—Customs legislation—Conflict with Imperial enactment—Duty upon foreign-built ship—Construction of statutes—Crown—Interest.

The Parliament of Canada has legislative authority to impose a customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship.

2. The provision in item 409 of the Customs Tariff Act of 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambiguous imposition of the duty, such as would support the right of the Crown to exact the payment of such duty.

3. Interest can only be recovered against the Crown by contract or under statute.

Wallace Nesbitt, K.C., for the suppliants.

E. L. Newcombe, K.C., for the Crown.

ROSS v. THE KING.

Revenue—Customs duties—Importation of steel rails—Return of duties paid under protest—Interest—Law of Province of Quebec.

The suppliants had imported, at different times during the years 1892 and 1893, large quantities of steel rails into the port of Montreal, to be used by them as contractors for the construction of the Montreal Street Railway. The customs authorities contended that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of \$53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council in *Toronto R. W. Co. v. The Queen*, [1896] A. C. 551, and some time in the year 1897, the customs authorities returned the amount of the duties to the suppliants. The suppliants claimed interest on the money during the time it was in the hands of the Crown, and they filed their petition of right therefor.

Held, that, as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec.

2. That on the question at issue the law of the Province of Quebec was the same as the laws of the other Provinces of the Dominion.

3. That, as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed, it could not be made liable by the institution or commencement of action.

Laine v. The Queen, 5 Ex. C. R. 128, and *Henderson v. The Queen*, 6 Ex. C. R. 47, distinguished.

I. F. Hellmuth and *D. W. Saunders*, for the suppliants.

E. L. Newcombe, K.C., for the Crown.

[21ST JANUARY, 1902.]

McGEE v. THE KING.

Crown—Right of way over Crown property—Easement—Prescription—C. S. U. C. c. 88, ss. 37, 40, 44—Possession—Predecessors in title.

The provisions of C. S. U. C. c. 88, ss. 37, 40, and 44, were in force at the time of Confederation, and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada.

2. Under such provisions, where one enjoys an easement as against the Crown and over Crown property within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority in Ontario, for a period of twenty years, he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation.

3. To establish the easement by prescription it is not necessary to shew that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription.

D. B. MacLennan, K.C., for the suppliant.

A. J. Johnston, for the Crown.

McQUADE v. THE KING.

Crown—Public work—Injurious affection of property—Deprivation of access—Street—Damages.

By the construction of a public work a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property, which fronted on the highway. In the first expropriation for the public work of land in the neighbourhood no part of the suppliant's property was taken. Afterwards, and during the construction of the

public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing up of the street or highway should be taken into account as one of the elements of damage.

Held, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway, which was proximate and not remote.

Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, *Caledonian Railway Co. v. Walker's Trustees*, 7 App. Cas. 259, and *Barry v. The Queen*, 2 Ex. C. R. 333, referred to.

D. B. MacLennan, K.C., for the suppliant.

P. K. Halpin, for the Crown.

[27TH JANUARY, 1902.]

HOGABOOM v. THE KING.

Crown—Insolvent bank—Winding-up Act—Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel.

Where funds belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General, as unadministered assets, in the case of the insolvency of a bank, in proceedings under the Winding-up Act, R. S. C. c. 129, and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund:—

Held, that, if it was clear that the matter had been really determined, effect should be given to the estoppel, but that where to give effect to it would work injustice, the Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel.

A reference to the Registrar was directed to ascertain what proportion of the fund in the hands of the Minister properly belonged to the suppliants. The rule as to estoppel stated by KING, J., in *Farwell v. The Queen*, 22 S. C. R. 558, referred to.

2. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General.

Held, that the suppliants were not entitled to such indemnity.

[81ST JANUARY, 1902.]

KEMP v. CHOWN.

Patent of invention—Infringement—Lantern globe—Want of element of inventiveness.

In an action for infringement of letters patent for improvements in lanterns, one feature only of the lantern, the globe of which could be lifted vertically for the purpose of lighting the lamps, came in question; and as to that, one issue was whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lit, or in the working out of that idea or conception, there was invention to sustain a patent.

Held, that there was no invention to constitute a valid patent.

C. A. Masten and C. A. Duclos, for the plaintiff.

W. B. Raymond and F. B. Osler, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[81ST DECEMBER, 1901.]

REX v. CLARK.

Criminal law—Theft—Evidence—Answers tending to criminate—Claiming privilege.

The prisoner, being a manager of a branch store for the sale of goods supplied by a factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store, without keeping the usual check on them which his employers' system demanded, and had the goods delivered to a customer of his branch.

Held, that he was properly convicted of theft as defined by the Criminal Code.

If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case provided for by s. 5 of the Canada Evidence Act, 1893, as amended by 61 V. c. 53) in any criminal proceedings against him thereafter, but if he does object he is protected.

Judgment of the Judge of the County Court of Wentworth affirmed.

J. V. Teetzel, K.C., for the prisoner.

John R. Cartwright, K.C., and *John Crerar*, K.C., for the Crown.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., LOUNT, J., 21ST JANUARY, 1902.]

In re MCINTYRE.

MCINTYRE v. LONDON AND WESTERN TRUSTS CO.

Trustees—Will—Annuities—Setting apart securities—Distribution of residue—Realization of estate—Investments—Redemption of annuities out of estate—Consent

An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator

were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose came to the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled. The order also provided that, in the event of differences as to matters arising under the foregoing declaration, a local Master should determine such differences and give necessary directions.

Held, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose; and, there being in the hands of the executors and trustees proper trust securities amply sufficient to secure all the annuities and to leave a surplus presently available for distribution among the persons entitled to the residue, there was no necessity to convert these securities into money; and it would suffice to set apart securities for such an amount as, calculating the interest to be derived from it at the rate of four per cent. per annum, would produce a yearly sum equal to the amount of the annuities to be provided for.

In re Parry, 42 Ch. D. 570, and *Harbin v. Masterman*, [1896] 1 Ch. 351, followed.

Hicks v. Ross, [1891] 3 Ch. 499, referred to.

Held, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue.

In re Medland, *Eland v. Medland*, 41 Ch. D. at p. 492, and *In re Parry*, *supra*, followed.

The order also directed that, in the event of the parties agreeing or the Master directing that any sum be expended on the purchase of Government annuities, the annuitant might elect to receive such sum in discharge of his annuity, and that the same should, on the execution of a proper discharge, be paid to the annuitant.

Held, that it is only when the persons whose estate is liable to pay an annuity and the annuitant both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent.

Order of *BOYD, C.*, 21 Occ. N. 380, varied.

G. F. Shepley, K.C., for the executors and the widow.

A. B. Aylesworth, K.C., for David McIntyre.

M. D. Fraser, for Hugh McIntyre.

J. Folinsbee, for six children and eight grandchildren of the testator.

D. Urquhart, for the Baptist Home Mission Fund.

MCKENZIE v. McLAUGHLIN.

Defamation—Pleading—Privilege—Discovery—Examination of plaintiff—Relevancy of questions—Allegation of damages—Rule 488.

In an action for slander, the defence, besides a denial of the material allegations of the statement of claim, was that the words were spoken without malice, in the belief that they were true, and under such circumstances as to make them a privileged communication. There was no justification. The words were: "He perjured himself and stole the money from the township;" and the innuendo was that the plaintiff had committed wilful and corrupt perjury for the purpose of procuring a reward of \$5 from a municipal corporation, and had secured the reward by perjury.

Held, that certain questions put to the plaintiff upon his examination for discovery relating to the reward and directed to eliciting information as to the payment of it to the plaintiff; another question as to statements made by the plaintiff at meetings of the municipal council; another question as to the fact of the council having offered a reward to be paid to any one who killed a dog found worrying sheep; another question apparently intended to elicit information as to the particular times or occasions when the words were spoken; and other questions which might elicit information relevant to the defence of privilege—were all questions relevant to the issues raised on the pleadings, and should be answered by the plaintiff.

Though a defendant may not be able to prove all that is necessary to be shewn to establish a defence of privilege.

he is entitled to the benefit of what he does shew, in mitigation of damages, if it goes to that—subject, perhaps, to his having given the notice required by Rule 488.

The Court expressed no opinion on two questions raised, viz., whether, having regard to the provisions of Rule 488, it is necessary for a defendant to plead the facts on which he intends to rely in mitigation of damages (*Beaton v. Intelligencer Printing and Publishing Co.*, 22 A. R. 97), and whether, if it is not necessary to so plead, it is proper to examine for discovery as to matters affecting damages only, unless or until the notice required by the Rule has been given.

I. F. Hellmuth, for the plaintiff.

C. Swabey, for the defendant.

[22ND JANUARY, 1902.]

BIRKETT v. BREWDER.

Mechanics' liens—Material men—Agreement between owner and contractor—Drawback—Value of plant—Completion of work—Judgment—Estoppel.

The plaintiffs furnished materials to the contractors for certain works, and the action was brought against the contractors and the owner to realize a lien under the Mechanics' and Wage-Earners' Lien Act. The agreement between the contractors and the owner for the execution of the works provided (cl. 10) that all machinery and other plant, materials, and things provided by the contractors and not rejected should from the time of their being provided become, and be until the final completion of the works, the property of the owner for the purpose of the works, and should not be taken away or used or disposed of except for the purpose of the works, but at the completion of the works all such plant and machinery as should not have been used should be delivered to the contractors: also (cl. 12) that on the happening of certain events the owner might take the works out of the contractors' hands and complete them, and in that case the contractors should have no claim for any further payments in respect of the work performed, but should, nevertheless, remain liable for all loss and damage which might be suffered by the owner, and that all materials and plant should remain the property of the owner for the purposes mentioned in cl. 10.

After work to the value of \$24,290.88 had been done, the owner took possession of the works, the materials on the ground, and the plant and machinery of the contractors, and no work had since been done by them under the contract.

An action by the contractors against the owner for damages for improperly taking the works out of their hands and to recover the value of the materials, machinery and plant, and some supplies taken by the owner, and also to recover a large sum on account of work done, had been dismissed.

Held, that the 15 per cent. which, under s. 11 of the Act, R. S. O. c. 153, the owner was required to deduct from any payments made in respect of the contract and to retain as a fund for the discharge of liens, was to be computed on the value of the work and materials, but not upon the value of the plant as well, notwithstanding that for the security of the owner the plant was declared to be for the purposes of the contract his property.

It was contended for the plaintiffs that, although there might be nothing justly done by the owner to the contractors, the lien of the plaintiffs attached upon what might ultimately become due, and that the trial should have been postponed until the final completion of the works.

Held, that, if the judgment dismissing the action brought by the contractors were binding on the plaintiffs, they would not be benefitted by the postponement, for the effect of that judgment was that the contractors had forfeited all right to payment for any work which they had performed and for which they had not been paid; and, even if the judgment were not binding on the plaintiffs, the case should not be sent back for a new trial.

G. F. Shepley, K.C., for the plaintiffs.

A. B. Aylesworth, K.C., for the defendants.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 80TH JANUARY, 1902.]

EXCELSIOR LIFE INS. CO. v. EMPLOYERS' LIABILITY
ASSURANCE CORPORATION.

In re FAULKNER.

Arbitration and award—Submission—Appointment of sole arbitrator—Arbitration Act, R. S. O. 1897 c. 62, s. 8.

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a

loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient."

Held, MACMAHON, J., dissenting, that the submission was one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R. S. O. 1897 c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other might appoint a sole arbitrator.

Decision of STREET, J., 2 O. L. R. 301, 21 Occ. N. 532, affirmed.

In re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, 2 O. L. R. 585, 21 Occ. N. 595, overruled.

A. B. Aylesworth, K.C., for the appellants.

R. McKay, for the respondents.

[FALCONBRIDGE, C.J., STREET, J., 8TH FEBRUARY, 1902.]

WILSON v. BOTSFORD-JENKS CO.

Master and servant—Injury to servant—Defective condition of appliances—Knowledge of master—Company—Officer of—Admissions by—Evidence—Onus—Nonsuit.

The plaintiff was in the employment of the defendants as a labourer, assisting in the erection of an elevator. He stated that he was directed by D., a superintendent of the work, to go upon a planking which answered the purpose of a scaffolding in an excavation made for the purpose of placing therein the leg of the elevator. The planking gave way while the plaintiff was on it, and he was precipitated to the bottom of the excavation, sustaining injuries. He alleged that the scaffolding was defectively constructed, unsafe, and unfit for the purpose for which it was intended, to the knowledge of the defendants.

It was not argued that the defendants were liable to the plaintiff for D.'s negligence, if any; but it was contended that the defendants had knowledge of the defective construction and unsafe condition of the scaffolding through J., their secretary-treasurer.

It was not shewn that J. assumed to give orders to the men, or directions as to the practical work which was going on; but there was evidence that he was standing, with his hands in his pockets, looking down into the excavation, on the morning of the accident, and that on former occasions he had been seen to call D. on one side and say something to him, which no one overheard. There was no evidence that the persons employed by the defendants were not proper and competent persons, or that the materials used were faulty or inadequate; nor was there any evidence that the defendants had any better means of knowing of the danger than the plaintiff.

Held, that the onus was on the plaintiff, and he had not made out a case to be submitted to the jury.

Matthews v. Hamilton Powder Co., 14 A. R. 261, *Wigmore v. Jay*, 5 Ex. 354, *Lovegrove v. London, etc. R. W. Co.*, 16 C. B. N. S. 669, and *Allen v. New Gas Co.*, 1 Ex. D. 251, referred to.

Evidence was given of an admission made by J. to the plaintiff after the accident, as to the defective condition of the scaffolding and the defendants' knowledge of it.

Held, that he had no authority to make admissions on behalf of the defendants, an incorporated company.

Bruff v. Great Northern R. W. Co., 1 F. & F. 344, *Great Western R. W. Co. v. Willis*, 18 C. B. N. S. 748, *Barnett v. South London Tramways Co.*, 18 Q. B. D. 815, *Johnson v. Lindsay*, 53 J. P. 599, and *Newlands v. National Employers' Accident Assn.*, 53 L. T. N. S. 242, referred to.

W. J. Hatton, for the plaintiff.

W. R. Riddell, K.C., for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 12TH FEBRUARY, 1902.]

CHEVALIER v. ROSS.

Pleading—Amendment—Increasing amount claimed—Mistake—Money paid into Court—Acceptance by mistake.

The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out

of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant.

Emery v. Webster, 9 Ex. 242, followed.

Order of LOUNT, J., affirmed.

J. H. Moss, for the plaintiff.

I. F. Hellmuth, for the defendant.

[MEREDITH, C.J., 11TH FEBRUARY, 1902.]

CARSWELL v. LANGLEY.

Bankruptcy and insolvency—Assignment for benefit of creditors—Annuitant—Right to rank on estate—Assignments Act.

An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R. S. O. 1897 c. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. \$100 per quarter on the first day of each quarter during her natural life.

Held, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R. S. O. c. 147 to rank upon the estate of the insolvent for the present value of such payments.

Grant v. West, 23 A. R. 533, and *Mail Printing Co. v. Clarkson*, 25 A. R. 1, followed.

Semble, that such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts.

In re Cowan's Trust, 14 Ch. D. 638, has been disapproved in *Webb v. Stenton*, 11 Q. B. D. 518.

J. J. Warren, for the plaintiffs.

F. E. Hodgins and *W. N. Irwin*, for the defendant.

[FERGUSON, J., 27TH JANUARY, 1902.]

CANADIAN BANK OF COMMERCE v. TOWN OF TORONTO JUNCTION.

Municipal corporations—Treasurer—Tax sale—Power of treasurer to pledge credit of corporation.

A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of

advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R. S. O. 1897 c. 224, s. 224, he is only *persona designata* to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of his defined duties. A creditor in respect to the publication of such advertisements must look to him personally.

Warwick v. County of Simcoe, 26 C. L. J. 461, approved of and followed.

W. H. Blake, for the plaintiffs.

C. C. Going, for the defendants.

[MEREDITH, J., 8TH FEBRUARY, 1902.]

In re McALPINE AND LAKE ERIE AND DETROIT RIVER R. W. CO.

Arbitration and award—Clerical error in award—Motion to refer back—Railway Act of Canada.

Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act.

Held, that if the Provincial legislation (R. S. O. 1897 c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (c)) to correct the mistake. If that legislation were not applicable, there was no power to remit the award, nor to correct the error upon this motion.

Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through the arbitrators: *Ward v. Dean*, 3 B. & Ad. 234; *Mordue v. Palmer*, L. R. 6 Ch. 22; and the Railway Act of Canada does not authorize the re-opening of a reference.

T. W. Crothers, for the claimant.

H. E. Rose, for the railway company.

IN CHAMBERS.

[MACMAHON, J., 16TH DECEMBER, 1901.]

In re TOUGHER.

Surrogate Courts—Applications for letters of administration—Different Courts—Preference.

Where applications for letters of administration to the

estate of a deceased person are made in more than one Surrogate Court, preference will be given to the application made by the applicant nearest in the order in which administration is usually granted

Jurisdiction to proceed was conferred on the Surrogate Court in which application was made by the mother of the intestate, as against that in which application was made by a trust company under instructions from brothers, who claimed as creditors.

James Bicknell, for the mother.

J. H. Moss, for the trust company.

[MEREDITH, J., 12TH FEBRUARY, 1902]

LANGLEY v. LAW SOCIETY OF UPPER CANADA.

Parties—Addition of—Separate causes of action—Joinder—Rules 185, 186, 187, 192—Third party notice—Indemnity.

The plaintiff sued to recover the amount of a book debt assigned to him. The defendants admitted nothing, and pleaded payment and set-off.

Held, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him, in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration.

Rules 185, 186, 187, 192, discussed.

Tate v. Natural Gas and Oil Co., 18 P. R. 82, and *Evans v. Jaffray*, 1 O. L. R. 614, followed.

Smurthwaite v. Hannay, [1894] A. C. 494, *Thompson v. London County Council*, [1899] 1 Q. B. 840, and *Quigley v. Waterloo Manufacturing Co.*, 1 O. L. R. 606, distinguished.

Held, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt.

Confederation Life Association v. Labatt, 18 P. R. 266, followed.

C. D. Scott, for the plaintiff.

Hamilton Cassels, for the defendants.

George Bell, for the added defendant.

MANITOBA

In the King's Bench.

[FULL COURT, 21ST DECEMBER, 1901.]

McCOWAN v. MACKEY.

Sale of goods—Contract for delivery by instalments—Refusal by buyer to accept—Repudiation—Rescission—Remedy of seller.

Action for damages for breach of an alleged contract by the defendant to purchase of the plaintiff 100 tons of hay.

The plaintiff's case was that the hay was to be taken from five stacks inspected by the defendant; the balance to be made up of new hay to be cut by the plaintiff, to be delivered before the 15th September, 1899.

The defendant admitted the contract for the hay in the stacks, but with a warranty as to quality, and denied that he agreed to purchase more.

The plaintiff shipped two car loads from the stacks, which the defendant received and retained; but with a protest against the quality of the first car load and a claim for default in that respect.

The defendant sent to the plaintiff certain letters and telegrams upon which the latter relied as a repudiation amounting to a wrongful putting an end to the contract and entitling him at once to sue for damages.

After the plaintiff had shipped the second car to the defendant, the defendant telegraphed him "Ship no more hay till you hear from me." On the same day he wrote the plaintiff a letter in which, after complaining of the quality of the hay in the first car, he said, "I will not take any more hay from you." When the plaintiff received the telegram and letter he had a third car loaded and ready for shipment. The defendant telegraphed the plaintiff again, apparently in reply to one sent by the plaintiff in reference to this third car: "Wait my letter; don't want hay I never bought." In the defendant's letter he again complained of the hay on the first car and told the plaintiff, "I will not have any more of your hay unless you make the first car right." When the plaintiff received the defendant's letter he at once shipped the car, which was then ready loaded, to Winnipeg, instead of to the defendant, and sold the hay in Winnipeg.

The action was tried before DUBUC, J., who found that the contract was as claimed by the plaintiff; that the hay delivered was such as the defendant was bound to accept, and that there had been such a wrongful repudiation by the defendant as entitled the plaintiff to bring his action.

The defendant appealed against the verdict entered for the plaintiff.

Held, that there had been such a wrongful repudiation by the defendant as entitled the plaintiff to sue for damages. There must be action on the part of the promisee; a mere passive attitude is not enough; a cause of action at once arises, and he may evidence his election by suing, without prior act: *Frost v. Knight*, L. R. 7 Ex. 111: or, he may make his election in a binding manner by other acts, and bring his action later. The plaintiff's action in selling the car load of hay which, by the contract, he was to deliver as part of that sold, of itself evidenced an election to abandon the contract.

If a purchaser placed his vendor in a position in which he has to deal with the subject-matter of the contract in such a way as to prevent its performance, such dealing should of itself be taken as a sufficient election to enable the plaintiff to maintain his action. A positive absolute refusal by one party to carry out the contract is, in itself, a complete breach of the contract on his part, and dispenses the other party from the useless formality of tendering the performance of a condition precedent: *Freeth v. Burr*, L. R. 9 C. P. 208; *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434.

Phippen and Hartley, for the plaintiff.

Aikins, K.C., and *Robson*, for the defendant.

[BAIN, J., 29TH JANUARY, 1902.]

NATIONAL TRUST CO. v. HUGHES.

Conflict of laws—Policy of insurance—Appropriation of—Subsequent revocation, by will, of appropriation—Lien for premiums.

The plaintiffs, the executors and trustees under the will of R. R. Hughes, brought this action to obtain a declaration as to the effect of a clause in the testator's will.

The testator had effected an insurance policy on his life in the London Life Insurance Company of Canada, which, on the face of it, was expressed to be for the benefit of his wife Alexandria Hughes; by his will he absolutely revoked the benefit, declaration, or appropriation previously;

made, and directed that the insurance moneys which should become payable under the policy should become a part of his estate, the same as if the policy had been made payable to his executor, and that the insurance money should, after his death, be paid by the company to his executor and become a part of his estate.

The widow claimed a lien for premiums she had paid, to keep the policy alive.

The insurance company was incorporated in Ontario, and afterwards obtained an Act of incorporation from the Dominion. The head office of the company was in Ontario; at the time the insurance was effected, the testator and his wife were living in Manitoba; the insurance moneys, under the terms of the policy, were made payable to the testator's wife at the head office in Ontario; the testator and his wife were both living in Manitoba when he made his will, and since his death the company had paid the insurance moneys to the plaintiffs, the executors.

It was contended on behalf of the widow that, as the policy was issued in Ontario, and was an Ontario contract, it was governed in all respects by the law of Ontario, and not by that of Manitoba, and that the revocation of the widow's benefit in the policy was, therefore, ineffective.

Held, that, as the contract was made in Ontario, the premiums were payable there, proof of death had to be furnished there, and the insurance moneys were payable there. it was in Ontario that it was to be performed, and as this would seem to outweigh any presumption there could be from the fact that the testator was living in Manitoba, the general rule must prevail, and it must be presumed that the parties intended that the contract itself should be governed by Ontario law: *Ex p. Dever*, 18 Q. B. D. 660.

It by no means followed, however, that because the contract itself was to be governed by the law of Ontario, the collateral question of the revocation of the wife's benefit in the policy must also be determined by the Ontario law: *Chatenay v. Brazilian Tel. Co.*, [1891] 1 Q. B. 79; *Lee v. Abdy*, 17 Q. B. D. 309.

The revocation by the insured of his wife's benefit in the policy was a different thing from a contract of assignment of the policy; but still it was the exercise of a right incident or relating to the policy which belonged to him by the law of the place where he lived.

Lee v. Abdy supports the view that the insured had the right to revoke his wife's benefit in the policy. The question was one not of the construction of the policy or con-

tract, but of the capacity of the insured to make a disposition of the benefit of the policy; and he could deal with the benefit that he had given his wife in the policy in such manner as the laws of Manitoba empowered him. A transfer or disposition of personal property, good by the law of the owner's domicile, is valid wherever the property may be.

Judgment declaring that the plaintiffs held the insurance moneys on the trusts of the will; the widow to have a lien thereon for the premiums she had paid, to keep the policy in force.

Costs of all parties to be paid out of the estate.

E. E. Sharpe, for the plaintiffs.

Perdue, for the widow.

J. S. Tupper, K.C., for the guardian *ad litem*.

Hudson, for Sisters of Charity named in the will.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 20TH MARCH, 1901.]

KETTLE RIVER MINES, LIMITED v. BLEASDELL.

Appeal—Security for costs—Practice.

Appeal called on before the full Court on the 20th March, 1901. On the 16th March an order had been made for security for costs of the appeal, but not providing for a stay of proceedings. Counsel for the respondent asked that the appeal be struck out of the list, as security had not been furnished. The Court stated that an order for security for costs of an appeal to the full Court should provide for a stay of proceedings until security is given. In the result the appeal was stayed until security was furnished, and unless furnished one week before the first day of the next regular sittings of the full Court, the appeal should stand dismissed.

Duff, K.C., for the appellant.

A. C. Galt, for the respondent.

[28RD MARCH, 1901.]

MURPHY v. STAR MINING CO.

Mining law—Adverse claim—Affidavit and plan—Extension of time for filing—Practice—Mineral Act, s. 37.

Adverse action under the Mineral Act, commenced in December, 1899. No affidavit or plan as required by the Act having been filed within the required time, the plaintiff, on an application to IRVING, J., obtained an order dated the 21st February, 1900, extending the time until the 15th May, 1900. This order not having been complied with, and no statement of claim having been delivered, the defendants took out a summons to dismiss for want of prosecution, and on the return on the 14th November, 1900, DRAKE, J., refused the summons, and, without any motion being made for that purpose, extended the time for filing the affidavit and plan until the 14th May, 1901.

The defendants appealed, and the appeal was allowed. MCCOLL, C.J., dissenting.

Per Curiam: Noble v. Blanchard, 7 Brit. Col. L. R. 62, must not be taken as deciding that an order to extend the time for filing the affidavit and plan required by s. 37 of the Mineral Act may be made by a Judge in Chambers. Such an order can be made only by the Court. The appeal is allowed, but without costs, as counsel for the respondent may have been misled by the report of *Noble v. Blanchard*.

Hunter, K.C., for the appeal.

Alexis Martin, contra.

[10TH JANUARY, 1902.]STAR MINING AND MILLING CO. v. BYRON N.
WHITE CO.

Mines—Inspection—Underground workings—Extralateral rights—Form of order—Copies of plans—Undertaking as to damages—Costs—Interlocutory appeals.

This was an action of trespass to extralateral rights appurtenant to a mineral claim located and recorded in 1891, and the point in dispute was as to the terms of an inspection order enabling the plaintiffs to inspect the defendants' workings.

Held, affirming the order of McCOLL, C.J., that the order might allow the inspecting party to make copies of plans, charts, etc., of the other party's workings.

2. That the order should contain an undertaking for damages, and the practice does not require security to be given.

Held, also, that in interlocutory appeals, when a party is allowed costs of the appeal, the costs are payable forthwith.

Bodwell, K.C., for the appellants.

Davis, K.C., (*S. S. Taylor*, K.C., with him), for the respondents.

[11TH JANUARY, 1902.]

REX v. BROOKS.

Criminal law—Neglect to provide necessaries—Child's death due from want of medical aid—Aiding and abetting—Criminal Code, ss. 209, 210.

Case reserved for the consideration of the Court of Criminal Appeal. The prisoner, an elder of the sect "Catholic Christians in Zion" or "Zionites," was indicted for aiding and abetting and counselling in his actions one John Rogers, who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. At the trial *DRAKE, J.*, found that the prisoner knew that the children had diphtheria, and knew that it was a dangerous and contagious disease; that the ordinary remedies would have prolonged their lives, and in all probability would have resulted in their complete recovery; and he convicted him and sentenced him to three months' imprisonment. At the prisoner's request a case was reserved, and the question was argued before *WALKEM, IRVING, and MARTIN, JJ.*, who affirmed the conviction.

Held, that medical attendance and remedies are necessaries within the meaning of ss. 209 and 210 of the Criminal Code, and anyone legally liable to provide such is criminally responsible for neglect to do so.

So also at common law.

Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse.'

Maclean, for the Crown.

The prisoner was not represented.

[13TH JANUARY, 1902.]

HAGGERTY v. LENORA MOUNT SICKER COPPER
MINING CO.

Contract—Option—First refusal—Appeal books—Numbering of pages.

An agreement between the plaintiff, a contractor, and the defendants, provided that the plaintiff should have the hauling of all ore shipped up to 15,000 tons, and not less than 10,000 tons, as required by the defendants; that if the defendants wished to terminate the contract they could do so on taking over the plaintiff's plant at a valuation to be fixed, and on paying the plaintiff the profits he would have made had he been allowed to complete the contract; and that if, in case of the completion of the agreement, the defendants wished to ship 5,000 tons more, the plaintiff should have the first refusal of a contract. The defendants terminated the contract when 7,169 tons had been hauled.

Held, by DRAKE, J., and affirmed by the full Court, that the defendants were not bound to supply more than 10,000 tons; also that the plaintiff had no claim under the "first refusal" clause.'

The pages of appeal books should be numbered at the top of the pages.

Luxton, for the appellant.

Duff, K.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[81ST DECEMBER, 1901.]

HILL v. HILL.

*Leave to appeal—Alimony—Lunatic—Admission to asylum—Removal—
Summary judgment—Rule 616.*

On a motion for leave to appeal from the judgment of a Divisional Court, 2 O. L. R. 541, 21 Occ. N. 560, affirming the decision of MEREDITH, C.J., 2 O. L. R. 289, 21 Occ. N. 525, and holding that the plaintiff in the action was not entitled to alimony, and (2) that on a motion by the plaintiff for summary judgment under Rule 616, judgment dismissing the action was properly given, the Court of Appeal, being of the opinion that the judgment was right, refused leave to appeal.

S. H. Bradford, for the plaintiff.

W. R. Riddell, K.C., for the defendant.

BOYD, C.]

[4TH DECEMBER, 1901.]

KING v. LOW.

*Building contract—Specifics sum—Destruction of building before completion
—Quantum meruit.*

The defendant, who had taken a contract for the erection of a dwelling house at \$4,050, accepted the plaintiff's tender to do the plumbing and tinsmithing work for \$500; but before the completion of the plaintiff's contract, though after he had done work up to \$488, the building was destroyed by fire. The defendant had received two sums of \$1,500 on

account of his contract, but he denied that any portion of it was for work done by the plaintiff. In an action by the plaintiff to recover the \$488 on a *quantum meruit*:—

Held, that where, as here, the contract is to do work for a specific sum, and this applies as well to original as to sub-contracts, there can be no recovery until the work is completed, unless the failure to do so is caused by the defendant's fault; and, as the plaintiff admitted the non-completion by suing on a *quantum meruit*, and there was nothing to shew any fault on the defendant's part, there could be no recovery.

Appelby v. Meyers, L. R. 2 C. P. 660, followed.

Judgment of BOYD, C., reversed.

J. A. Hutcheson and A. A. Fisher, for the plaintiff.

E. G. Code, for the defendant.

Co.J. OF RENFREW.]

[MOSS, J.A., 11TH FEBRUARY, 1902.]

In re VOTERS' LISTS OF CARLETON PLACE.

Parliament—Voters' lists—Notice of complaint—Form of—Grounds of objection—Subjoined lists—Amendment of notice.

In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, the names of persons wrongfully omitted from the voters' list were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M. F. and" appeared.

Held, having regard to the provisions of s. 6 (1) and (7), and Form 6 (list 1) of the Voters' Lists Act, and of ss. 1 (12), 13, and 56 of the Assessment Act, and of s. 4 of the Manhood Suffrage Registration Act, that the letters "M. F." could properly be read as meaning "Manhood Franchise," and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage.

2. The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3, and 4 being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the

whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the "subjoined lists."

Held, that the lists were part of the complaint, and it was sufficient in that regard.

3. *Held*, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under s. 32.

G. H. Watson, K.C., for electors against the rulings of the County Court Judge.

E. Bristol, for electors supporting the rulings.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., LOUNT, J., 8TH JANUARY, 1902.]

LEISHMAN v. GARLAND.

County Courts—Appeal to Divisional Court—When authorized—New trial.

Judgment having been pronounced by a junior Judge in a County Court action, a motion by way of appeal from or to set aside such judgment and to enter judgment for the defendants, or in the alternative for a new trial, was made to the senior Judge; and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action.

Held, that an appeal lay to the Divisional Court by the unsuccessful party to such appeal; and the fact that a new trial in the alternative was asked for was immaterial.

The sub-sections of s. 51 of the County Courts Act, R. S. O. 1897 c. 55, applicable are s.-ss. 1, 2, and 5, and not s.-s. 3.

B. N. Davis, for the plaintiff.

W. R. Riddell, K.C., for the defendant.

[STREET, J., BRITTON, J., 14TH FEBRUARY, 1902.

PARENT v. COOK.

Practice—Third parties—Notice—Time—Enlarging—Rules 209, 353.

Appeal by the defendants from the decision of MEREDITH, C.J., *ante* 31, 2 O. L. R. 709.

J. H. Rodd, for the appellants.

J. H. Moss, for the plaintiff.

At the close of the appellants' argument the appeal was dismissed with costs.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 15TH FEBRUARY, 1902.

BELLING v. CITY OF HAMILTON.

Way—Injury to pedestrian—Defect in carriage-way—Liability of municipality—Findings of trial Judge.

The plaintiff, in crossing at night on foot a busy street in a city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriage-way. There was a hole or depression in the asphalt pavement from one and a half to one and seven-eighths inches deep at its nearest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff.

Held, FALCONBRIDGE, C.J., dissenting, that the plaintiff, using the carriage-way when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe for vehicles; and the last finding of the Judge put the plaintiff out of Court.

Boss v. Litton, 5 C. & P. 407, explained and distinguished.

Semble, per STREET, J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage.

and therefore the corporation could not be guilty of negligence in regard to it.

Held, also, STREET, J., dissenting, that, as a Judge had been by statute substituted for a jury as the tribunal for the trial of actions of this kind, at least as much respect should be accorded to his findings as to the findings of a jury

Per FALCONBRIDGE, C.J., that the judgment ought to be upheld, as it was a question of fact, not of law, whether the depression was an actionable defect in the highway.

J. H. Long, for the plaintiff.

J. P. Stanton, for the defendants.

[19TH FEBRUARY, 1902.]

MORPHY v. COLWELL.

Bankruptcy and insolvency—Transfer by insolvent debtor—Attacking—Time—Division Court proceeding—Collateral inquiry—Pressure—Evidence of.

A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor \$200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the Division Court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference

Held, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it.

Held, also, FALCONBRIDGE, C.J., dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure

inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor.

Molsons Bank v. Halter, 18 S. C. R. 88, and *Stephens v. McArthur*, 19 S. C. R. 446, followed.

Per FALCONBRIDGE, C.J., that the Judge in the Court below had ample ground for saying that he did not believe the evidence put forward to support the pressure, and his judgment ought not to be reversed because he had not said so in express terms.

W. H. Blake, for the claimant.

J. M. McEvoy, for the primary creditor.

[MEREDITH, C.J., MACMAHON, J., 19TH FEBRUARY, 1902.]

LEWIS v. DALBY.

Security for costs—Public officer—Policemen—Trespass warrant.

The defendants, police officers, having a warrant to arrest a man, by mistake entered the house of his neighbour, the plaintiff, to execute the warrant, but did not actually arrest the plaintiff, and withdrew on finding their mistake. The plaintiff sued for trespass and assault.

Held, that, as the defendants were acting in good faith under a warrant, and had complied with the requirements of s. 2 of R. S. O. 1897 c. 89, they were entitled under that Act to an order for security for costs.

B. N. Davis, for the plaintiff.

A. F. Lobb, for the defendants.

[MEREDITH, C.J., 16TH DECEMBER, 1901.]

In re GOUGH.

New trustees—Appointment of—Married woman.

Under a will three trustees and executors were appointed, to one of whom only probate was granted, one of the other

two dying before probate was applied for, and the other having renounced. The estate was duly administered, and the trusts carried out by such executor and trustee, with the exception of certain property which had been devised to a daughter for life, and after her death directed to be sold, and the proceeds divided amongst testatrix's children. On the death of, or vacancy occurring, as to any one of the trustees, the remaining two could fill up the vacancy, and in the case of there being only one trustee left, he was empowered to apply to the Court to have the vacancies filled up.

On an application by the said trustee to the Court, two additional trustees were appointed, one of whom was a married woman, with whom the said daughter, who was in delicate health, resided, and who was taken care of by her.

J. E. Day, for the petitioner.

F. W. Harcourt, for the official guardian.

[FERGUSON, J., 12TH FEBRUARY, 1902.]

GLENN v. RUDD.

Contract—Statute of Frauds—Master and servant—Employment for an indefinite term—Damages—Master and Servant Act, R.S.O. c. 157, s. 5.

A sub-contract to employ a person as a salesman so long as the employer's contract with third persons might remain in force, that contract being terminable at any time, is not within the Statute of Frauds, for the sub-contract may or may not continue for a year.

Such a sub-contract does not come within s. 5 of the Master and Servant Act, R. S. O. 1897 c. 157.

The employers' contract came to an end by the voluntary dissolution of their firm.

Held, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract, and that, although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages.

Talbot Macbeth, K.C., for the plaintiff.

G. C. Gibbons, K.C., and *John J. Drew*, for the defendants.

[MACMAHON, J., 10TH FEBRUARY, 1902.]

KEITH v. OTTAWA AND NEW YORK R. W. CO.

Railways—Injury to passenger—Negligence—Opportunity to alight.

A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops, and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that when the passenger jumps off the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence.

George McLaurin, for the plaintiff.

Wallace Nesbitt, K.C., and *W. H. Curle*, for the defendants.

[LOUNT, J., 18TH DECEMBER, 1901.]

UNION BANK OF CANADA v. RIDEAU LUMBER CO.

Trespass—Wrongful and wilful—Damages—Mode of assessment.

Where, in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or *bona fide*.

J. Travers Lewis, for the plaintiffs.

G. F. Henderson, for the defendants.

[18TH FEBRUARY, 1902.]

GEGG v. BASSETT.

Trade-mark—Execution—Right of property.

The right of property in a registered specific trademark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which it has been used.

L. V. McBrady, for the plaintiff.

W. Laidlaw, K.C., for the defendants.

IN CHAMBERS.

[MEREDITH, C.J., 14TH DECEMBER, 1901.]

NEWSOME v. MUTUAL RESERVE FUND LIFE
ASSOCIATION.*Notice of trial—Service of—Letter wrongly addressed—Ratification.*

On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in St Thomas, prepared a notice of trial and copies thereof, in three actions, which he directed to be forwarded to his Toronto agents, with instructions to serve and return with admissions of service; but, by a mistake in the office, the envelope was addressed to the defendants' solicitors in Toronto, and reached their office on the following morning; but did not come to the notice of the member of the firm who had charge of the defences therein until after four o'clock, when, on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitor, which was done.

Held, reversing the decision of the Master in Chambers, that what was done did not constitute valid service of the notices on the defendants' solicitors; nor did the defendants' solicitors do anything to ratify such service.

S. Alfred Jones, for the plaintiff.

Shirley Denison, for the defendants.

[18TH DECEMBER, 1901.]

In re McKAY v. TALBOT.

Division Courts—Motion for immediate judgment—Service with summons—Regularity of—Computation of time—Sundays and holidays—Enlargement—Waiver.

A special summons issued out of a Division Court was served on Friday the 8th November, returnable on the following Tuesday, the 12th, and with it was served a notice of motion for immediate judgment, also returnable on the 12th.

Held, that the notice was properly served, for there is nothing in s. 116 of the Division Courts Act, R. S. O. 1897

c. 60, which requires that, before such notice is given, the time for the filing of a dispute notice should have first expired.

Held, also, that there was two clear days' notice of the motion, for the King's birthday and Sunday, which intervened, would not be excluded. Con. Rule 343, whereby, where the time is less than six days, Sundays and holidays must be excepted, does not apply to Division Courts, and no similar provision is contained in the Division Courts Act or Rules; but, in any event, the objection was cured by an enlargement procured by the defendants on the return day until the next day, which had the effect of giving the defendants two clear days irrespective of such holidays.

Quære, whether an order made upon a motion of which two clear days' notice had not been given, would be valid.

J. H. Moss, for the plaintiff.

G. C. Campbell, for the defendants.

[19TH DECEMBER, 1901.]

In re MARTIN AND MERRITT.

Vendor and purchaser—Mortgage—Notice of sale—Service of—Recitals in deeds—Assigns—Meaning of—Devolution of Estates Act—Caution—Non-registration of.

Where, by a provision in a mortgage, no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible, and the conveyance made on a sale under the power of sale contained recitals that service had been duly made on the mortgagor and his wife, the accuracy of such recitals being in no way disproved, a subsequent vendor of the land, in making title on a sale thereof, is not called upon to furnish any other evidence of such service; and further, the objection being as to the proof of service on the wife, no such proof was in any event required, for, by the terms of the mortgage, service only was to be required to be made on the mortgagor and his assigns, and the wife was not an assign.

Where, after the death of a mortgagor, a married woman, and after the coming into force of the Devolution of Estates Act. R. S. O. c. 127, and the expiration of a year from the mortgagor's death, without any caution being registered, sale proceedings were taken on the mortgage, service of notice

of sale on the husband and her heirs, two infant daughters, is sufficient, it not being necessary to serve the personal representatives.

Kirwan Martin, for the vendor.

D'Arcy Tate, for the purchaser.

[8TH JANUARY, 1902.]

WARD v. BENSON.

Parties—Numerous defendants in the same interest—Appointment of solicitor to defend—Rule 200.

The object of Rule 200, which provides that, where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all so interested, is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons, all having the same interest; but does not authorize the making of an order by the Court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest who are already defendants to the action.

W. J. Elliott, for the plaintiff.

[9TH JANUARY, 1902.]

EVANS v. JAFFRAY.

Discovery—Examination of parties—Refusal to answer—Materiality of questions—Affidavit on production—Sufficiency of.

The plaintiff alleged a contract of partnership between him and one of the defendants for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, &c., and that the other defendants had maliciously caused a breach of the partnership contract, and claimed a partnership account, and damages for such breach and for conspiracy. On examination for discovery questions were answered by the last named defendants admitting the formation of a company, and the subsequent payment to the first mentioned defendant of \$20,000; but they refused to answer questions tending to elicit the source of that sum.

Held, reversing the order of the Master in Chambers, that such questions were irrelevant, and need not be answered.

On such examination the defendants also refused to answer questions relating to certain agreements which the defendants had procured to be entered into for the purchase of the plants, and which, the plaintiff alleged, were in substitution of the agreements procured by the alleged partnership.

Held, affirming the order of the Master in Chambers, that such questions were relevant, and should be answered.

In an affidavit on production made by one of the defendants, who was also the defendants' solicitor, it was stated that a search had been made for certain documents, viz., the said cheque and a memorandum in writing containing the purchase prices of the plants, but that they could not be found, and that, as to the said agreements, they were in the custody of the solicitor-defendant, as solicitor.

Held, reversing the judgment of the Master in Chambers, that the affidavit was sufficient; and a motion for a further and better affidavit was refused.

F. A. Anglin, for the plaintiff.

E. F. B. Johnston, K.C., and *C. W. Kerr*, for the defendants Cox and Ryckman.

[7TH FEBRUARY, 1902.]

REX *ex rel.* DAVIS v. CAMPBELL.

Municipal councillors—Disqualification—Proceeding against municipality
—*Municipal Act. s. 80.*

At the municipal election held in the town of Mitchell on the 6th January, 1902, the respondent Hugh Campbell was elected mayor, and the other respondents were elected councillors, of the town of Mitchell for 1902, and subsequently took the declarations of office, and sat as members of the municipal council.

The relator complained that at the time of such election, each one of the respondents had "a claim, action, or proceeding" against the municipality.

By s. 80 (1) of the Municipal Act, R. S. O. c. 223, "no person who, either by himself or with or through another, has any claim, action, or proceeding against the municipality, shall be qualified to be a member of the council of any municipal corporation."

The respondents were members of "The Good Citizens' League" of the town of Mitchell, and they subscribed money to pay the expenses of a summary proceeding taken at the instance of the league to quash a by-law of the town. The respondents were not the applicants in the application to quash the by-law.

Held, affirming the judgment of BARRON, Co. J. of Perth, that the proceeding to quash the by-law was a proceeding against the municipality, within the meaning of s. 80; and, upon the evidence and findings of the County Court Judge, that it was a proceeding taken by the respondents "through another."

Something more than membership in the organization was necessary to render the members answerable for expenditures or acts done in the name of the association; but their assent to and participation in the proceeding were shewn by the evidence.

J. Idington, K.C., for the relator.

N. W. Rowell, for the respondents.

[STREET, J., 25TH FEBRUARY, 1902.]

In re GARDNER.

Will—Construction—Distribution of estate—"Heirs"—"Next in heirship"
—Period of ascertainment.

Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the death of my wife) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Walkins, and my deceased sister Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship."

Held, that the persons entitled in the first place were all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The words "children or their heirs" meant "children or their issue," and gave the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue,

the share of that child was diverted and went to such issue, and vested at once and finally in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personalty: *Keay v. Boulton*, 25 Ch. D. 213. The heirs or next of kin are to be ascertained at the death of the person whose vested share they take.

A. McKechnie, for the executor.

F. W. Harcourt, for the infants.

J. A. Wright, J. H. Moss, and R. E. Heggie, for adults interested.

[MEREDITH, J., 18TH FEBRUARY, 1902.]

***In re* NEWBORN — TORONTO GENERAL TRUSTS CORPORATION *v.* NEWBORN.**

Will — Construction — Dower — Election — Annuities — Predecease of first annuitant — Rights of subsequent annuitant — Intestacy — "Balance" of estate.

Summary application by the corporation, administrators with the will annexed of the estate of Richard Robinson Newborn, late of the township of Etobicoke, farmer, for an order declaring the true construction of the will, which was executed in 1892, and was in the testator's own handwriting, except some formal parts, which were printed in a common form, filled up by the testator, who died in 1900. In the will he gave annuities to his wife and only child, but the latter predeceased him. The testator was illiterate; the will was not separated into sentences nor punctuated. The material parts of the will were as follows:—I give, devise and bequeath all my real and personal estate . . . in the manner following . . . I give to my wife \$200 per year as long as she remains my widow and to my daughter the sum of \$200 per year as long as she remains unmarried but in case she marries then she is only to receive \$150 per year the fifty taken off to go to my wife per year . . . And at her death the said \$150 is to go to the Toronto Home for Incurables until the farm is sold my wife and daughter to have and to hold the house and lot with furniture and chattels while they remain unmarried at the death or marriage of either of them it is to go to the other But after the death or marriage of both the house and lot is to be sold and the money is to go to the Sick Children's Hospital in Toronto the above annuities are to be taken out of the farm rent . . . Any

balance of money received from rent . . . is to go with the interest of what money is in the Permanent Building Society and interest annually divided equally between the Presbyterian Church at Mimico and the Toronto Home for Incurables until the farm is sold I here give the executors power to sell the farm in case of increased expenses or rise in property the amount to be invested in first mortgages the amount of interest required to be used in place of rent the balance of interest to go to the aforesaid two institutions until the death or marriage of my wife or daughter after the death of both \$1,000 goes to Presbyterian Church at Mimico and \$500 to the Protestant Orphans' Home the balance to be divided equally between the Home for Incurables of Toronto and the Sick Children's Hospital." The estate of the testator was substantially the same at the date of the will and at his death, and consisted of his farm, which was rented, a small house and lot where he lived, and \$2,600 which was deposited with the Canada Permanent Loan and Savings Company at the time the will was made, and at the death, with the Dominion Bank.

Held, that the widow was put to her election between the provisions of the will in her favour and her dower: see *Hill v. Hill*, 1 Dr. & War. 94; *Thompson v. Burris*, L. R. 16 Eq. 592; *Amsden v. Kyle*, 9 O. R. 439; *Leys v. Toronto General Trusts Co.*, 22 O. R. 603.

2. There was no authority for the contention that because the first annuitant died in the testator's lifetime, those who were to take at her death took nothing. The annuity was payable to them from the testator's death, but only \$150 a year: see *Hardwick v. Thurston*, 4 Russ. 383; *Edwards v. Saloway*, 4 DeG. & Sm. 248.

3. There was no intestacy as to the additional \$50.

4. Upon the facts, as found by the Judge, with regard to the money on deposit, there were no reasons impelling the conclusion that there was an intestacy as to the interest therein, in the face of the testator's declaration that he disposed of all his property.

5. There was no intestacy as to the corpus or any part of it. By the word "balance" the testator meant the rest or residue of the whole of his property.

6. There was no intestacy as to the furniture and chattels, after the expiration of the interest therein given to the widow; this property was included also in the "balance."

W. N. Ferguson, for the administrators.

W. M. Clark, K.C., for the Home for Incurables.

E. F. B. Johnston, K.C., for the Hospital for Sick Children.

Huson Murray, for the Protestant Orphans' Home.

J. D. Montgomery, for the widow.

S. H. Bradford, for two sisters of deceased.

E. W. J. Owens, for others interested.

[THE MASTER IN CHAMBERS, 4TH DECEMBER, 1901.]

SCOTT v. MEMBERY.

Particulars—Statement of defence—Assault—Wrongful dismissal—Justification.

Where in an action by a clerk against his former employer, an hotel keeper, for an alleged assault and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff was *held*, entitled to particulars of the names of such guests.

J. R. Roaf, for the plaintiff.

D. Urquhart, for the defendant.

(Affirmed by MEREDITH, C.J., 9th December, 1901.)

[7TH JANUARY, 1902.]

PUTTERBAUGH v. GOLD MEDAL MFG. CO.

Practice—Libel—Jury notice—Necessity for.

The effect of s. 102 of the Judicature Act, R. S. O. 1897 c. 51, which provides for actions of libel, etc., being tried by a jury, is to dispense with a jury notice being given in such actions, so that a notice of trial is properly given without such notice having been first served; s. 106 not applying to actions of libel.

F. C. Cooke, for the defendants.

J. E. Jones, for the plaintiff.

[5TH FEBRUARY, 1902.]

CANADIAN MINING AND INVESTMENT CO. v.
WHEELER.*Judgment debtor—Examination of transferee—Third mortgagee—"Exigible under execution"—Rule 903.*

A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver.

W. R. P. Parker, for the plaintiffs.

J. J. MacLennan, for the alleged transferee.

 MANITOBA

In the King's Bench.

[FULL COURT, 15TH FEBRUARY, 1902.]

CODVILLE v. FRASER.

Bankruptcy and insolvency—Assignments Act, R.S.M.c. 7—Amendment, 1900, c. 3—Preference—Pressure—Proceeds of sale under chattel mortgage—Following—Dominant motive of debtor.

Appeal from decision of BAIN, J., 21 Occ. N. 451.

Held (RICHARDS, J., dissenting), that the appeal should be allowed with costs, and the action dismissed with costs.

The received doctrine in England now appears to be that, in order to avoid a transaction as entered into "with a view of giving" a creditor a preference under the Bankruptcy Acts, it should appear that the "dominant" motive of the debtor was to give a preference: *Sharp v. Jackson*, [1899] A. C. 419; *In re Vautin*, [1900] 2 Q. B. 325. What one is to search for under the Manitoba Act, as under the English Bankruptcy Act, is the "dominant" or governing motive of the debtor.

The plaintiffs themselves put forward the debtor as their sole witness to the circumstances under which the transaction took place and which influenced his act. He was not contradicted.

If the debtor's account was to be taken as correct, there could not properly be any other inference than that his dominant motive was to make an arrangement for continuing the business; this was practically hopeless, but parties in his position do not usually recognize this so clearly as it appears afterwards to others; there was no warrant for assuming that all this was mere subterfuge.

The amendment to the Assignment Act declares that a *prima facie* presumption is to arise from the effect of a transaction. But that should not justify the Court in looking only to the effect and in refusing to attach any weight to the debtor's account of the circumstances, upon an assumption that his account has not been accepted by the trial Judge.

MUNICIPALITY OF LOUISE v. CANADIAN PACIFIC R. W. CO.

County Court—Jurisdiction—Title to corporeal hereditament—Costs.

Appeal from a judgment of a County Court awarding to the plaintiff municipality damages for the taking by the defendant company of quantities of sand and gravel from several alleged highways and allowances for roads in the municipality.

The initial question raised was, whether the action was one in which the right or title to any corporeal or incorporeal hereditament came in question, within the meaning of s. 59 of the County Courts Act, R. S. M. c. 33.

The claim of the municipality to recover was based upon s. 615 of the Municipal Act, R. S. M. c. 100, vesting in each municipality the possession of the public roads within its boundaries, subject to any rights in the soil reserved by the individuals who laid out the same, and upon s. 644 (c), empowering municipalities to pass by-laws for selling stone or gravel on any allowance or appropriation for a public road. For the defence it was contended that the question of dedication for use as a highway was a question of title, and the right of the municipality to recover, even where this was proved, was challenged.

As to two of the alleged highways there was no evidence of dedication by any person. The defendants' track passed across what would have been the lines of two village streets, if these had been produced. But the land was in its natural state, and there was no evidence of dedication to the public use; as to a third, the question of length of user was submitted to the jury. The remaining one of the alleged highways was the road allowance between two sections of land according to the Dominion Government system of surveys.

Held, that real and substantial questions were *bona fide* raised for determination upon the issue, of the title of the municipality to the land, for the taking of which the action was brought. The real issue was as to that title; the right or title to a corporeal hereditament came in question; and the County Court had no jurisdiction to decide upon that right or title.

It appearing that the County Court had no jurisdiction to entertain the action, the judgment for the plaintiffs should be set aside and judgment entered in the County Court against the plaintiffs for the defendants' costs of the action (see 1 Edw. VII. c. 5, s. 1); the plaintiffs to pay the costs of the appeal.

Hough, K.C., for the plaintiffs.

Robson, for the defendants.

REX v. JOHNSON.

Criminal law—Lottery—Disposing of property by chance.

Crown case reserved. At the autumn assizes in November, 1900, the accused was tried on two charges: (1) that he did unlawfully cause to be advertised and published a certain proposal, scheme, or plan for disposing of a horse, buggy, and harness by lot; (2) that he unlawfully sold, bartered, exchanged, or otherwise disposed of certain lots, cards, or tickets, as a means or device for giving, selling, or disposing of a certain horse, buggy, and harness by lot.

The accused carried on a business under the name of "The Bankrupt Stock Buying Company," selling clothing and other goods: he published an advertisement in a newspaper in Winnipeg, which contained the following:—

"Gigantic free gift. During this sale we shall give to each purchaser of \$5 and upwards a ticket entitling him to participate in the free gift of a horse, buggy, and harness, value, \$300."

"To be given away on December 24th. The holder of the winning ticket, if he shoots a certain turkey at 50 yards in five shots, gets the horse, buggy and harness."

The accused gave to each purchaser of goods for \$5 and upwards a coupon or ticket as follows:—"This coupon entitles the holder to participate in the drawing for horse, buggy, and harness given away by the Bankrupt Stock Buying Company. Drawing to take place December 24th, 1900." The accused had upon his premises a horse, buggy, and harness, which he represented to purchasers of goods to be the identical horse, buggy, and harness referred to in the advertisement and coupon.

The jury found the accused guilty on both charges.

The question submitted was as follows:—"Was the accused, under the circumstances, properly convicted of the offences charged in the indictment."

Held, that the conviction should be affirmed.

It was a question for the jury whether the interposition of the shooting was intended as a real contest, or as a device for covering up a scheme to dispose of the property by lot, and upon the evidence they were justified in finding as they did.

Patterson, for the Crown.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 16TH NOVEMBER, 1901.]

WARMINGTON v. PALMER.

Negligence—Contributory negligence—Defective machinery—Excessive damages—New trial—Full Court—Practice—Argument—Appeal—Grounds of—Particulars.

In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at work in the mine, the jury found *inter alia*, that the system adopted for lowering the men was faulty and that the plaintiff did not comply with the printed rules of the mine. They assessed the damages at \$4,000.

Held, by IRVING, J., that the plaintiff was entitled to judgment, although adherence by him to the printed rules would have prevented the accident.

Held, on appeal, MARTIN, J., dissenting, that there should be a new trial, on the grounds that the damages were excessive, that the plaintiff by his recklessness had contributed to the accident, and that there was no evidence to support the finding that the plant was defective.

Points not argued, although included in the notice of appeal, will be considered as abandoned.

Grounds of appeal should be so particularized that the opposite party will know beforehand what he has to meet, and when "misdirection" is alleged, particulars should be stated.

Charles Wilson, K.C., and *L. G. McPhillips*, K.C., for the appellants.

E. P. Davis, K.C., and *C. B. Macneill*, for the respondent.

[IRVING, J., 21ST DECEMBER, 1901.]

In re NORTHERN COUNTIES INVESTMENT TRUST,
LIMITED, AND CITY OF VANCOUVER.

Municipal Corporations—Expropriation—Compensation—Vancouver Incorporation Act, 1900, s. 133—Award—Jurisdiction—Enforcement.

The right to compensation cannot be determined by arbitrators appointed under s. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation.

An award of such arbitrators cannot be enforced summarily under s. 13 of the Arbitration Act.

E. P. Davis, K.C., for the company.

Hammersley, K.C., for the city.

IN CHAMBERS.

[IRVING, J., 11TH FEBRUARY, 1902.]

NICHOL v. POOLEY.

Costs—Criminal libel—Taxation or action for—Stay—Criminal Code, ss. 833-5.

N., after his acquittal (at the third trial) on a charge of criminal libel preferred against him at the instance of Pooley and Turner, proceeded to tax his costs, as provided by the Criminal Code, and moved before DRAKE, J., the trial Judge,

for the costs of some commission evidence used at the first trial. DRAKE, J., dismissed the motion (*ante* p. 75, *Rex v. Nichol*), and also decided that the prosecutors were not liable for the costs of the two abortive trials. As there was no appeal from that order, N. abandoned the taxation, and commenced this action for his costs. The defendants applied for a stay of proceedings.

Held, that the plaintiff should not be allowed to pursue both remedies at once, but, as in the other proceeding there was no appeal, this action should be allowed to proceed, provided that the plaintiff would undertake to abide by such order as might be made at the trial with regard to the costs of the taxation proceedings thrown away, and in the event of the plaintiff giving such undertaking the taxation proceedings should be stayed.

R. Cassidy, K.C., for the defendants.

E. P. Davis, K.C., for the plaintiff.

TANAKA v. RUSSELL.

Arrest—Capias—Irregularity or nullity—Waiver by giving special bail.

On the defendant being arrested, his solicitors gave an undertaking to the sheriff to put in special bail in accordance with the terms of the writ of *capias*. The order for the *capias* was intituled "In the matter of an intended action," and the defendant took out a summons, intituled "In the matter of an intended action," to set aside the writ of *capias* on many grounds; this summons was returnable, by leave of IRVING, J., before him at Vancouver, and when the application came on to be heard preliminary objections were taken that this application should be heard in Chambers at New Westminster, and further that the summons was in the matter of an intended action. The summons was discharged on the ground that it was wrongly intituled.

On a second summons, issued and returnable at Vancouver, coming on to be heard, IRVING, J., held that, under Rule 52, he had power to give directions that it should be so issued and returnable. The plaintiff then objected that the undertaking to give security was sufficient to waive all irregularities in the proceedings, and that all the grounds as mentioned in the summons were merely irregularities.

Held, that the giving of special bail waived his right to object to the writ.

Gilmour, for the plaintiff.

E. P. Davis, K.C., for the defendant.

Exchequer Court of Canada.

ADMIRALTY DIVISION.

[McLEOD, Loc.J., 6TH JANUARY, 1902.]

THE "PAWNEE."

Ship—Collision—Fog—Sailing Rules.

The defendant steamer bound for St. John, while steering in a dense fog, a N.-W. by N. course, heard three blasts of a fog horn from the plaintiff's vessel, a little before the beam on the port side. The steamer was then going at a speed of from 4 to 6 knots an hour, and kept on her course. The plaintiff's vessel continued sounding her horn at regular intervals, and was proceeding on a northerly course before a light wind barely sufficient to enable her to keep steerage way. About 10 minutes after the horn was heard by the steamer, she struck the vessel on her starboard side, and sunk her.

Held, that the steamer was solely to blame, as she had infringed Art. 16 of the regulations by not stopping after the horn was heard.

H. H. McLean, K.C., for the plaintiffs.

C. J. Coster, for the steamer.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 10TH FEBRUARY, 1902.]

WIEDEMAN v. GUITTARD.

Promissory note—Effect of indorsement—Maker—Proof of signature—Presentment—Notice of dishonour—Inference from evidence—Leave to appeal.

An indorsement of a negotiated promissory note, even though the indorser really be a surety, admits, *prima facie* at all events, the ability and signature of all prior parties.

In an action by the holder of a promissory note and chattel mortgage against the makers of the mortgage and makers and indorser of the note, the plaintiff failed to prove the signature of one of the makers of the note, and the action, as far as the note was concerned, was dismissed as to that maker, although a judgment was recovered on the chattel mortgage.

At the trial a defendant, an indorser of the note, although represented by counsel, gave no evidence, and judgment was given against her. She appealed to a Divisional Court, and her appeal was dismissed. She now applied for leave to appeal to the Court of Appeal.

The plaintiff gave evidence at the trial that, in payment for "the property" sold, he received a mortgage and the note in question and cash for the balance; that the note was not paid at maturity and was protested after presentment and notice sent. It was contended that no one could tell what notice was sent or to whom.

Held, that it should be inferred from the evidence, in the absence of any weakening of it by cross-examination, that presentment was made on the day the note became due, that payment was refused, and that due notice of dishonour was given; and leave to appeal was refused.

W. M. Douglas, K.C., for the defendant S. A. C. White.

F. A. Anglin, for the plaintiff.

[17TH FEBRUARY, 1902.]

In re WATTS.

Extradition—Bail pending appeal—Powers of Judge of Court of Appeal.

A fugitive, having been committed for extradition, applied to a Judge under a *habeas corpus* for his discharge, which was refused, and he was remanded for extradition. Pending the *habeas corpus* proceedings he was admitted to bail by another Judge, upon the condition that if he was remanded for extradition he should surrender himself.

He appealed against the order remanding him for extradition, and applied for bail pending the appeal.

OSLER, J.A., declined to make any order on the grounds. (1) that it did not appear that the applicant was in actual custody, and (2) that it was doubtful if a single Judge of the Court of Appeal had power to make the order, as he

did not regard a matter of bail as one incidental to the appeal, and so capable of being dealt with by a single Judge under s. 54 of the Judicature Act.

F. A. Anglin, for the applicant.

G. F. Shepley, K.C., for the complainant.

[MOSS, J.A., 21ST FEBRUARY, 1902.]

KIDD v. HARRIS.

Appeal—Leave to appeal to Court of Appeal—Judgments on different branches of case—Special circumstances.

In an action which at the trial resolved itself into two branches, (1) the status of some of the parties, and (2) the testamentary capacity of the testator and the validity of the will propounded, the trial Judge dealt with the validity of the will only, and, on an appeal, a Divisional Court dealt with the question of status only.

Held, upon an application for leave to appeal to the Court of Appeal, that, although the applicants had the judgment of two tribunals against them, they had the opinion of one Court only in respect of either branch of the case, and, in view of the value of the estate and the important consequences to them, sufficient special circumstances were shewn to entitle them to leave to appeal.

H. M. Mowat, K.C., for the applicants.

G. E. Kidd, for the plaintiffs, the executors.

A. Mills, for the defendants the specific legatees.

J. H. Spence, for the defendant C. H. Harris, a residuary legatee.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., BRITTON, J., 18TH JANUARY, 1902.]

BOOTH v. BOOTH.

Mechanics' liens—Contract on two adjoining buildings—Lien for work on one—Registration—Time—Extent of work done.

Where a contract is made with the respective owners of adjoining lands, on which two separate buildings are erected,

but included under one roof, for the repair thereof, at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches and can be enforced under the Mechanics' Lien Act, against the lands of each of such owners for the price of the work done and the materials provided on each respective building.

The findings of the local Master who tried a mechanic's lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of such work and materials, was upheld, for, though the evidence was contradictory, there was evidence to support such findings.

T. A. O'Rourke, for the land-owner defendant.

H. L. Drayton, for the plaintiff.

[*Boyd, C., Ferguson, J.*, 12TH FEBRUARY, 1902.]

· REX v. COLE. ·

Criminal law—Offence—Attempt to incite—Perjury—Bail—Recognizance—Jurisdiction of justice of the peace—Criminal Code, ss. 530, 601.

A defendant charged with offering money to a person to swear that A., B., or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizances taken by one justice of the peace.

Held, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that s. 601 of the Code did not apply.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law.

C. H. Ritchie, K.C., for A. F. Bowman, the defendant's surety.

J. R. Cartwright, K.C., for the Crown.

[STREET, J., BRITTON, J., 17TH FEBRUARY, 1902.

In re REX v. MEEHAN.

*Courts—Proper forum—Application for mandamus to justice of the peace—
Judge in Court—Divisional Court.*

The order *nisi* and order absolute which may be granted by the High Court under s. 6 of the Act to protect Justices of the peace and others from Vexatious Actions, R. S. O. 1897 c. 88, are civil, not criminal, proceedings, and the applications for such orders are therefore to be heard before a single Judge, sitting as the High Court, and not before a Divisional Court.

I. F. Hellmuth, for the complainant.

E. E. A. DuVernet, for the magistrate.

J. R. Cartwright, K.C., for the Crown.

[MEREDITH, C.J., FERGUSON, J., 26TH FEBRUARY, 1902.

HODGINS v. O'HARA.

*Company—Shares—Subscription—Allotment—Failure to organize company
—License—Insurance Act.*

Judgment of LOUNT, J., *ante* 29, affirmed an appeal.

J. Idington, K.C., for the plaintiff.

A. W. Anglin, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 26TH FEBRUARY,
1902.

EVANS v. JAFFRAY.

*Discovery—Affidavit of documents—Materiality—Examination of parties—
Scope of—Contents of documents—Costs of lengthy examination.*

The plaintiff alleged a contract of partnership between him and the defendant J. for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy.

It appeared from the examination for discovery of the defendant R. that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to this action). The plaintiff alleged that these agreements were, in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid \$20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of defendant J., which was paid.

Held, that the agreements and the cheque and also a certain memorandum prepared by the defendant R. were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents.

2. That the defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when the plaintiff should have established his right to recover damages.

3. That the plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J.; whether it was their own money or that of other persons, and if the latter, of what persons; and for what it was paid.

4. That the plaintiff was entitled also to discovery as to the amount paid by R. and C. to the company for the bicycle branch of their business; it being alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor.

5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them.

Stuart v. Bute, 11 Sim. 452, 12 Sim. 461, *Taylor v. Russell*, 11 Sim. 391, 1 Cr. & Ph. 104, and *Dalrymple v. Leslie*, 8 Q. B. D. 5, followed.

Semble, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Decision of MEREDITH, C.J., *ante* 117, varied.

F. *A. Anglin*, for the plaintiff.

E. *F. B. Johnston*, K.C., and *C. W. Kerr*, for the defendant *Cox* and Ryckman.

[4TH MARCH, 1902.]

ROSE v. CRODEN.

Pleading of action—Statement of claim—Amendment—Writ of summons—Two causes of action—Election to pursue one—Penalty—Discovery—Dominion Elections Act, 1900.

The writ of summons (issued 30th January, 1901) was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered 27th March, 1901), denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ.

Held, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery.

Regina v. Fox, 18 P. R. 343, distinguished.

The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused.

Sections 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed.

N. W. Rowell, for the plaintiff.

G. C. Gibbons, K.C., for the defendant.

[12TH MARCH, 1902.]

***In re* DOOLITTLE v. ELECTRICAL MAINTENANCE AND
CONSTRUCTION CO.**

*Division Court—Territorial jurisdiction—Cause of action—Flooding land
—Erection of dam—Prohibition.*

In a Division Court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the Court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such Court.

Held, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the Division Court in which the action was brought; and prohibition was ordered.

F. A. Anglin and *R. D. Gunn*, for the defendants.

F. G. Evans, for the plaintiff.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 15TH MARCH, 1902.]

TAYLOR v. DELANEY.

Appeal—Surrogate Court—Form of notice and bond—Description of appellate Court.

On a motion to quash an appeal to a Divisional Court subsequent to the passing of 58 V. c. 13, s. 45 (O.), on the ground that the notice of appeal did not specify the Court to which the appeal was taken, and that the bond filed followed the Surrogate form "To the Court of Appeal:—"

Held, that the intention to appeal expressed in the notice was sufficient, and that the words "the Court of Appeal"

in the bond might be read as an equivalent of "the proper appellate tribunal;" and a motion to quash was dismissed.

J. H. Moss, for the plaintiffs.

F. A. Anglin, for the defendant Delaney.

[FERGUSON, J., MEREDITH, J., 8RD MARCH, 1902.

GILDNER v. BUSSE.

Slander—Privilege—Master and servant—Malice.

A master is not necessarily liable in damages because, in the presence of fellow servants or even of casual bystanders, he accuses his servant of theft. Such an accusation is *prima facie* privileged, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like.

Judgment of *BOYD, C.*, reversed.

W. J. O'Neil, for the defendant.

J. M. Godfrey, for the plaintiff.

[FALCONBRIDGE, C.J., 27TH FEBRUARY, 1902.

PADGET v. PADGET.

Practise—Appearance—Limitation of—Submission to judgment—Irregularity

Motion by the plaintiff to set aside as irregular an appearance entered by the defendant, or for leave to sign judgment for the declaration asked for in the indorsement on the writ of summons, with costs, and to proceed with the plaintiff's claim for damages, as indorsed on the writ, or to discontinue the action as to the claim for damages, without costs. The indorsement on the writ was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of John Padget, but erroneously described therein, were absolutely freed and discharged from the conditions and obligations to which they are subjected by the will in favour of the defendant, and absolutely freed and discharged from all bequests, legacies, and other payments charged thereon by the will in favour of the defendant: and for damages against the defendant for wrongful

refusal to execute a quit-claim deed of the lands when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against the defendant and for costs. The appearance also stated as follows: "Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant is also willing to execute a quit-claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will . . ."

W. A. D. Lees, for the plaintiff.

J. J. MacCraken, for the defendant.

FALCONBRIDGE, C.J.:—There is no authority whatever in the Rules or in the practice for an appearance limited as is this one, in an action of the character disclosed in the indorsement of the writ of summons. The appearance will, therefore, be set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. The defendant may have leave to file a proper appearance on payment of costs of this motion. But the motion was really argued before me as a motion for judgment, and the merits were gone into, and if the defendant so elect within one week, my order will be that, on execution by him of the quit-claim and on payment of costs (which I fix at \$10), this action shall be discontinued.

[FERGUSON, J., 21TH FEBRUARY, 1902.]

HULL v. ALLEN.

Evidence—Parol evidence to establish trust—Admission of.

Among other claims in this action, the plaintiff asked to have it declared that the purchase made by the defendant of a lot of land was made to him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust.

Held, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust.

The authorities are conflicting. *Bartlett v. Pickersgill*, 1 Cox 15, 1 Eden 515, 4 East 577, *Heard v. Pilley*, L. R.

4 Ch. 548, *James v. Smith*, [1891] 1 Ch. at p. 387, and *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196, discussed.

Held, however, that the evidence in this case failed to prove the trust.

W. Nesbitt, K.C., and *A. S. Ball*, for the plaintiff.

J. P. Mabee, K.C., for the defendant.

[ROBERTSON, J., 22ND JANUARY, 1902.]

SUTTON v. VILLAGE OF PORT CARLING.

Survey—Village lots—Authorization—Statutory requirements—Order in council—Resolutions of municipal council—By-law—Cost of survey—Assessment for—Proprietors interested.

The council of an incorporated village, upon its own motion, passed a resolution "that the council do write to the Lieutenant-Governor and council to send a surveyor to finally settle disputes in regard to Port Carling streets." The clerk of the council thereupon wrote a letter, addressed to the Lieutenant-Governor in council, stating that there had been great dissatisfaction with regard to the surveyor's lines of the village lots known as "the Bailey estate," composed of about 114 lots; that the lines had been run more than once since the original survey, and each time had been altered; that the village council had been applied to repeatedly to have the work done by an experienced surveyor, appointed by "your honourable council," under s. 39 of R. S. O. 1887 c. 152, and to have the boundaries of the lots ascertained and marked: and asking the council to "decide in favour of this." In answer to this the assistant commissioner of crown lands wrote as follows: "Referring to yours . . . asking that certain streets on which are about 114 lots known as 'the Bailey estate' be re-surveyed, owing to the original survey having become obliterated, . . . you understand the survey will have to be at the cost of the municipality, and the survey would consist, under R. S. O. 1887 c. 152, s. 39, of planting posts at the angles of the lots on Bailey street, Joseph street, . . . and a street . . . which, it appears, has no name. These are the streets on which the Bailey lots front, and I presume that a post planted at the front angles of these lots would be all that the municipality would require. . . . Let us know at once, and . . . give us the name of the surveyor to

whom you wish instructions to issue." Thereafter a resolution was passed by the village council "that the clerk be instructed to order a surveyor to locate the streets of the village at once." The clerk then wrote to the commissioner of crown lands that the council had decided to employ C., land surveyor, "to run the lines on certain streets and lots on the Bailey estate." An order in council was passed, by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph street, Bailey street, and a street south of Bailey street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of \$290.77 should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate.

Held, that the survey directed was not authorized and was illegal, the requirements of the statute (R. S. O. 1887 c. 152, s. 39) not having been complied with so far as to give the Lieutenant-Governor in council jurisdiction to authorize the survey.

2. That the survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it.

3. That, if there was jurisdiction to authorize the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not.

In re Scott and County of Peterborough, 26 U. C. R. 36, followed.

Regina v. McGregor, 19 C. P. 69, distinguished.

R. D. Gunn and T. E. Godson, for the plaintiffs.

C. E. Hewson, for the defendants.

[MACMAHON, J., 25TH FEBRUARY, 1902.]

OTTAWA ELECTRIC CO. v. CONSUMERS ELECTRIC CO.

Municipal corporations—Agreements with electric light companies—Use of streets—Poles and wires—Rights of rival companies—Proximity of wires—Injunction.

The plaintiffs and defendants were respectively companies incorporated to produce and supply electricity for heat.

light, and power, and each had authority from the corporation of the city of Ottawa to erect and maintain poles and wires along the sides of, across, and under the streets of the city for certain periods. The plaintiffs had obtained their rights before the defendants, and had erected their poles and wires before the defendants were incorporated. The agreement between the city corporation and the defendants provided that the latter should not, without the express permission of the corporation, erect additional poles on certain streets.

Held, that, as the plaintiffs and defendants were both electric light companies, and therefore on an equal footing in regard to the business they were respectively chartered to carry on, the fact that the plaintiffs were in prior occupation of the streets gave them no exclusive right or privilege to use such streets or the particular sides of such streets occupied by their poles and wires. But, being first in occupation, and using the streets under an authority conferred by the municipality, they were entitled to protection against a company subsequently using the street under a like authority in such a manner as would be likely to injure the property of the plaintiffs or endanger their workmen or servants.

Bell Telephone Co. v. Belleville Electric Light Co., 12 O. R. 571, *Consolidated Electric Light Co. v. People's Electric Light and Gas Co.*, 94 Ala. 372, and *Rulland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 377, referred to.

The defendants were enjoined from maintaining or placing their wires within three feet of the plaintiffs' wires.

Seemle, that the plaintiffs could not by extending cross-arms on their poles occupy space not required for the present or immediate future service.

Held, that danger apprehended by the plaintiffs from the use by the defendants of their wires in the condition in which they were strung or threatened to be strung, was ground for moving for an interim injunction.

Siddons v. Short, 2 C. P. D. 572, and *Western Union Telegraph Co. v. Guernsey, etc., Electric Light Co.*, 46 Mo. App. 120, referred to.

G. F. Henderson and *D. J. McDougal*, for the plaintiffs.

W. Nesbitt, K.C., and *Glyn Osler*, for the defendants.

[STREET, J., 22ND FEBRUARY, 1902.]

In re BRADBURN AND TURNER.

Will—Debts charged on lands—Devise after payment—Executors' power to sell—R.S.O. 1897 c. 129, ss. 18, 19—Gifts to widow in lieu of dower—Evidence of election—Release.

A testator by his will directed his executors to pay his debts, and, subject to the payment of debts, devised a particular portion of his estate, and directed that the balance of that portion of his estate, after payment of the debts, should be divided amongst his four children in equal shares. Then followed a paragraph declaring that the property willed should go to the parties direct.

Held, that a power of sale was given to the executors under the provisions of s. 19 of R. S. O. 1897 c. 129, and that purchasers were, by s. 19, released from the necessity of inquiring as to the due execution of the power.

The will also contained gifts to the widow, including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower.

Held, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower.

A. P. Poussette, K.C., for the vendors.

E. A. Peck, for the purchaser.

[10TH MARCH, 1902.]

CITY OF TORONTO v. BELL TELEPHONE COMPANY OF CANADA.

Constitutional law—Incorporation of companies—Dominion objects—Interference with property and civil rights in Province—Telephone company—Right to carry poles and wires along and across streets—Consent of municipalities—Dominion and Provincial Acts—Construction—Inconsistent provisions.

1. Under the British North America Act, the power of the Canadian Parliament extends to the granting of charters of incorporation to companies with Canadian, as distinguished from Provincial, objects, and to declaring the objects of their incorporation; but, except in the case of companies incorporated for carrying into effect some of the heads

mentioned in s. 91, the mere fact of a Canadian incorporation does not carry with it the right of interfering with property and civil rights in the different Provinces, in any way, no matter how strongly the objects of incorporation may seem to require such interference; and in order that such companies may entitle themselves to do so, it is necessary that they obtain the authority of Provincial legislation.

2. While the defendants were duly and properly incorporated under their special Act, 43 V. c. 67 (D.), they did not by that Act obtain the power of interfering in any Province with the property or rights of persons or corporations, and could not do so until authorized by an Act of the Provincial Legislature.

3. The defendants, being desirous of exercising their powers within the Province of Ontario, petitioned the Legislature of that Province to confirm the powers which their Dominion Act of incorporation purported to confer upon them, and especially the power of carrying their poles and wires along, across, and under the streets and highways in the Province, and thereupon the Act 45 V. c. 71 (O.) was passed, authorizing them to exercise within the Province the powers in the Act mentioned. Two months later, upon the defendants' petition, the Act 45 V. c. 95 (D.) was passed, amending their Act of incorporation in certain particulars, and declaring that the Act of incorporation as amended and the works thereunder authorized were for the general advantage of Canada.

Held, that from this time forward the defendants were subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not thereby repealed, as the Dominion Act had not expressly declared that the provisions of the Ontario Act was no longer binding; and the defendants were still entitled to all the rights and subject to all the restrictions contained in the Ontario Act not abrogated by absolutely inconsistent provisions in the Act of incorporation.

4. By the defendants' Dominion Act they were given a general power to erect and maintain their lines upon, under, and across all streets and highways, qualified by the condition that the location of the lines and the opening up of the streets was to be done under the direction of an officer appointed by the municipal council, and in such manner as the council might direct, and that in certain specified cases the consent of the council must first be obtained. By the Provincial Act similar powers were given, but one important qualification was, "that in cities, towns, and incorporated

villages, the company shall not erect any pole higher than 40 feet above the surface of the street, nor affix any wire less than 22 feet above the surface of the street, nor carry any such poles or wires along any street without the consent of the municipal council.

Held, that the effect of this latter provision was to forbid the defendants carrying *any* poles or wires at all along any street without the consent of the council—not merely poles or wires of the height described in the previous part of the same sentence.

5. The Ontario Act, in so far as it was not consistent with the Dominion Act, must not be taken to be repealed by the latter; the Ontario Act should be treated as conferring special rights upon the defendants in regard to their works in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.

6. Therefore, the defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without first obtaining the consent of the municipal council; but, inasmuch as the Ontario Act does not make their power to carry wires *across* streets dependent upon the consent of the council, they may carry them across the streets, either above or under ground, subject in the latter case to the direction of the council and its engineer or other officer as to the location of the line and the manner in which the work is to be done, unless such direction shall not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the plaintiffs.

W. Cassels, K.C., G. Lynch-Staunton, K.C., and S. G. Wood, for the defendants.

[MEREDITH, J., 18TH NOVEMBER, 1901.]

HISLOP v. JOSS.

Mortgage—Foreclosure—Tax title defence—Conveyance of equity of redemption to purchaser at tax sale—Onus of proof of taxes in arrear—Improvements under mistake of title.

In an action for foreclosure, in which a defendant set up a purchase at a tax sale and a conveyance of the equity of

redemption from the mortgagor, but did not prove the regularity of the sale, or that taxes were in arrear, and relied upon 58 V. c. 90, s. 13 (O.), and 63 V. c. 103, s. 11 (O.), and also claimed for improvements as made under a mistake of title:—

Held, following *Stevenson v. Traynor* (1886), 12 O. R. 804, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale for taxes, and had not been satisfied.

Held, also, that the words “sales . . . for taxes” in s. 11 of 63 V. c. 103, mean sales for taxes for which the lands might rightly be sold.

Held, also, under the circumstances here, that the defendant had made no improvements as under a mistake of title—there was no mistake—he had simply improved his own land which he took subject to the mortgage.

Judgment for the plaintiff with costs to be added to his claim against the land, and no costs against the defendant Lyons, the purchaser.

James Haverson, for the plaintiff.

W. E. Raney, for the defendant Lyons.

S. H. Bradford, for the defendant Joss.

[An appeal by the plaintiff upon the question of costs was heard by a Divisional Court on the 12th February, 1902, and was dismissed with costs. The defendant Lyons gave notice of an appeal, but abandoned it.]

[BRITTON, J., 17TH MARCH, 1902.]

TORONTO JUNCTION PUBLIC SCHOOL BOARD v. COUNTY OF YORK.

Public schools—Separate town within county—County model school situated in—Liability of county.

The town of Toronto Junction, territorially within the limits of the county of York, but a separate town within the provisions of the Municipal Act, and as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of ss. 83 and 84 of the Public Schools Act, 1 Edw. VII. c. 39; and the county is bound to contribute to the support of a county model school situated in the town.

W. E. Raney, for the plaintiffs.

C. C. Robinson, for the defendants.

IN CHAMBERS.

[ROBERTSON, J., 19TH MARCH, 1902.]

REX *ex rel.* ROBERTS v. PONSFORD.*Municipal elections—Quo warranto—Notice of motion—Time—Wrong day of the week—Mistake—Amendment.*

A notice of motion in the nature of a *quo warranto* to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under s. 220 of the Municipal Act, R. S. O. 1897 c. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required by s. 221) for "Tuesday the 24th day of February"—the 24th February being, in fact, a Monday. Afterwards, the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday the 25th February, but this notice was not a seven clear days' notice.

Held, that the notice of motion was good and sufficient notice for Tuesday the 25th February, and that the sureties upon the relator's recognizance, as required by s. 220, would have no ground of objection because of the proceedings not being properly prosecuted.

Eldon v. Haig, 1 Chit. 11, followed.

Semble, that the practice in actions in the High Court is applicable to these *quo warranto* proceedings.

J. H. Moss, for the relator.

DuVernet, for the respondents.

[STREET, J., 24TH FEBRUARY, 1902.]

ARMSTRONG v. LANCASHIRE FIRE INS. CO.

Writ of summons—Service on foreign insurance company—Agent—Power of attorney—Cause of action.

An English insurance company, who had carried on business in Canada, and whose head office was at Toronto, by two powers of attorney had appointed its general agent at Toronto attorney to receive process under both R. S. O. 1897 c. 203, s. 66, and R. S. C. c. 124, s. 13, transferred its Canadian business to another company, and closed its Canadian

offices, but the deposit under the Dominion Act had not been released, and neither of the powers of attorney had been cancelled.

On a motion to set aside the service of a writ of summons, which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it, on the ground that the company was not within the jurisdiction:—

Held, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property in Quebec was properly served upon the agent named as attorney at Toronto under Rule 159, and that the Court in Ontario, therefore, had jurisdiction to entertain the action.

Seemle, that the power of attorney required to be filed under R. S. C. c. 124, s. 13, is to receive service of process in any suit instituted in any Province of Canada in respect of any liability incurred *in such Province*, and not in respect of any liability incurred *in Canada*.

D. L. McCarthy, for the defendants.

W. E. Middleton, for the plaintiffs.

[25TH FEBRUARY, 1902.]

HUME v. HUME.

Pleading—Counterclaim—Claim on behalf of defendant and others—Release—Rules 203, 248.

The plaintiff, having under her deceased husband's will a charge on land devised by him to the defendant, brought this action to enforce payment of arrears by a sale of the land and for construction of the will.

The defendant delivered a counterclaim alleging that he was one of the next of kin of the testator; that the testator by his will directed the plaintiff, who was executrix, and his executors, to manage a farm for the maintenance of the children until the youngest should reach the age of twenty-four; that the plaintiff received all the profits of the farm for many years, and kept them; that the defendant, as one of the next of kin, was entitled to a share; that the executors of the testator had never had control of the land; and that any remedy against them was barred by statute; and he asked for an account and payment into Court of the amount found due by the plaintiff. to be divided amongst the parties

entitled. He further alleged that the plaintiff had executed a release of a part of the charge for which she claimed.

Held, that the counterclaim was in effect for a declaration that the plaintiff was a trustee for the defendant and the other next of kin of certain profits of working the testator's farm alleged to have been received by her so many years ago that if she were not a trustee their rights would be barred. The counterclaim was an action brought on behalf of the defendant and the other *cestuis que trust*, who would be necessary parties at the outset but for Rule 203, and who must be made parties in the Master's office; and not being for himself alone, but for himself and others, did not come within Rule 248.

Pender v. Taddei, [1898] 1 Q. B. 798, followed.

The effect of the release was not a matter to be raised by counterclaim, but as a defence.

Counterclaim struck out.

J. Bicknell, for the defendant.

N. F. Paterson, K.C., for the plaintiff.

(Affirmed by a Divisional Court, 12th March, 1902.)

[7TH MARCH, 1902.]

CLERGUE v. McKAY.

Discovery — Production of documents — Affidavit — Privilege — Confidential communications — Solicitor and client.

There has been a progressive development of the particularity required in the description of correspondence between a solicitor and his client in order that it may be protected from discovery by reason of privilege. As the affidavit on production cannot be contradicted, the grounds upon which the privilege is claimed must be set forth explicitly and fully, so that the Court may judge as to whether the documents so described are properly withheld from production.

The affidavit must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged.

Where the solicitors were acting as agents for the sale of the defendant's land in question in this action, shortly before the first of the letters for which the defendant claimed privilege was written;—

Held, that the defendant, in order to protect the correspondence, should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action."

Gardner v. Irwin, 4 Ex. D. 49, *O'Shea v. Wood*, [1891] P. 286, and *Ainsworth v. Wilding*, [1900] 2 Ch. 315. followed.

Hoffman v. Crerar, 17 P. R. 405, commented on.

A. B. Aylesworth, K.C., and *R. U. McPherson*, for the plaintiff.

W. M. Douglas, K.C., for the defendant Preston.

[8TH MARCH, 1902.]

MORRISON v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of railway company—Engine-driver—Rules 439, 461 (2).

The driver of the engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of an accident which caused his death, is not an officer of the railway company examinable for discovery under Rule 439, in an action against the company for negligence.

As, by Rule 461 (2), the depositions on discovery of an officer of a corporation may be used in evidence against the corporation, the meaning of Rule 439 should not be extended so as to include any class of employes without the Court being satisfied that they properly come within it.

Knight v. Grand Trunk R. W. Co., 13 P. R. 386, followed.

Leitch v. Grand Trunk R. W. Co., 12 P. R. 541, 671, 13 P. R. 369, *Dawson v. London Street R. W. Co.*, 18 P. R. 223. and *Casselman v. Ottawa, Arnprior, and Parry Sound R. W. Co.*, ib. 261, distinguished.

J. G. O'Donoghue, for the plaintiff.

D. L. McCarthy, for the defendants.

[MEREDITH, J., 19TH MARCH, 1902.]

NESBIT v. GALNA.

Security for costs—Residence of plaintiff out of Ontario—Return.—Ordinary residence—Rules 1198 (b), 1199.

The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199. on præcipe, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario.

Held, that the plaintiff actually resided out of Ontario when the præcipe order was made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain, a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain.

Held, also, that if the præcipe order were set aside, an order under Rule 1198 (b) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made.

D. L. McCarthy, for the plaintiff.

J. D. Falconbridge, for the defendants.

[THE MASTER IN CHAMBERS, 18TH FEBRUARY, 1902.]

CUMMINGS v. RYAN.

Partnership—Action in name of firm—Demand for names and places of residence—Sole member of—Time when information furnished—Motion for—Costs.

The plaintiff, who carried on business alone in a firm name, brought his action in the firm name. The defendants'

solicitor demanded the names and places of residence of all persons constituting the firm, and no answer was given until four days afterwards, when the plaintiff's solicitor gave the information to the defendants' solicitor in the office of a special examiner; but at the same hour notice of a motion by the defendants for an order for the information was served at the office of the plaintiff's solicitor.

On the return of the motion counsel for the defendants asked only that the costs of the application be made costs in the cause.

Held, that, as the plaintiff was the cause of the difficulty in using a firm name, he might well have been ordered to pay the costs so occasioned, and an order was made as asked by the defendants.

R. S. Neville, for the plaintiff.

Frank Denton, K.C., for the defendants.

[5TH MARCH, 1902]

DOMINION BURGLARY GUARANTEE CO. v. WOOD.

Practice—Discontinuance of action—Counterclaim—Cause of action—Jurisdiction.

Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue.

C. A. Moss, for the plaintiffs.

F. E. Hodgins, for the defendant.

In the County Court of the County of Perth.

[BARRON, CO. J., 6TH FEBRUARY, 1902.]

In re IRELAND.

Public schools—Election of trustee—Equality of votes—Casting vote—Complaint—Jurisdiction of County Court Judge.

Upon the complaint of James Steele of the election of

William Ireland as a public school trustee for the year 1902 for Falstaff ward, in the city of Stratford:—

Held, that the Public Schools Act, 1 Edw. VII. c. 39, s. 63, presupposes an election, and that, inasmuch as in the election in question there was a tie, and the proper officer had not yet given the casting vote, there was not an election within the meaning of the section, and the Judge of the County Court had no jurisdiction to hear the complaint.

E. Sidney Smith, K.C., for the complainant.

G. G. McPherson, K.C., for the school board.

The respondent, in person.

In the Second Division Court of Leeds and Grenville.

[McDONALD, Co. J., 5TH MARCH, 1902.]

HAYNEN v. MUNDLE.

Lost property—Rights of finder—Third person—Master and servant—Property found by servant on master's premises.

The defendant was a shop-keeper, and the plaintiff a salesman in the employment of the defendant in the shop. One day the plaintiff picked up from the floor of the shop a roll of bank-notes, and handed it to the defendant, who caused inquiry to be made for the owner, and put the notes in his till for safe-keeping. No claim was made, and the defendant kept the notes. The plaintiff brought this action to recover \$20, the money value of the notes.

McDONALD, Co. J.—The property in question was undoubtedly "lost," in the legal sense of the word.

In the Am. and Eng. Ency. of Law, under the title "lost property," it is stated that, as against all other persons than the owner, the finder becomes the substantial owner of the thing found by him, and may maintain trover or other appropriate action to enforce such right of ownership.

[*Bridges v. Hawkesworth*, 15 Jur. 1079, 21 L. J. Q. B. 75, and *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, referred to.]

But in this case it has to be considered whether, owing to the plaintiff having been in the employment of the defendant, he is deprived of his rights as a finder. The American cases, of which there are several, maintain his right, and I have not found any English authority bearing upon the matter.

[*McDowell v. Ulster Bank*, 60 Alb. L. J. 346, distinguished on the ground that it was the duty of the porter of the bank who found the lost property in that case, to pick up such articles and hand them over to the bank, and his possession was the possession of the bank itself.]

Judgment for the plaintiff for \$20 and costs.

BRITISH COLUMBIA

In the Supreme Court.

[FULL COURT, 17TH NOVEMBER, 1901.]

WAKE v. CANADIAN PACIFIC LUMBER CO.

Mechanic's lien—Woodman's lien—Action for wages—Pursuing both remedies—Estoppel.

The plaintiff, a logger, was employed by one Green, who had a contract with the defendants, to cut logs on their land, and brought this action in a County Court under the Mechanics' Lien Act for \$74.44 for wages.

Before the commencement of this action the plaintiff and sixteen others obtained a joint judgment in the same Court against Green, under the Woodman's Lien for Wages Act, for the gross amount of their wages. In that action Green and the company were defendants, but the action was discontinued against the company, as they released all claim to the logs seized by the sheriff.

Held, that the plaintiff was estopped from proceeding under s. 27 of the Mechanics' Lien Act for the balance of his wages.

R. W. Harris, for the appellant.

Bowser, K.C., for the respondent.

[McCOLL, C.J., 21st JUNE, 1901.]

***In re* KING AND LAW SOCIETY OF BRITISH COLUMBIA.**

Barrister and solicitor—University graduate—Legal Professions Act, s. 37, s.-s. 5.

Order *nisi* calling upon the Law Society to show cause why a writ of *mandamus* should not be issued directed to the Law Society commanding it to enter the name of the applicant on its books as one entitled to be called and admitted on his paying the prescribed fee and passing the necessary examination. The applicant matriculated at the University of Dalhousie, Halifax, Nova Scotia, in August, 1892, and an LL.B. degree was conferred on him by the University on the 23rd April, 1895; in March, 1892, he began to study law and signed articles in Nova Scotia, and on the 2nd April, 1895, he was called and admitted there. Subsequent to his call and admission, he was employed two years in the office of a Halifax firm of barristers and solicitors. The term of service under articles in Nova Scotia for call and admission is ordinarily four years, but in case of a college graduate it is three years. In British Columbia, a graduate, in order to have his law course shortened, must be a graduate at the time he commenced to study law.

Heid, per McCOLL, C.J., that the fact that the applicant was graduated after he was called in Nova Scotia precluded the circumstance of his being a graduate from having shortened his term of study. Application dismissed.

Quaere, whether the plaintiff would have succeeded if he had graduated before the 2nd April, 1895.

Stuart Livingston, for the applicant.

A. D. Taylor, for the Law Society.

[WALKER, J., 21st FEBRUARY, 1902.]

MACAULAY v. VICTORIA YUKON TRADING CO.

Writ of summons—Special indorsement—Foreign judgment—Interest.

The plaintiffs sued on a judgment recovered in the Territorial Court of the Yukon, and in the indorsement of the writ of summons claimed interest at 5 per cent. per annum on the amount of the judgment to the date of the writ, and also from that date until judgment. No defence was filed.

and the plaintiffs signed judgment. The defendants now moved to set aside the judgment, on the ground that the writ was not specially indorsed, inasmuch as the interest claimed was not a debt or liquidated demand.

Held, that the writ was specially indorsed.

It is not necessary in such an indorsement to state that the interest is due by statute.

Motion dismissed.

J. H. Lawson, for the motion.

Cassidy, K.C., contra.

In the County Court of Vancouver.

[BOLE, Co.J., MARCH, 1902.]

BRITISH COLUMBIA PROVINCIAL LOAN ASSN. v. CHARNOCK.

*Mortgage—Proposal for—Liability of proposed mortgagor for expenses—
Agreement—Solicitor's costs—Expenses of appraisal—Commission to
agent.*

The defendant, being desirous of borrowing \$3,750, applied to the plaintiffs to make the loan. While the negotiations were in progress, another person offered to lend the defendant \$4,000 on the same security, which offer he accepted. The plaintiffs now sued the defendant for solicitor's costs, costs of appraisal, and brokerage at 1 per cent. on \$3,500 (the sum they were ready to advance), and they relied on the following clause in the written proposal made to the plaintiffs: "If the loan for any cause should not be completed, I agree to pay all expenses incurred."

BOLE, Co.J.—As to the solicitor's costs and expenses of appraisal, the charges being very reasonable, and being for services rendered the defendant at his request, I think the plaintiffs are entitled to recover the amounts as set out in the plaint, but when I come to the item of brokerage or commission at 1 per cent. on the gross amount of the loan, it does not seem to me that this can be properly included under the word "expenses," because the money was not

earned, and the plaintiffs would not be legally justified in paying it unless it were an expense properly incurred; the brokerage or commission, under the circumstances of the case, being only payable on completion of the loan to the plaintiffs' agents. As to an agent's right to recover commission, *Antrobus v. Wickens*, 4 F. & F. 291, *Gibson v. Crick*, 31 L. J. Ex. 304, *Lofts v. Bourke*, 1 Times L. R. 58, *Jeffrey v. Crawford*, 7 Times L. R. 618, may be referred to.

Judgment will therefore be entered for the amount of the plaintiffs' claim, less brokerage \$35, with costs.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 18TH FEBRUARY, 1902.]

GAUL v. TOWNSHIP OF ELLICE.

Malicious procedure—Enforcing invalid conviction—Information by constable—Invalid warrant—Indemnity resolution by municipal corporation—Arrest—Payment of fine—Protection to constable—Knowledge of corporation—Ultra vires resolution—Liability of members of corporation.

The plaintiffs, on the information of the defendant M., a constable, and one H., were summoned before a magistrate charged with interfering with and spoiling a spring of water at the side of a highway, but did not attend, and in their absence were convicted and fined, the conviction imposing one fine on all three.

A question was raised as to the regularity of the proceedings because there was no seal on the summons, and the magistrate hesitated about issuing a warrant until the township council passed a resolution indemnifying him against costs.

A warrant, directed "to all or any constables," etc., was issued, following the form of the conviction, and handed to another constable, who got M. to assist him and arrested the plaintiffs, conveyed them to gaol, and kept them there (over night) until the fine and costs were paid.

In an action against the township corporation and the defendant M. for maliciously enforcing an invalid conviction:—

Held, that the defendant M. was a constable and acted as such in the execution of the warrant, and was entitled to all the protection extended by the law to public officers of the peace; that the warrant being bad on its face, he

was, by virtue of s. 21 of the Code, exempt from all criminal responsibility; that he was protected from a civil action by virtue of R. S. O. 1897 c. 88, ss. 1 (2), 13, and 14, and the action should have been brought within six months and notice of action given under ss. 975, 976, and 980 of the Code.

Ex p. McCleave, 35 N. B. Repts. 100, distinguished.

Held, also, that there was no proof of knowledge on the part of the council that either the conviction or warrant was illegal, or that they were acting other than *bona fide* for the protection of the spring on the highway, and no evidence of malice; that, even if there was knowledge, the resolution was *ultra vires*, and they were not bound to make good any costs or any damages in any action by the magistrate, in consequence of the resolution; that the legal consequences of any illegal conduct arising from the act of the council were not to be visited on the municipality, but upon the members who passed the resolution.

McSorley v. Mayor, etc., of St. John, 6 S. C. R. 531, distinguished.

Judgment of the County Court of the County of Perth affirmed.

J. P. Mabee, K.C., for the plaintiffs.

G. G. McPherson, K.C., for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 4TH MARCH, 1902.]

MCCORMICK HARVESTING MACHINE CO. v. WARNICA.

Division Court—Jurisdiction—Ascertainment of amount over \$100—Proof of breach of undertaking.

The defendant gave two notes for \$75 and \$62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security that the notes might be treated as due.

The plaintiffs demanded further security, and, not receiving any, brought an action on the notes before the time mentioned in them for their maturity had expired.

Held, that, notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes, the Division Court had jurisdiction to entertain the action.

Petrie v. Machan, 28 O. R. 642, followed in preference to *Kreutziger v. Brox*, 32 O. R. 418.

Judgment of the 10th Division Court in the County of York reversed.

F. C. Cooke, for the plaintiffs.

C. E. Hewson, for the defendant.

[11TH MARCH, 1902.]

PHILLIPS v. MALONE.

Writ of summons—Service out of jurisdiction—Rule 163 (e)—Contract—Place of performance—Option exercised through post office—Terms—Acceptance—Onus.

An appeal from the decision of MEREDITH, C.J., *ante* 32, 3 O. L. R. 47, was dismissed with costs.

Held, per FALCONBRIDGE, C.J., that if the agreement of the 1st May, 1899, was complete, the contract was made in Quebec; but, if it was to be completed by the enlargement acts of the parties, there was no authority to the plaintiff to use the post-office as a means of communication.

Per STREET, J.—The plaintiff might have notified the defendants that he desired them to become the purchasers of the goods, but he had no right to prescribe the dates at which the defendants should pay for them. Their letter was only a proposal to take the goods upon the terms proposed therein, requiring an acceptance by the defendants to make it a complete contract, the onus of shewing which was on the plaintiffs, and was not satisfied.

J. A. Worrell, K.C., for the plaintiff.

George Kerr, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., 5TH MARCH, 1902.]

CROWN CORUNDUM AND MICA CO. v. LOGAN.

Action—Order for dismissal in default of doing an act—Effect of default—Necessity for further order.

Upon an appeal from an order of the Master in Chambers upon a motion to dismiss the action for default of an undertaking:—

Held, per MEREDITH, C.J., that where an order is made for the doing of an act, or, in the alternative, that the action should be dismissed, and default is made in the doing of the act, the order operates to put an end to the action, and no further order is necessary, and, the action being dead, the Court has no power to relieve from the consequences of such default.

On appeal, a Divisional Court, being of opinion that under the circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default.

W. E. Middleton, for the plaintiffs.

G. F. Macdonnell, for the defendant.

[STREET, J., BRITTON, J., 5TH MARCH, 1902.]

BIRKBECK LOAN CO. v. JOHNSTON.

Trusts and trustees—Shares in building society—Mortgage of shares held "in trust"—Notice—Mortgage collateral to loan on shares—Purchaser for value—Consolidation—Purchaser of trust shares.

The defendant A. J., being the holder of six shares of class A. permanent stock in her own name, and six shares of class C. instalment stock "in trust," and other shares of class B. stock, in a building society, obtained a loan of \$700 from the company, and transferred to the company's treasurer, as security, "all my stock in the said company, consisting of shares of classes A., B., and C. stock, held by me in the said company," and "all other stock or shares held by me in the said company."

Subsequently she obtained a further loan of \$600, and transferred to the treasurer, as security, six shares of class C. instalment stock, the intention being to transfer the six shares held "in trust" and already assigned, as the company contended, to secure the prior loan of \$700, giving also a mortgage on land, reciting that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance \$600 upon the said shares with this mortgage as further security.

The defendant A. K. J. became the purchaser of the land subject to the \$600 mortgage (which she assumed), and purchased from A. J. her equity in the six shares of

instalment stock so held "in trust," and took subject to the \$600 mortgage.

In an action by the company claiming consolidation of the loans and payment of both mortgages, or foreclosure:—

Held, that the use of the words "in trust" put the company upon inquiry, and they were affected by the notice that A. J. was not the owner of the shares and had no power to mortgage.

Held, also, that s. 53 of c. 205, R. S. O. 1897, did not empower the company to disregard the trusts, although it relieved them from seeing to the execution of any trust to which the shares were subject.

The defendant A. K. J. brought into Court the arrears due on the collateral mortgage, and the plaintiff company accepted the amount in satisfaction of such arrears.

Held, that the company could not consolidate the two mortgages as against A. K. J., as she was a purchaser for value, without it being shewn that she was aware at the time she purchased the equity of redemption in the lands that any prior mortgage existed against the six shares in the hands of the company.

Judgment of MACMAHON, J., reversed.

P. H. Bartlett, for the defendant Anna K. Johnston.

T. H. Luscombe, for the plaintiffs.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 18TH MARCH, 1902.

REGINA v. MCKINNON.

*Criminal law—Ontario Summary Convictions Act—Criminal Code, s. 841—
Time for laying information.*

The Ontario Summary Convictions Act, R. S. O. c. 90, s. 2, has the effect of incorporating s. 841 of the Criminal Code, and therefore, in the case of any offence punishable on summary conviction, if no time is especially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from the time the matter of complaint or information arose.

N. W. Rowell, for the defendant.

W. R. Riddell, K.C., for the prosecutors.

[BOYD, C., FERGUSON, J., MEREDITH, J., 7TH APRIL, 1902.

CLERGUE v. McKAY.

Discovery—Production of documents—Affidavit—Privilege—Confidential communications—Solicitor and client.

The decision of STREET, J., *ante* 148, affirmed on appeal.

W. M. Douglas, K.C., for the appellant.

A. B. Aylesworth, K.C., and R. U. McPherson, for the respondent.

[11TH APRIL, 1902.

MORRISON v. GRAND TRUNK R. W. CO.

Discovery—Examination of office of railway company—Engine-driver—Rules 439, 461 (2).

Held, reversing the decision of STREET, J., *ante* 149, that the driver of the engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of an accident, was an officer of the railway company examinable for discovery under Rule 439, in an action against the company to recover damages for the death of the husband by negligence causing such accident.

Dawson v. London Street R. W. Co., 18 P. R. 223, *Casselman v. Ottawa, Arnprior, and Parry Sound R. W. Co.*, *ib.* 261, and *Odell v. City of Ottawa*, 12 P. R. 446, followed.

J. G. O'Donoghue, for the plaintiff.

D. L. McCarthy, for the defendants.

[STREET, J., 21ST FEBRUARY, 1902.

In re PUBLISHERS' SYNDICATE.

MALLORY'S CASE.

Company—Subscription for shares—Condition precedent—Liability—Notice of allotment.

M. signed an application for five shares in the company, subject to the condition, not however appearing on its face,

that he was not to be required to accept any allotment until he should have collected \$700 then due to him, which would enable him to pay for the shares. The president was fully advised of this condition, either when the application was handed in to him, or shortly afterwards. The directors allotted the shares to M., but no formal notice of such allotment was ever given to him. He never paid anything on the shares or acted in any way as a shareholder. He failed to collect the \$700 referred to, and on two occasions told this to persons sent on behalf of the company to inquire; he finally went to the company's office and told the president that he had failed to collect the \$700, and would not take the shares, and was told it was "all right."

Held, in winding-up proceedings, that he was not a contributory in respect to the shares.

W. E. Raney, for Mallory.

C. D. Scott, for the liquidator.

[BRITTON, J., 1ST FEBRUARY, 1902]

PATTERSON v. TURNER.

Company—Subscription for shares—Abandonment of undertaking—Old subscriptions—Liability.

On the 28th January, 1899, the defendant and others subscribed for a certain number of shares of the stock of a projected company, the purpose of which was to build an hotel. The prospectus stated that it was intended to apply for a charter forthwith, and to commence building as soon as \$40,000 of the stock had been subscribed, and that the buildings were estimated to cost about \$45,000, and to be ready for opening at the beginning of the summer season of 1899. The company, however, was not formed, nor was anything done towards getting the hotel ready for occupation by the time mentioned. Prior to the 24th October, 1899, only \$28,700 had been subscribed, but additional subscriptions obtained on that date and shortly afterwards brought the total up to \$40,150. On the 24th November, 1899, letters patent of incorporation were issued. About the 1st July, 1900, the hotel was completed, and cost about \$15,000 more than originally contemplated.

Held, that, as the undertaking had not been proceeded with within a reasonable time from its inception, and as

the defendant had not at any time after the 1st October, 1899, agreed to be bound by his subscription, or approved of then proceeding with the erection of the hotel, or that it should cost the sum it was afterwards erected for, he could not now be held bound to take the shares he had subscribed for.

A. B. Aylesworth, K.C., and G. H. Levy, for the plaintiff.

G. Lynch-Staunton, K.C., for the defendant Turner.

S. F. Washington, K.C., for the hotel company.

IN CHAMBERS.

[MOSS, J.A., 27TH JANUARY, 1902.]

In re HOLLAND.

Revenue—Succession duty—Charge against legacies—Payment of legacy within year—Set-off.

The direction in a will to executors to pay debts and funeral and testamentary expenses does not operate so as to make the payment of the succession duty, payable under R. S. O. 1897 c. 24, a charge on the residue and to exonerate the legacies from payment thereof.

Manning v. Robinson, 29 O. R. 483, followed.

The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies, and charges, from paying a legacy forthwith, and so to allow the amount thereof to be set off against a mortgage due by a legatee to the estate.

R. C. Chute, K.C., for the executors.

R. U. McPherson, for the residuary legatee.

[7TH FEBRUARY, 1902.]

In re EVANS.

Will—Legacy—Sickness, provision in case of—Executors, discretionary power of—Personal representatives of deceased legatee.

A testatrix by her will bequeathed a sum of money to a son, with a direction that her executors should invest the

same and pay to the son half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary; and in case of his death, after paying the funeral and other necessary expenses, to divide the amount equally amongst her other surviving children; and by a residuary clause, she gave the residue of her estate to her children in equal shares.

Held, that in case of sickness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives.

James Bicknell, for the executors.

R. U. McPherson, for the brothers and sisters.

H. G. Tucker, for Alexander Wright.

[STREET, J., 27TH JANUARY, 1902.]

R. J. LOVELL CO. v. COLES.

Writ of summons—Service out of jurisdiction—Contract of hiring—Breaches within and without Ontario.

The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed-on remuneration, in selling and taking orders for their goods over a prescribed route to British Columbia and return, his duties on such return requiring him to call at a number of places in Ontario, to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position. The plaintiffs refused to accept his resignation, and, after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for breach thereof.

Held, by the Master in Chambers, dismissing an application to set aside an order for service of the writ of summons out of Ontario, that there was a breach of the contract within Ontario for which the plaintiffs were entitled to sue.

On appeal to a Judge in Chambers, this order was varied by limiting the action to breaches in Ontario; but reserving to the plaintiffs the right to bring actions for breaches which occurred out of Ontario.

H. L. Drayton and L. F. Stephens, for the defendant.

R. S. Cassels, for the plaintiffs.

[15TH FEBRUARY, 1902.]

In re WATTS. •

Extradition—Child-stealing—Contempt of foreign Court—Parent stealing his own child—Foreign law—Criminal Code.

Application for discharge on a writ of habeas corpus.

The prisoner and his wife got a collusive decree for divorce in the State of Illinois, where they were domiciled in 1900, and the marriage was absolutely dissolved. One of the terms of the decree gave the custody of their child, five years old, to the wife, with permission to the prisoner to take it out with him in the day time, but to return it the same day.

The prisoner having obtained the child, instead of returning it, brought it to Canada.

Held, following *In re Murphy*, 24 O. R. 163, 23 A. R. 380, that "child stealing" being mentioned in the existing Extradition Treaty between the United States and Great Britain, as one of the extradition crimes, the Court should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries, and the onus did not rest upon the prosecutor of proving what the foreign law was. The evidence taken before the extradition commissioner shewed a case of child stealing under s. 284 of the Criminal Code, and, in the absence of evidence of the foreign law, that was sufficient.

Section 284 of the Criminal Code does not exclude the case of father and child.

Though what was done was a contempt of Court, yet if a man has committed a crime it does not become the less a crime because it also happens to be a contempt.

As to the prisoner's contention that he had acted in good faith because he had been advised that the decree of divorce having been obtained collusively, was a nullity, this was a matter which might properly be set up as a defence by the prisoner upon his trial, but could not be dealt with by the magistrate, who had before him the decree of the foreign Court and the oath of the wife that she did not collude.

A. B. Aylesworth, K.C., and *F. A. Anglin*, for the prisoner.

G. F. Shepley, K.C., for the complainant.

[LOUNT, J., 24TH FEBRUARY, 1902.]

In re DUNCOMBE.

Will—Construction—"Including"—"Estate"—Policies of insurance—R. S.O. 1897 c. 202, s. 2, s.-s. 36, s. 159.

By a clause in his will a testator bequeathed to his wife one-half his estate, "including policies of insurance made payable to her upon my death." The testator left three policies, one for \$1,000 payable to his wife, the second providing for payment to his wife of an annuity of \$250 per annum for twenty years, and the third payable at his death to the "legal heirs."

There were no children, grandchildren, or mother, living at the time of the testator's death, but his widow survived him.

Held, that the third policy, being payable to the heirs and not to the widow as a preferred beneficiary, formed part of the testator's estate, although as a fact the widow was the legal heir; but the first two policies did not form part of the estate. By them a trust was created in favour of the wife as a preferred beneficiary, and so remained until the death of the testator.

Held, also, that "including" imported addition.

W. A. Wilson, for the executors.

J. M. Clark, K.C., for the widow.

J. R. Cartwright, K.C., for the Attorney-General.

A. M. Stewart, for the official guardian.

W. F. Muir, for a legatee, representing a class.

[THE MASTER IN CHAMBERS, 21ST JANUARY, 1902.]

COOKE v. WILSON.

Discovery—Examination for—Appointment—Attendance on—Voluntarily taking oath—Refusal to answer questions—Absence of subpoena.

Where a plaintiff, who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn:—

Held, that she was precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpoena.

Regina v. Flavelle, 14 Q. B. D. 364, followed.

J. A. Ferguson, for the defendant.

J. W. McCullough, for the plaintiff.

[8RD FEBRUARY, 1902.]

MORANG & CO. (LIMITED) v. G. M. ROSE & SONS CO.
(LIMITED.)

Parties—Joinder of—Application to strike out—Matter of substance.

An objection that one joined as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by Rule 259, and is not a proper subject for an application to strike out parties under Rule 185.

G. G. S. Lindsey, K.C., for the defendants.

J. H. Moss, for the plaintiffs.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 18TH MARCH, 1902.]

GALLAGHER v. CITY OF MONTREAL.

Practice—Reference—Accounts—Warrant to proceed—Dismissal of bill.

It is not a ground for dismissal of the bill in a suit that the plaintiff fails to take out a warrant to proceed in a reference in the suit to take accounts between the parties. On the failure of the plaintiff to take out the warrant the defendant is entitled to do so.

*Chandler, K.C., for the motion.**Teed, K.C., contra.*

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 10TH JANUARY, 1902.]

McKAY v. VICTORIA YUKON TRADING CO.

Appeal—Trial by Judge without a jury—Findings of fact—Commission evidence—Reversal by appellate court.

In an action in the Yukon for damages for breach of contract, tried before CRAIG, J., without a jury, the evidence for the defence being evidence taken on commission, the Judge held that the contract sued on was made with the defendant company and not with one Munn as alleged by the defence, and gave judgment for the plaintiffs.

Held, reversing the finding and allowing the appeal, that the Judge had failed to appreciate the commission evidence.

Different rules govern an appellate court when considering the soundness of findings based on evidence taken on commission, as distinguished from that given by witnesses present in Court.

L. P. Duff, K.C., for the appellants.

F. Peters, K.C., and *W. M. Griffin*, for the respondents.

[DRAKE J., 27TH FEBRUARY, 1902.]

HYLAND v. CANADIAN DEVELOPMENT CO.

Evidence—Examination of witness de bene esse—Rule 368.

Summons to examine a witness *de bene esse*. The witness lived at Telegraph Creek, in Cassiar District, but at the time of the hearing of the summons he was in Victoria temporarily, and the application was for the purpose of getting his evidence before he went back to Telegraph Creek.

DRAKE, J., held that R. 368 was applicable, and made the order as asked.

H. G. Lawson, *contra*.

A. L. Belyea, K.C., for the summons.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[10TH APRIL, 1902.]

RENNIE v. QUEBEC BANK.

Chose in action—Assignment of—Validity—Notice—Bank Act—Statute of Elizabeth—Execution—Interest in partnership—Sale—Action—Parties.

Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898.

Held, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor.

Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity.

Per ARMOUR, C.J.O.—Debts are not included in the expression "goods, wares, and merchandise," as used in the Bank Act.

The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having

been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her.

Per OSLER, J.A.—The husband was not a proper party to this action, the purchaser at the sale under the execution being the only person interested in getting rid of the assignment.

Judgment of a Divisional Court, 1 O. L. R. 303, 21 Occ. N. 183, affirmed.

J. O'Donohoe, K.C., and W. Norris, for the appellants, the plaintiffs.

A. B. Aylesworth, K.C., and H. G. Kingstone, for the respondents, the defendants.

[12TH APRIL, 1902.]

***In re* TOWNSHIP OF NOTTAWASAGA AND COUNTY OF SIMCOE.**

Assessment and taxes—Equalisation of assessment—Appeal to County Court Judge—Time for delivering judgment—R. S. O. 1897 c. 224, s. 88, s.-s. 7—Imperative enactment.

The provision in s.-s. 7 of s. 88 of the Assessment Act, R. S. O. 1897 c. 224, that the judgment of the County Court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative.

Judgment of a Divisional Court, 3 O. L. R. 169, *ante* 48, reversed.

C. E. Hewson and A. E. H. Creswicke, for the appellants.
Haughton Lennox, for the respondents.

GRAVES v. GORRIE.

Copyright—Works of fine art—25 & 26 V. c. 68 (Imp.)

The Imperial Act 25 & 26 V. c. 68, an Act for amending the law relating to copyright in works of Fine Arts, does not extend to Canada.

Judgment of a Divisional Court, 1 O. L. R. 309, 21 Occ. N. 232, affirming that of ROSE, J., 32 O. R. 266, 20 Occ. N. 456, affirmed.

J. T. Small, for the appellants.

J. H. Denton, for the respondent.

BOYD, C.]

[10TH APRIL, 1902.

HOSPITAL FOR SICK CHILDREN v. CHUTE.

Will—Construction—Power of advancement—Exercise of, by trustees—Division of estate.

A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities.

Held, that a division of the estate among the children made by the trustees in good faith two years after the death of the testatrix was a valid exercise of the power.

Judgment of BOYD, C., affirmed.

S. H. Blake, K.C., and *James Bicknell*, for the appellants.

W. H. Blake and *J. J. Lundy*, for other charities.

J. H. Macdonald, K.C., and *F. C. Jones*, for the respondents the trustees.

G. F. Shepley, K.C., for the respondent Frank E. Bilton.

W. R. Riddell, K.C., for the respondent Naomi Bilton.

[11TH APRIL, 1902.

TOWN OF WHITBY v. GRAND TRUNK R. W. CO.

Railways—Statutory obligation—Enforcement by municipality—Prohibition against removal of "workshops"—Breach—Damages.

Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O. L. R. 480, 21 Occ.

N. 226, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in s. 37 of 45 V. c. 67 (O.), providing that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town:"—

Held, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 V. c. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Company before the amalgamation or by the defendants since amalgamation; and the plaintiffs should be allowed to amend and to have judgment for such damages as they were entitled to.

Held, also, that "the workshops now existing" meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops.

A. B. Aylesworth, K.C., and *J. E. Farewell*, K.C., for the plaintiffs.

W. Cassels, K.C., for the defendants.

FERGUSON, J.]

[12TH APRIL, 1902.

TUCKETT-LAWRY v. LAMOUREAUX.

Will—Annuity—Ademption—Evidence.

A testator gave by his will to each of two daughters an annuity for life of \$6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly, and the will was not altered:—

Held, that the doctrine of ademption applied, and that, notwithstanding the different natures of the two gifts, and

even without the evidence of intention, the second daughter's annuity must be treated as reduced *pro tanto*.

Held, also, however, that the evidence of intention was admissible and was conclusive.

Judgment of FERGUSON, J., 1 O. L. R. 364, 21 Occ. N. 187, affirmed.

E. Martin, K.C., and *A. B. Aylesworth*, K.C., for the appellant.

G. F. Shepley, K.C., and *E. H. Ambrose*, for the respondents.

ROBERTSON, J.]

ANDERSON v. MIKADO GOLD MINING CO.

Master and servant—Injury to servant—Non-observance of rules—Mines Act.

A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if, in consequence of the non-observance of these rules by a servant, that servant is injured, the master is not liable.

It was held that the master was not liable in damages for the death of the servant resulting from the servant using, in direct violation of rules, the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act.

Judgment of ROBERTSON, J., reversed.

A. B. Aylesworth, K.C., and *N. W. Rowell*, for the appellants.

R. C. Clute, K.C., and *A. R. Clute*, for the respondents.

MEREDITH, J.]

[16TH APRIL, 1902.]

MADILL v. TOWNSHIP OF CALEDON.

Way—Non-repair—Injury to pedestrian—Sidewalk built by voluntary subscription and statute labour—Liability of municipality to repair.

Judgment of MEREDITH, J., 3 O.L.R. 66, affirmed on appeal.

E. F. B Johnston, K.C., and *E. G. Graham*, for the appellants, the defendants.

E. E. A. DuVernet, for the plaintiff.

LOUNT, J.]

[10TH APRIL, 1902.]

FRANKEL v. GRAND TRUNK R. W. CO.

Railways—Carriage of goods—Claim for non-delivery—Place of delivery—Consignees—Refusal to accept—Termination of transitus—Position of carriers—Bailees—Duty to have goods ready for delivery—Damages for breach.

Action for breach of contract to carry and deliver five car loads of scrap iron which the plaintiffs had sold to a rolling mill company. The contract of sale provided for delivery at the purchasers' mill at Sunnyside, Toronto, and in the shipping bills the property was addressed to the plaintiffs or the mill company, Sunnyside. The mill was situated near the defendants' main track. There was no station there, but there was a siding leading off the track into the mill. The station nearest to the mill was Swansea, and the cars containing the scrap iron arrived there, and notice of their arrival was sent to the plaintiffs and to the mill company. The station agent had previously been instructed by the plaintiffs to deliver all cars addressed to the plaintiffs at Swansea or Sunnyside, to the mill company. The mill company, after inspection of the goods at Swansea, refused to accept them. The cars were not sent on to Sunnyside, but remained at Swansea, and, being in the way of the traffic, had been, before the refusal to accept, run up a side line and left in a cutting. This was early in February, and, while the cars were in the cutting, the wheels became covered with clay by reason of a thaw, and then were frozen fast, and the cars were not got out until the end of April. The trial Judge found in favour of the plaintiffs, and assessed the damages at \$1,000. The defendants appealed.

Held, OSLER, J.A., dissenting, that the mill company were the consignees of the scrap iron, and had a right to put an end to the transitus at Swansea by refusing to receive it, and there was no necessity for the defendants to tender the goods at Sunnyside.

Held, however, MACLENNAN, J.A., dissenting, that the defendants were liable to the plaintiffs in damages for not keeping the cars, after the refusal, in such a position that the plaintiffs could unload them and remove their property.

[The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, and LISTER, J.J.A. LISTER J.A., died while the case was under consideration. A majority of the remaining members of the Court agreed upon a judgment

varying that of the trial Judge by limiting the plaintiffs' recovery to damages suffered by reason of the delay up to the time that the defendants had placed the cars in such a position that the plaintiffs could take their goods.]

Wallace Nesbitt, K.C., and *H. E. Rose*, for the appellants.

G. F. Shepley, K.C., and *J. Baird*, for the plaintiffs.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., 18TH FEBRUARY, 1902.]

FORD v. HODGSON.

Timber—Sale of—Interest in land—Severance—Identification—Vendor's lien—Injunction.

St. G., the owner of land, by an agreement in writing sold all the timber on it to E., taking promissory notes in payment. E. assigned all his interest in the agreement to S., his principal, who made the notes; E. indorsed them to St. G.

S. cut and removed timber from the land, and cut and piled on the land a lot of cordwood, which he sold to the defendant, but did not pay the notes.

St. G. sold the land and all her interest in the timber and the notes to the plaintiff.

The defendant sought to remove the wood, but the plaintiff obtained an injunction restraining him, and claimed a vendor's lien.

Held, that the sale of the timber to be removed in three years by the purchaser was of an interest in land, in respect of which a vendor's lien arose by operation of law, which was not displaced by the cutting or sale of the timber, as long as it could be identified and remained on the land; and the remedy was by an injunction and enforcement of the lien.

Summers v. Cook, 28 Gr. 179, followed.

Judgment of FALCONBRIDGE, C.J., affirmed.

W. R. Riddell, K.C., for the defendant.

R. J. McLaughlin, for the plaintiff.

[FALCONBRIDGE, C.J., BRITTON, J., 18TH MARCH, 1902.]

TORONTO GENERAL TRUSTS CORPORATION v. WHITE.

*Landlord and tenant—Arbitration and award—Valuation of buildings—
Interest on amount fixed by award.*

In a lease for twenty-one years it was provided that the buildings should be valued at the end of the term by three valuers or arbitrators, whose award should be made within the six months next preceding the 1st November, 1900, and the value paid by the lessor within six months from that date, with interest from that date.

Valuers or arbitrators were duly appointed, and possession given by the lessees on the 31st October, 1900, the last day of the term, but the award was not made until the 30th November, 1901.

Held, that the lessees were entitled to interest on the value of the buildings, as ascertained by the award, from the 1st November, 1900.

Judgment of MACMAHON, J., reversed.

F. E. Hodgins, for the plaintiffs.

W. Laidlaw, K.C., for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 14TH MARCH, 1902.]

HALL v. ALEXANDER.

*Easement—Projecting eaves—Descending water and snow—Common owner—
Conveyances by—Grant and reservation of rights.*

The plaintiff's predecessor in title, owning a lot of land, built two houses thereon, with a passageway between them, and the eavestrough and part of the eaves of the defendant's house projecting over the passageway. He then conveyed to the defendant's predecessor in title the westerly house, "with the privilege and use of the projection of the roof . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection, and that, on any sale or conveyance of the house to the east, he would "save and reserve the right . . . to such projection."

Subsequently he conveyed the easterly house, with the land between the two houses, to the plaintiff, "subject to the right . . . to the use of the projection . . . as at present constructed."

In an action to compel the defendant to prevent the discharge of water, snow, and ice from his roof into the plaintiff's passageway:—

Held, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the grantor could not insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming down, and the plaintiff stood in no higher position than the grantor; that the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below; and the action was dismissed with costs.

Judgment of the County Court of York reversed.

G. H. Watson, K.C., for the defendant.

E. E. A. DuVernet and *W. W. Vickers*, for the plaintiff.

[ROBERTSON, J., 10TH APRIL, 1902.]

In re REX v. MEEHAN.

Criminal law—Municipal elections—Illegal voting—Indictable offence—Information—Police magistrate—Mandamus.

Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII. c. 26, s. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial jurisdiction to compel him to consider and deal with an application for an information for such an offence.

J. M. McEvoy, for the applicant.

E. E. A. DuVernet, for the magistrate.

[MEREDITH, J., 24TH MARCH, 1902.]

WEBB v. NEW YORK LIFE INS. CO.

Insurance—Life—Tender of premium—Refusal to accept—Necessity for tender of future premiums.

The plaintiff was the widow of Joseph Webb, whose life was insured by the defendants, by a policy bearing date the

15th July, 1890, for \$1,000, on a ten year renewable plan. The premium was payable monthly, and amounted to \$1.34.

The statement of claim averred that the plaintiff duly paid the monthly premiums down to and inclusive of the premium due for the month of December, 1891, and that said premiums were paid at the defendants' office in the city of Toronto. It further alleged that Joseph Webb went from the city of Toronto to the city of Chicago, in the State of Illinois, one of the United States of America, in the month of December, 1891; that the plaintiff, as was her custom, attended at the defendants' place of business in Toronto in due time to pay the monthly assessment for January, 1892, and *tendered the same*, but that the defendants refused to accept the said assessment, and at the same time further refused to accept any future assessment, unless Joseph Webb should be re-examined, giving as a reason for such refusal that, having left the country, he would have to be re-examined; that the plaintiff was and always had been ready and willing to pay the monthly assessments as required by the policy, but the defendants refused to accept the same; that Joseph Webb died on the 22nd June, 1895.

The defendants denied the allegations as to tender.

The action was tried before MEREDITH, J., at Toronto.

F. E. Hodgins and *D. T. Smith*, for the plaintiff.

D. T. Symons and *H. G. Kingstone*, for the defendants.

MEREDITH, J. (at the trial):—The onus of proof of a tender is of course upon the plaintiff; and I am far from satisfied that she has discharged that burden. I am not prepared to accept the testimony of the plaintiff and her sister as to what took place ten years ago. I am not prepared to accept as a fact the statement that the money was tendered and refused as they allege. I find as a fact that that is not proved. That is of course enough for the determination of the case against the claim. I am not favourably impressed with the manner in which the testimony was given: it cannot outweigh all other considerations and outweigh probabilities. I do not say that these witnesses have intended to mislead the Court. In ten years a person needing a thousand dollars, perhaps often needing ten dollars, very urgently, may easily learn to believe that to have been a fact which it is her interest to allege as a fact. I am not able to find on the whole evidence in favour of the plaintiff on this first question—this question at the threshold of the claim.

I am also of opinion that under the circumstances *one tender would not have been sufficient to maintain this action.* There were no such circumstances as would justify the assured in the reasonable belief that future tenders would be rejected in the way alleged. No attempt was made to seek a reason from any one in authority. The tender was made, if made at all, to a subordinate clerk in the office. No attempt was made to see the agent there. No complaint was made to the head office. Nothing was done such as one would expect to be done where a person's rights have been disregarded and it is sought to have them recognized. Upon this second ground, therefore, I think the action also fails.

In my opinion it is a case in which a tender of the future payments was necessary. Some further steps should have been taken to do that which the contract called for on behalf of the assured. He made no complaint; he went on as if he were perfectly satisfied there was a practical abandonment of the insurance; all of which is consistent with my first finding, as well as the second, and inconsistent with the claim now made.

[LOUNT, J., 14TH MARCH, 1902.]

In re CITY OF KINGSTON AND KINGSTON LIGHT, HEAT,
AND POWER CO.

Municipal corporation—Purchase of gas works—"Works, plant, appliances, and property" of company—Arbitration to fix value—Franchise and goodwill.

By agreement between the city and the company, the former was to have the option of purchasing and acquiring the works, plant, appliances, and property of the company used for light, heat, and power purposes, both gas and electric, upon giving to the company notice as therein provided, at a price to be fixed by arbitration under the Municipal Act. The majority of the three arbitrators, in fixing the value of the works, plant, appliances, and property, included nothing for the earning power or franchise and rights of the company.

Held, that they were right in so doing, though the determination of the question was not to be decided by the meaning to be attached to the word "property," but by the fair interpretation and construction of the agreement. The

word "property" as used in the agreement was, on the fair construction of the instrument, limited to the preceding words, and these words were not to be construed so as to include such an intangible right as the franchise or goodwill of the company.

R. T. Walkem, K.C., and *J. L. Whiting*, K.C., for the company.

D. M. McIntyre, for the city corporation.

[BRITTON, J., 14TH APRIL, 1902.]

In re SALTER AND TOWNSHIP OF BECKWITH.

Intoxicating liquors—Local option by-law—Directions to voters—Motion to quash—Electors' status to oppose.

A local option by-law named as one of the polling places a small unincorporated village, without specifying any house, hall, or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could be easily found.

Held, following *In re Huson and South Norwich*, 19 A. R. 343, that the polling place was sufficiently defined.

But *held*, also, that, as directions to voters had not been, as required by the Municipal Act, ss. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up under the direction of the council of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by s. 204, and the fact that no harm had, as far as shewn, resulted, being no answer.

The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name.

Re Mace and Frontenac, 42 U. C. R. at p. 76, followed.

G. H. Watson, K.C., and *J. Grayson Smith*, for the applicant.

J. J. Maclaren, K.C., and *J. S. L. McNeely*, for the respondents.

IN CHAMBERS.

[MEREDITH, C.J., 10TH APRIL, 1902.]

PENNINGTON v. MORLEY.

*Mechanic's lien—Action begun by statement of claim—Service out of Ontario
—Jurisdiction to allow.*

There is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action.

In re. Busfield—Whaley v. Busfield, 32 Ch. D. 123, followed.

Such service is not a matter of practice, but, of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons.

Semble, that if there were power to allow service of such a statement out of Ontario, it could not be allowed *nunc pro tunc* after it had been effected without an order.

Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanic's lien, under R. S. O. 1897 c. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside.

History of the legislation in Ontario as to service out of the jurisdiction.

W. M. Douglas, K.C., for the plaintiff.

J. H. Moss, for the defendants Crosby and Nordyke.

[THE MASTER IN CHAMBERS, 24TH MARCH, 1902.]

REX *ex rel.* ROSS v. TAYLOR.

Municipal elections—Quo warranto proceeding—Cross-examination on affidavits—Discretion as to permitting.

An application by the relator for an order allowing him to proceed and cross-examine the several persons who had made the affidavits filed by the respondent in an answer to the affidavits filed by the relator in support of his motion in the nature of a *quo warranto* to void the election of the respondent as reeve of the village of Port Dover.

The application was heard by the Master in Chambers on the 21st March, 1902.

W. M. Douglas, K.C., for the relator.

S. C. Biggs, K.C., for the respondent, opposed the application on account of the great expense, which would exceed the amount of the relator's recognizance.

THE MASTER IN CHAMBERS.—I have read all the affidavits filed, and, in my opinion, the application should not be granted. In *Regina ex rel. Piddington v. Riddell*, 4 P. R. 80, the late Mr. Justice Morrison in delivering judgment said, at p. 85: "On the argument I was pressed by counsel for the relator to order further proceedings with a view to the oral examination of the parties and the production of their books for the purpose of impeaching the facts sworn to by Clinkinbroomer and the defendant. I could only be warranted in doing so upon the ground that I considered the facts sworn to, to be untrue. I see no reason for my thinking so." In that case argument had taken place upon the affidavits filed; here no argument has been heard. I refer to the case to shew that it was a matter of discretion as to permitting the examination or not. In using this discretion I think that no examination would be helpful to me in considering the matter. The relator has the right to file affidavits in reply to those on behalf of the respondent. He will have an opportunity of doing so if he desires it, and the matter will stand adjourned for that purpose.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 18TH MARCH, 1902.]

DE BURY v. DE BURY.

Husband and wife—Purchase by husband of real estate in name of wife—Gift—Presumption—Surrender of leases of wife's freeholds—Merger—Purchase by husband—Lien—Title of wife.

Freehold property and leaseholds, the reversion in which was vested in the plaintiff's wife by devise under her father's will, were purchased by the plaintiff in 1893, while acting as manager of her landed estates, with his own money. The

freehold property, was conveyed by the vendor to the plaintiff's wife by his directions, and the surrender of leases was to the plaintiff and wife. Under the law at that date a husband was entitled to the rents and profits of his wife's real estate. By s. 4 (1) of the Married Women's Property Act, 1895 (N.B.), real estate belonging to a married woman, not acquired from her husband, is held and may be disposed of by her as a *feme sole*.

Held, that the presumption that a purchase by a husband in the name of his wife is intended to be a gift to her was not rebutted by the evidence in the case.

2. That the wife could not alienate the freehold estates so acquired from her husband, at least during his lifetime.

3. That on the purchase of the leases the estate under them merged in the freehold of the wife, and that she could dispose of the whole estate without the husband's consent, and free of any equity in him for repayment of the purchase money or money expended by him in making repairs to the property.

Stockton, K.C., and *Mullin*, K.C., for the plaintiff.

Earle, K.C., for the defendants.

MANITOBA

In the King's Bench.

[DUBUC, J., 20TH MARCH, 1902.]

ROBERTS v. HARTLEY.

Fraudulent conveyance—Husband to wife—Action to set aside—Land exempt as homestead—Effect of conveyance as to exemption.

The plaintiff recovered judgment against one of the defendants, and registered a certificate against his lands; he alleged that a conveyance made by one defendant to the other, his wife, was fraudulent and void under 13 Eliz. c. 5 and the Assignments Act, R. S. M. c. 7, and prayed that it should be set aside, and the lands sold to satisfy his judgment. The defendants contended that the property was their actual residence and home, and was, under the

Judgments Act, R. S. M. c. 80, s. 12, exempt from the registered judgment and proceedings of the plaintiff. The defendants lived in the town of Neepawa, on the property in question, which was their actual residence and home; the man was not a farmer; the property was worth \$1,200; there was a mortgage on it of \$600; so that the interest of the defendants in the property was \$600. The statute, in such cases, allows an exemption of \$1,500.

Held, that, had not the man transferred the property to his wife, his right of exemption could not have been in any way impeached. Before the transfer the property was not available to his creditors for payment of their claims, and the conveyance did not remove from the reach of creditors anything on which they might have realized their judgments: *Osler v. Muter*, 19 A. R. 94; *Field v. Hart*, 22 A. R. 449.

Action dismissed without costs.

C. P. Wilson and *F. L. Davis*, for the plaintiff.

A. Haggart, K.C., for the defendants.

[DUBUC, J., 19TH APRIL, 1902.]

MANITOBA FARMERS' HEDGE AND WIRE FENCE CO.
v. STOVEL CO.

Libel—Trial by jury—Verdict for plaintiff for \$1—Depriving plaintiff of costs.

Action for libel in which the jury brought in a verdict in favour of the plaintiffs for \$1. The plaintiffs' counsel applied for full costs of suit, which was opposed.

By Rule 926, where any action is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge or the Court otherwise orders.

Held, that the verdict of \$1 recovered should not carry costs, but no costs should be allowed to defendants: *Moore v. Gill*, 4 Times L. R. 738; *Myers v. Financial News*, 5 Times L. R. 42; *O'Connor v. Star*, 68 L. T. 146; *Wood v. Cox*, 5 Times L. R. 272.

J. F. Kilgour, for plaintiffs.

H. M. Howell, K.C., for defendants.

[BAIN, J., 12TH APRIL, 1902.]

REX v. CARRIERE.

Criminal law—Criminal Code, s. 773—Trial for offence, other than that for which accused committed.

The accused was committed for trial by a magistrate, after a preliminary inquiry, on an information dated 26th January, 1902, which charged that he, "being in the employment of the rural municipality of St. Boniface as secretary-treasurer, and being intrusted by virtue of such employment with the receipt, custody, and possession of the moneys of said municipality, did fraudulently and unlawfully steal" certain specified sums of money amounting to \$428.79, on certain specified dates, and the accused elected to take a speedy trial before a Judge on this charge.

On 30th November, 1901, another information had been laid against the accused, charging that he, "between the 31st day of December, 1899, and the 14th day of September, 1901, being secretary-treasurer of the rural municipality of St. Boniface, unlawfully stole various sums of money belonging to the said rural municipality, amounting in all to \$1,600."

No one appeared to prosecute this charge on the day fixed for its hearing, and the magistrate thereupon discharged the accused.

When the accused came up for his speedy trial before the Judge, on the day fixed for the trial of the offence charged on 26th January, 1902, counsel for the Crown stated that he did not intend to proceed against the accused on the charge on which he had been committed for trial, but wished, under the provisions of s. 773 of the Criminal Code, to prefer a charge against him practically similar to the one which was set out in the information of 30th November, 1901, that the accused, between 1st December, 1899, and 14th September, 1901, had unlawfully and fraudulently converted to his own use \$1,629.98, being part of the moneys received by him as such secretary-treasurer.

Counsel for the accused opposed the application.

Section 773 of the Code provides that the prosecuting officer "may, with the consent of the Judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part, other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges

do not appear or are not mentioned in the depositions upon which the prisoner was so committed."

Held, that the application should be refused. The provisions of s. 773 must be controlled, to some extent at any rate, by s. 767, s.-s. 3, (63 & 64 V. c. 46), which provides that "if the prisoner has been brought before a Judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial."

In practice a Judge should not, against the wish of the prisoner, give his consent to any charge being preferred against him, unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial and on which he has been brought before a Judge and consented to be tried without a jury.

The charge which it was proposed to prefer against the accused was substantially different from the one on which he had been committed for trial.

As counsel for the Crown stated the Crown did not intend to proceed against the accused on the charge for which he had been committed for trial, he was discharged.

G. Patterson, for the Crown.

R. A. Bonnar and *R. G. Affleck*, for the accused.

[RICHARDS, J., 26TH MARCH, 1902.]

COX v. SCHACK.

Sale of goods—Lien contract—Execution of, after purchaser took possession of goods—Lien Notes Act—Bills of Sale and Chattel Mortgage Act—Non-registration of instrument.

In the summer of 1900 Schack verbally agreed with one Couse to place in his store certain shop fittings; the price, \$2,000, was to be paid half in cash and half by Couse's notes; the fittings were put together in Couse's store by Schack's workmen. Schack never put his name on the fittings, or any other distinguishing name, as required by s. 2 of the Lien Notes Act, R. S. M. c. 87.

Couse commenced business on the 6th September, 1900; on or before that date, he, with Schack's knowledge and

assent, took possession of the fittings and used them as an owner would. On the 6th September Couse had practically carried out his part of the contract, and had paid in cash nearly half of the price, and had given Schack his notes for about the other half.

On the 15th September (nine days after Couse had taken possession of the fittings and commenced business) he executed, at Schack's request, an instrument in writing, stating that the property in the fittings should remain in Schack and should not pass to him, Couse, until paid for in full, and that on default Schack might enter and retake the fittings. The instrument was not registered under the Bills of Sale and Chattel Mortgage Act.

On the 1st June, 1901, Couse made an assignment to the plaintiff, under the Assignments Act; he then owed Schack \$367 on the fittings; when the assignment was made, the plaintiff took possession under it of Couse's stock in trade, including the fittings in question.

On the 21st June, while the plaintiff was in possession, Schack, by his bailiff, entered the store and seized the fittings, claiming them by virtue of the instrument executed by Couse, and advertised them for sale. The plaintiff then began this action to restrain Schack and his bailiff from selling, and to have the fittings returned, and the instrument executed by Couse declared void as against the plaintiff.

Judgment was given for the plaintiff, with costs, declaring that as against him, as assignee of Couse, the defendants had no claim on the goods in question; that from the time of the assignment the instrument of the 15th September, 1900, was null and void as against the plaintiff, and the plaintiff was entitled to the goods.

Held, as to the contention that the provisions of the Lien Notes Act rendered Schack's claim void, that the fittings in question were manufactured goods within the meaning of that Act, but that the plaintiff was not such a person as could take advantage of its provisions. It must be restricted to cases where the claim under the lien note would be a fraud upon some purchaser who had, *bona fide* and without notice of the claim of the lien note holder, given valuable consideration for the goods. That case did not arise here.

The property had passed to Couse on or before the 6th September, before the instrument of the 15th September

was executed; that instrument, not having been registered, was null and void as against the creditors of Couse.

G. A. Elliott, for the plaintiff.

C. P. Wilson and *J. A. Machray*, for the defendants.

BRITISH COLUMBIA.

In the Supreme Court.

[HUNTER, C.J., 28TH MARCH, 1902.]

DIAMOND GLASS CO. v. OKELL MORRIS CO.

Costs—Summons for judgment under Order XIV.

Summons for judgment under Order XIV. The right to judgment was not disputed, but it was contended on behalf of the defendants that the plaintiffs were not entitled to any more costs than they could have got by taking judgment in default of defence, as the time for filing the defence had expired before the summons was issued.

Held, that the plaintiffs were entitled to the costs of the summons.

W. A. Gilmour, for the plaintiffs.

A. J. Kappels, for the defendants.

Supreme Court of Canada.

EXCHEQUER COURT.]

[20TH FEBRUARY, 1902.]

REX v. LIKELY.

Crown—Expropriation of land—Damages—Valuation—Evidence.

The Crown expropriated land of L. and had it appraised by valuers, who assessed it at \$11,400, which sum was tendered to L. but refused. L. brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him \$17,000. On appeal by the Crown from this judgment:—

Held, GIROUARD, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuers was a very generous compensation to L. for the loss of his land, and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuers should not be given in this case, expressly stated that the same course would not necessarily be followed in future cases of the kind.

Judgment below reversed.

McAlpine, K.C., for the appellant.

Stockton, K.C., for the respondent.

ONTARIO.]

[11TH MARCH, 1902.]

TOWNSHIP OF ELIZABETHTOWN v. TOWNSHIP OF AUGUSTA.

*Drainage—Artificial obstruction—Failure of scheme—Report of engineer—
Removal of obstruction—New report without examination.*

In 1884 a petition was presented to the plaintiffs' council asking for the removal of a dam and other obstructions to Mud Creek, into which the drainage of the township and of Augusta, adjoining, emptied. The council had the creek examined by an engineer, who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each

township. The council then passed a by-law authorizing the work to be done, which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886 the Act was amended, and a fresh petition was presented to the council, which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval), but presented to the council his former report, plans, specifications, and assessment, and another by-law was passed, under which the work was done. In an action to recover from Augusta its proportion of the assessment:—

Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 4, 21 Occ. N. 375, STRONG, C.J., dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the plaintiffs' council to cause the work to be done, and claim from Augusta its proportion of the cost.

Held, further, reversing the judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment.

Appeal allowed with costs.

G. H. Watson, K.C., and H. A. Stewart, for the appellants.

J. A. Hutcheson, for the respondents.

QUEBEC.]

[18TH FEBRUARY, 1902.]

In re TWO MOUNTAINS DOMINION ELECTION.

ETHIER v. LEGAULT.

Parliamentary elections—Petition—Lost record—Substituted copy—Judgment on preliminary objections—Discretion of Court below—Jurisdiction.

The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections, and, in retransmission to the Court below, the record was lost. Under the procedure in similar cases in the Province where the petition was pending, a record was reconstructed in substitution for the lost record, and, upon verification as to its correctness, the Court below ordered the substituted record

to be filed. Thereupon, the respondent in the Court below raised preliminary objections, traversing the correctness of a clause in the substituted petition, which was dismissed by the judgment appealed from.

Held, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the Court below in ordering the substituted record to be filed.

Appeal dismissed with costs.

Belcourt, K.C., for the appellant.

Beaudin, K.C., for the respondent.

[20TH FEBRUARY, 1902.]

In re RICHELIEU DOMINION ELECTION.

Appeal—Controverted election—Judgment dismissing petition—Want of prosecution—R.S.C. c. 32.

There is no right of appeal to the Supreme Court of Canada from a judgment dismissing a petition against the return of a member of the House of Commons for want of prosecution within the six months prescribed by R. S. C. c. 9, s. 32, the Controverted Elections Act.

Appeal quashed with costs.

Fitzpatrick, K.C., A.-G., for the respondent.

Bisaillon, K.C., for the appellant.

In re BEAUHARNOIS DOMINION ELECTION.

LOY v. POIRIER.

Parliamentary elections—Petition—Trial—Extension of time—Appeal—Jurisdiction.

On the 25th May, 1901, an order was made by BELANGER, J., for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois,

thirty days after judgment should be given on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on the 29th October, and on the 19th November, on application of the petitioner for instructions, another order was made by the same Judge which directed that judicial days only should be counted in computing the thirty days, and stating that such was the meaning of the order of the 25th May, and that the 6th December would be the date of trial. On the petition coming on for trial on the 6th December, the appellant moved for peremption on the ground that the six months' limitation for hearing had expired. The motion was refused, and on the merits the election was declared void. On appeal to the Supreme Court:—

Held, DAVIES, J., dissenting, that an appeal would not lie from the order of the 19th November; that the Judge had power to make such order, and its effect was to extend the time for trial to the 6th December; and that the order for peremption was, therefore, rightly refused.

Beique, K.C., and *Brossoit*, K.C., for the appellant.

Bisaillon K.C., and *Laurendeau*, for the respondent.

[3RD MARCH, 1902.]

DALLAS v. TOWN OF ST. LOUIS.

*Municipal corporations—Negligence—Personal injuries—Drains and sewers
—Liability—Officers and employees.*

The Act incorporating the town of St. Louis, Quebec, gives power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation."

Held, affirming the judgment below, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control.

Lafleur, K.C., and *Hibbard*, for the appellant.

Bisaillon, K.C., and *Migneault*, K.C., for the respondents.

[4TH MARCH, 1902.]

HIGGINS v. STEPHENS.

Partnership—Account—Action pro socio—Procedure—Appeal.

The judgment appealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and the liquidation of the same, without producing full and regular accounts of the partnership affairs.

Held, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong, and, therefore, that the appeal should be dismissed.

Markin and *Demers*, for the appellant.

Atwater, K.C., and *Stephens*, K.C., for the respondent.

PRICE v. TALON.

Master and servant—Injury to servant—Saw-mill—Opening in floor—Fencing—Negligence—Appeal—Findings at trial—Contributory negligence.

T. was working in a saw-mill at a time when the saws were stopped in order to change any saws requiring to be replaced. One only, the butting saw, was left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen sat on this table, and T., going towards the end to find a seat, slipped and fell into an opening in the floor where the deal ends were dropped on being cut off. On slipping he threw out his left arm, which came against the saw in motion, and was cut off. In an action for damages against the mill-owner, the trial Judge held that the latter was negligent in not protecting the opening and in not stopping the butting saw with the others. On appeal from the decision of the Court of Review confirming the judgment at the trial:—

Held, affirming the judgment, that the want of protection of the opening was negligence for which the owner was responsible.

Held, also, STRONG, C.J., *hæsitante*, that, if T. was guilty of contributory negligence, he was sufficiently punished by a division of the damages at the trial.

Held, per SEDGEWICK, DAVIES, and MILLS, JJ., that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others.

Stuart, K.C., and *Bender*, K.C., for the appellant.

Belcourt, K.C., and *Martineau*, for the respondent.

NOVA SCOTIA.]

[18TH FEBRUARY, 1902.]

BROWN v. MOORE.

Contract—Statutory prohibition—Penal statute—Wholesale purchase—Liquor license—Guarantee—Validity of—Forfeiture.

An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect.

The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute.

Judgment below affirmed.

J. J. Ritchie, K.C., for the appellant.

R. L. Borden, K.C., for the respondent.

[19TH FEBRUARY, 1902.]

COMMERCIAL BANK OF WINDSOR v. MORRISON.

Promissory note—Conditional indorsement—Principal and agent—Knowledge of agent—Constructive notice—Deceit.

A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled.

Pym v. Campbell, 6 E. & B. 370, followed.

The principal is affected by notice to the agent, unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the principal to shew that the agent had an interest in deceiving his principal.

Kettlewell v. Watson, 21 Ch. D. 685, and *Richards v. Bank of Nova Scotia*, 26 S. C. R. 381, referred to.

Judgment below affirmed.

J. J. Ritchie, K.C., for the appellant.

Roscoe, K.C., for the respondent.

[20TH FEBRUARY, 1902.]

OLAND v. McNEIL.

*Sale of land—Conveyance absolute in form—Mortgage—Resulting trust—
Notice to equitable owner—Estoppel—Inquiry.*

The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners.

Judgment below affirmed.

R. L. Borden, K.C., for the appellants.

W. F. O'Connor, for the respondent McNeil.

Newcombe, K.C., and *Drysdale*, K.C., for the respondent Wallace.

SKINNER v. FARQUHARSON.

Will—Capacity of testator—Insane delusion.

F. in 1890 executed a will providing generally for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support; the son was given half the residue, and the testator's daughter the other half; his wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house, and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.:—

Held, reversing the judgment of the Supreme Court of Nova Scotia, 33 N. S. Reps. 261, *SEDGEWICK*, J., dissenting, that the provision made by the will for the testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them, and the will was therefore valid.

R. L. Borden, K.C., for the appellant.

Harrington, K.C., for the respondent.

HAWLEY v. WRIGHT.

Negligence—Personal injuries—Use of elevator—Contributory negligence.

H. entered an elevator in a public building, after inquiring of the boy in charge if a certain tenant was in his office, and being told he was not. He remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minutes when a call came from the fifth floor. The elevator went up, and the passenger who had rung entered, H. at first making no attempt to get out. The operator then shoved to the door of the elevator, and at the same time started the wheel, which had to be completely turned round to move the elevator. The turning of the wheel would also close the door. While it was being turned H., without giving warning, tried to get out through the door, and, the elevator being then descending, he was caught between it and the floor and injured, so that he died soon after. In an action by his administrator against the owner of the building:—

Held, that the accident was entirely due to the conduct of H. himself, and the owner was not liable.

Judgment in 34 N. S. Reps. 365 affirmed.

W. F. O'Connor, for the appellant.

R. E. Harris, K.C., for the respondent.

PETERS v. WORRALL.

Account—Action for—Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.

P. was agent to manage the wharf property of W. and receive the rents and profits thereof, being paid by commission. When his agency terminated, W. was unable to obtain an account from him, and brought an action therefor, which was compromised by P. paying \$375, giving \$125 cash and a note for the balance, and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that on one of the accounts assigned to him \$100 had been paid, and demanded credit on his note for that sum. This W. refused, and in an action on the note P. asserted that the error avoided the compromise, and that the note was without consideration, or in the alternative that the note should be rectified.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that, as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing a greater liability on the part of P., W. was entitled to recover the full amount of the note.

Drysdale, K.C., and *Mellish*, for the appellant.

Harrington, K.C., for the respondent.

NEW BRUNSWICK.]

[19TH FEBRUARY, 1902.]

MCCLEAVE v. CITY OF MONCTON.

Principal and agent—Police constable—Illegal act—Liability of municipal corporation—Respondeat superior.

M. was convicted by the police magistrate for Moncton of the offence of keeping liquor for sale in his hotel, contrary to the provisions of the Canada Temperance Act. The conviction was quashed on *certiorari*, on the ground that the police officer who laid the information for a search warrant had himself illegally executed such warrant. M. then brought an action against the city corporation claiming damages for unlawful entry into his hotel and carrying off liquors therefrom, and for the value of the liquor destroyed under the Act.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the police officer was not the agent of the city in executing the warrant, though his appointment came from the city; that the city only performed a statutory duty in appointing him; and the doctrine of *respondeat superior* had no application.

Teed, K.C., for the appellant.

Chandler, K.C., for the respondent.

BRITISH COLUMBIA.]

[7TH MARCH, 1902.]

WARMINGTON v. PALMER.

Negligence—Work in mine—Entering shaft—Code of signals—Disregard of rules—Damages.

A miner was getting into a bucket by which he was to be lowered into the mine when, owing to the chain not being

checked, his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine-owners, the jury found that the system of lowering the men was faulty, the men in charge of it negligent, and the engine and brake by which the bucket was lowered not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing, among other things, that signals should be given by any miner wishing to go down the mine or be brought up by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual, in descending, to signal with the bells, and that the injured miner knew of the rules, but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for the plaintiff:—

Held, reversing that judgment, 8 Brit. Col. L. R. 344, and restoring the judgment of the trial Judge, 7 Brit. Col. L. R. 414, that there was ample evidence to support the findings of the jury that the defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employers and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should, therefore, not have been granted.

Held, further, that, as the negligence causing the accident was not that of the employers themselves, but that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employers' Liability Act, R. S. B. C. 1897 c. 69.

E. P. Davis, K.C., for the appellant.

R. C. Clute, K.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 4TH MARCH, 1902.]

FINDLAY v. OTTAWA FURNACE AND FOUNDRY CO.

Industrial design—Cook-stove—Imitation—Infringement—Injunction—Cancellation of conflicting design.

The plaintiffs were registered owners of an industrial design for a cook-stove, called the "Royal Favorite, 9-25,"

which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of such stoves, caused a model to be made from it, and, with some minor alterations chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement, and for an order to expunge the defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs.

Held, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of the defendants' design should be expunged from the register.

W. D. Hogg, K.C., for the plaintiffs.

G. F. Henderson, for the defendants.

[20TH MARCH, 1902.]

TUCKER v. THE KING.

Crown—Claim against, for payment for services rendered as commissioner, R.S.C.c. 115—Servant—Public office.

A person appointed under the provisions of R. S. C. c. 115 as a commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown, cannot recover against the Crown payment for his services as such commissioner, there being no provision for such payment in that enactment or elsewhere.

2. The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute.

3. The appointment partakes more of the character of a public office, than of a mere employment to render a service under contract, express or implied.

E. L. Newcombe, K.C., for the Crown.

S. P. Leet, K.C., for the suppliant.

HAMBLY v. ALBRIGHT.

Patent for invention—Process for manufacturing phosphorus—Importation and non-manufacture—Patent Act, s. 37—Interpretation.

Section 37 of the Patent Act, which provides that a patent shall be void at the end of two years from the date

thereof, unless the patentee, his legal representative or assignee, within that period or any authorized extension thereof, commence and continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada, does not apply when the invention is for an art or process.

2. A patentee is not in default for not manufacturing his invention unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price, and where the invention is a process only, the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum.

The Anderson Tire Co. of Toronto v. American Dunlop Tire Co., 5 Ex. C. R. 100, referred to.

3. The effect of s. 37 of the Patent Act is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the interest of the owner is concerned.

H. Aylen, K.C., and A. W. Duclos, for the plaintiff.

F. S. MacLennan and C. A. Duclos, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, C.J.]

[12TH APRIL, 1902.

MacLAUGHLIN v. LAKE ERIE AND DETROIT RIVER
R. W. CO.

*Patent for invention—Contract—Grant—Licensee—Revocation—Right to
manufacture—Changes in article manufactured.*

By written agreement the plaintiff granted to the defendants the license and right to use a certain patented in-

vention of his, being an automatic air brake, and to equip their rolling stock in whole or in part with the same during the term of the patent. He also bound himself to supply the defendants with the air brake and equipments at a certain price. The plaintiff complained that, though the object of his agreement was that his brake might be advertised by its user on the defendants' road in the form in which he had patented it, the defendants were injuring his invention by substituting a different mechanical device of their own for one of those employed by him in the construction of the instrument, and using the brake as thus altered to his detriment. The plaintiff contends that, if the defendants used his invention at all, they must use it in accordance with the form described in his patent, and asked for an injunction.

Held, ARMOUR, C.J.O., dissenting, that the defendants had a right so to do. In the absence of agreement, there is nothing to prevent a licensee from making such changes or alterations as he thinks proper, and there was no stipulation here restricting the ordinary legal right of the licensees to make for their own use such changes or alterations in the article covered by the invention which they had been authorized to use, as they might think proper, or restricting the use of the invention to the precise form in which the plaintiff had himself given it birth.

Judgment of MEREDITH C.J., 2 O. L. R. 190, 21 Occ. N. 466, reversed.

W. Cassels, K.C., and *A. W. Anglin*, for the defendants, appellants.

J. H. Rodd, for the plaintiffs.

FALCONBRIDGE, C.J.]

MYERS v. SAULT STE. MARIE PULP AND PAPER CO.

Master and servant—Injury to servant—Dangerous machinery—Negligence—Findings of jury—Reasonable precautions—Factories Act—Default of fellow-servant—Excessive damages—New trial.

A workman employed by the defendants, in order to do his work, had to climb a step ladder and step over the unguarded rim of a cogwheel, to a plank on which he did his work. In coming from his work a truckman removed the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel and he was injured.

At the trial the jury in answer to questions found that the injury to plaintiff was caused by the negligence of the defendants, and not by his own negligence or want of proper care; that it was only to a certain extent caused by the negligence of a fellow-servant, for, if the wheel had been properly guarded and the ladder properly fastened to the floor, the accident would not have happened; that the negligence of the defendants consisted in not guarding the wheel and fastening the ladder; that the wheel was a dangerous part of the mill gearing, and was not, as far as practicable, securely guarded; that he would not have received the injury if it had been so securely guarded.

Held, that the findings of the jury as to negligence were amply supported by the evidence, and could not be interfered with; that the defendants were bound by the common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions; that the defendants were also bound by the Factories Act to securely guard, as far as practicable, all dangerous parts of their machinery; that the jury having so found, and their finding being supported by the evidence, the intervention of the truckman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence, for their negligence still remained an operative cause of the workman's injury.

Mann v. Ward, 8 Times L. R. 699, not regarded as an authority.

Judgment of FALCONBRIDGE, C.J., affirmed, but, as the damages were considered excessive, a new trial was granted unless the plaintiffs would consent to reduce the amount of the damages.

W. R. Riddell, K.C., and *J. E. Irving*, for the appellants.

W. M. Douglas, K.C., for the respondents.

FERGUSON, J.]

DOVER v. DENNE.

Trusts and trustees—Liability for breach of trust by co-trustee—"Honestly and reasonably"—52 V. (2) c. 15, s. 1.

A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same

professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated the moneys of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be wealthy.

Held, that the defendant, having acted honestly and reasonably within the meaning of 62 V. (2) c. 15, s. 1, was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor.

Decision of FERGUSON, J., affirmed.

A. B. Aylesworth, K.C., and *E. B. Edwards*, K.C., for the appellants.

G. H. Watson, K.C., and *L. M. Hayes*, for the respondent.

LOUNT, J.]

[10TH APRIL, 1902.

In re VILLAGE OF MARKHAM AND TOWN OF AURORA.

Municipal corporations—By-law—Bonus—Promotion of manufactures—Removal of industry “already established”—Municipal Amendment Act, 1900, s. 9—Motion to quash registered by-law—Delay.

By s. 9 of the Municipal Amendment Act, 1900, a new sub-section, 12, is added to s. 591 of the Municipal Act, R. S. O. 1897 c. 223, which new section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality, but (e) “no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province.”

Held, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under cl. (e), notwithstanding that these persons

had determined, before negotiating with the town, to remove their business *from* the village at all events, and *to* such other place as should offer the largest inducement.

The by-laws were quashed, upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over to the manufacturers.

Decision of LOUNT, J., reversed.

W. E. Raney and *A. Mills*, for the village corporation, the appellants.

A. B. Aylesworth, K.C., and *T. H. Lennox*, for the town corporation, the respondents.

BOARDS OF CO. JJ.]

[12TH APRIL, 1902.]

In re BELL TELEPHONE CO. ASSESSMENT.

In re TORONTO ELECTRIC LIGHT CO. ASSESSMENT.

In re TORONTO RAILWAY CO. ASSESSMENT.

In re TORONTO INCANDESCENT LIGHT CO. ASSESSMENT.

In re OTTAWA ELECTRIC LIGHT CO. ASSESSMENT.

Assessment and taxes—Valuation of property—Electric companies—Rails, poles, and wires—Wards—Franchise—Going concern—Integral part of whole—1 Edw. VII. c. 29.

The Act 1 Edw. VII. c. 29, s. 2, has made no difference in the mode of valuing for assessment purposes the rails, poles, wires, and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in *In re Bell Telephone Company Assessment*, 25 A. R. 351; MACLENNAN, J.A., dissenting.

That Act merely removes one of the difficulties pointed out in the previous case, but does not extend the principle on which the value of such property, apart from the franchise of the company or its use as a going concern, is to be ascertained by the application of the rule provided by s. 28 of the Assessment Act for ascertaining its value. It is now to be valued as if it were all in one ward, that is to say, as a

whole or as an integral part of a whole, but still without reference to its connection with a franchise or its use as the property of a going concern.

Decisions of boards of County Court Judges affirmed.

A. B. Aylesworth, K.C., and *J. S. Fullerton*, K.C., for the corporation of the city of Toronto, appellants.

Taylor McVeity, for the corporation of the city of Ottawa, appellants.

G. Lynch-Staunton, K.C., and *E. H. Ambrose*, for the Bell Telephone Company, respondents.

H. O'Brien, K.C., for the Toronto Electric Light Company and the Toronto Incandescent Light Company, respondents.

J. Bicknell and *J. W. Bain*, for the Toronto Railway Company, respondents.

H. M. Mowat, K.C., for the Ottawa Electric Light Company, respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., LOUNT, J., 8RD MAY, 1902.]

CARR v. O'ROURKE.

Executors and administrators—Surrogate Courts—Grant of administration—Nominee of next of kin in Ontario—Discretion—Revocation—Fraud.

Only one of the next of kin, the sister, of an intestate resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a Surrogate Court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario.

Held, that the Surrogate Court had before it all those who were required by s. 41 of the Surrogate Courts Act, R. S. O. 1897 c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature

of the property of the deceased, and the age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendant.

Semble, that, even if the discretion had been improperly exercised, the grant would not have been revoked.

The practice of the Surrogate Courts in this Province is to apply the provisions of s. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act.

Held, also, affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant.

M. Wilson, K.C., and *J. B. O'Flynn*, for the plaintiff.

A. B. Aylesworth, K.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 29TH APRIL, 1902.]

GUNN v. HARPER.

Administrator ad litem—Death of appellant between argument and judgment—Dismissal of appeal—Security for costs.

Where an appellant to the Court of Appeal, being the plaintiff in the action, died between the date of the argument and the date of the judgment of the Court, which judgment dismissed the appeal, an administrator ad litem was appointed in order that the costs might be recovered from the sureties to the plaintiff's bond, given as security on the appeal.

Semble, that such appointment was not necessary, as the Court might direct judgment to be entered as of the date of hearing, in the name of the plaintiff.

T. D. Delamere, K.C., for the defendants.

No one for the representatives of the plaintiff.

[MEREDITH, C.J., 10TH APRIL, 1902.]

In re PHILLIPS v. HANNA.

Prohibition—Division Court—Jurisdiction—Splitting cause of action—Mortgage—Interest post diem—Damages—Permissive clause of Division Courts Act.

The plaintiffs on the 2nd November, 1901, brought an action in a Division Court for one year's interest due the 1st February, 1901, and for interest on that interest, amounting together to \$81.50, due on a mortgage, the principal of which was overdue.

Held, that the interest sued for, being interest post diem, was not due the plaintiff *qua* interest, but was recoverable only by way of damages, and the case did not come within the provisions of s. 79, s.-s. 2, of the Division Courts Act, R. S. O. c. 60.

Held, also, that the plaintiffs, if entitled to recover interest from the 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were then entitled would be about \$140, which sum was divided for the purpose of suing in the Division Court, and that is forbidden by s. 79: and prohibition was granted.

R. McKay, for the defendant.

F. E. Hodgins, for the plaintiffs.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[LANDRY, J., 2ND APRIL, 1902.]

CITY OF ST. JOHN v. WILSON.

Municipal corporation—Charter—Boundaries of city—Title to fisheries.

By the charter of the city of St. John the land granted to the city is defined, together with "all the lands and waters thereto adjoining or running in, by, or through the same," and part of the city's boundaries is "and

from thence along the north shore of the said river at low water mark to," etc. By 26 Geo. III. c. 46, the fisheries between high and low water marks on the east side of the river bounding the city are vested in the city.

Held, that the title to the fisheries between high and low water mark in fishing lots 3 and 4 is not in the city.

C. N. Skinner, K.C., for the plaintiffs.

W. Pugsley, A.-G., *A. O. Earle*, K.C., and *J. R. Campbell*, for the defendants.

[BARKER, J., 15TH APRIL, 1902.]

TRAVERS v. CASEY.

Will—Construction—Real property owned by ecclesiastic—Devise to successor—Intestacy.

The testator, the Roman Catholic Bishop of St. John, by his will declared that "although all the church and ecclesiastical properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust, according to the intention and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established." At the time of the making of the will and of the testator's death, certain real estate belonging to the church was vested in the testator and standing in his name, and he also owned in his own right certain other real estate. The moneys received from these different properties, as well as from various ecclesiastical sources, by the testator, were put in a common fund and used by him indiscriminately for church and personal purposes.

Held, that the testator did not die intestate with respect to his own real estate.

W. Pugsley, A.-G., for the plaintiff.

A. A. Stockton, K.C., *J. H. Barry*, K.C., and *J. L. Carlton*, K.C., for the defendants.

STEWART v. FREEMAN.

Specific performance—Contract for sale of land—Tender of purchase money—Time.

In an agreement to sell land by a specified date, unaccompanied by an agreement on the part of the proposed vendee to purchase, time is of the essence of the agreement, and specific performance will not be granted where the purchase money is tendered after the expiration of the date named in the agreement.

D. McLeod Vince and Hartley, for the plaintiff.

A. B. Connell, K.C., for the defendant.

In the St. John Probate Court.

[TRUMAN, J., 8RD APRIL, 1902.]

In re ROBERTSON.

Letters of administration—Quebec will—Notarial form.

Where a will is in notarial form and in the custody of a notary in the Province of Quebec, letters of administration with a certified copy of the will annexed, will be granted on proof by affidavit of the death and domicile of the testator, of the law of Quebec, and of the original will being executed in accordance therewith, that the original will is in the custody of a notary in that Province, and that the executors named in the will are acting thereunder.

W. H. Trueman, for the applicants.

MANITOBA**In the King's Bench.**

[KILLAM, J., 25TH APRIL, 1902.]

REX v. YOUNG.

Criminal law—Keeping a "bawdy house"—Criminal Code, 1892, s. 207 (j).

Motion for a writ of *habeas corpus* by a woman charged before a police magistrate with unlawfully keeping "a

bawdy house," and convicted thereof. There was evidence that the woman was a prostitute; it appeared that one man, who was previously unknown to her, went to a house of which she appeared to be in charge, that while he was there another woman called and went out again, after which he had sexual intercourse with the defendant and paid her money therefor. In the afternoon he returned with another man, when the same thing occurred. There was no evidence of the character of the woman visitor, or that she went to the house for any such purpose, or that any other women ever did so.

Held, that this was no evidence that the house was a bawdy house. A "brothel" is the same thing as a bawdy house. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described, where one woman receives a number of men: *Singleton v. Ellison*, [1895] 1 Q. B. 607.

Here the only charge was that of keeping a bawdy house, and it was necessary to prove that the house was one of that character. There being no evidence that the house was such as came within the legal meaning of the term "bawdy house," the prisoner could not be convicted of the only offence with which she was charged.

There should be a writ of *habeas corpus*, and, unless the Crown objected, the order might direct the discharge of the prisoner.

R. A. Bonnar, for the prisoner.

G. Patterson, for the Crown.

I. Campbell, K.C., for the chief constable.

[BAIN, J., 23RD APRIL, 1902.]

In re LANG AND SMITH.

Real Property Act—Caveator out of jurisdiction—Security for costs.

In May, 1893, Smith, the caveatee, executed a mortgage to Lang, the caveator, which was registered in the proper land titles office.

Smith afterwards applied for a certificate of title under the Real Property Act of the land mortgaged and other lands, and Lang was served with notice of the application. He thereupon filed a caveat and a petition asking that his mortgage might be declared to be a subsisting security on

the land mortgaged for the sum secured, interest, and costs. Lang was resident out of the jurisdiction, and *prima facie* Smith was entitled to security for costs; he took out a *præcipe* order, and Lang applied to the referee to set it aside, which application the referee refused.

Held, affirming the refusal, that the appeal should be dismissed with costs to the caveatee in any event.

The proceedings in the land titles office were not before the Court on this application, but it must be assumed that the district registrar had good reason for causing the notice of the application to be served on Lang, and it could not be said that it was Smith who had compelled Lang to come into Court to litigate. Lang was the actor in the proceedings in Court, and, as he resided out of the jurisdiction, he was subject to the general rule as to security for costs: *Apollinaris Co. v. Wilson*, 31 Ch. D. 632.

R. G. Affleck, for Lang.

A. C. Ewart, for Smith.

[RICHARDS, J., 16TH APRIL, 1902.]

WINTERS v. MCKINISTRY.

Mortgage—Power of sale—Service of notice—Fraudulent scheme of mortgagee to obtain land—Sale by way of exchange—Notice to third party through solicitor.

On the 14th April, 1900, the plaintiff mortgaged land to the defendant McK. to secure \$140 with interest, the whole to become due on the 1st December, 1900; the mortgage provided that the mortgagee on default of payment for one month might, on giving one month's notice, enter on and lease or sell the lands. Shortly after the mortgage was made the plaintiff paid the defendant McK. \$2.50 for interest.

In January, 1901, the plaintiff went to the United States and remained there till August, 1901, when he returned to Manitoba. Until about two and a half weeks before leaving Manitoba the plaintiff resided on the mortgaged land, but for the period mentioned he resided at his father's house, which was not on the mortgaged land.

Shortly after the plaintiff left Manitoba his brother paid for him \$32 to the defendant McK. on the mortgage.

About the 25th February, 1901, the defendant McK. instructed his solicitor to take proceedings to sell under the

power of sale in the mortgage: a notice of intention to sell was fastened to the door of the dwelling-house on the mortgaged property, but not served on the plaintiff personally.

The property was advertised for sale by auction on the 9th April, 1901.

Before the sale the defendant McK. arranged with one Dickerson to bid at the sale as if for himself, Dickerson, but in reality for McK. Dickerson bid at the sale, and the property was sold to him.

A deed, purporting to be made in pursuance of the power of sale, by the defendant McK. to Dickerson, and a quit claim deed from Dickerson to the defendant McK.'s wife, were prepared, under his instructions, by the solicitor who had conducted the sale proceedings; the former contained the expressed consideration of \$195, the latter that of \$200; the defendant McK. paid for both deeds; Dickerson was paid \$5, but otherwise no money was paid by or to him.

Prior to the above sale the defendant McK. had been negotiating with G. W. J. Barker, the husband and agent of Jane E. Barker, for the purchase of block K. in the town of Dauphin, the title to which was vested in Geo. Barker, the father of G. W. J. Barker, who held it for the benefit of Jane E. Barker, and an exchange was agreed to; it was carried out by a quit claim deed from the defendant McK.'s wife to Jane E. Barker of the plaintiff's farm, and a quit claim deed from Geo. Barker to the defendant McK.'s wife of block K. The consideration in each was stated to be \$600.

On the 30th November, 1901, the plaintiff brought this action, alleging that Jane E. Barker had notice of all the proceedings, and asking for a declaration that the alleged sale under the mortgage was void, and for an order that the deeds McK. to Dickerson, Dickerson to McK., and McK. to Barker, be set aside, and Jane E. Barker be ordered to reconvey to the plaintiff, or to execute a discharge of the mortgage, on payment of the amount due thereon, or, in the alternative, for damages against the defendant McK.

Held, that the alleged mortgage sale to Dickerson, and the deed Dickerson to McK.'s wife, were given merely in pursuance of a fraudulent scheme by the defendant McK. to become the owner of the plaintiff's land for much less than it was worth.

Declaration that the mortgage sale was fraudulent and void and that Mrs. J. E. Barker had no title or claim other than that of an assignee of the mortgage from the plaintiff to the defendant McK.; that on payment into Court of the

amount due, J. E. Barker should convey the lands to the plaintiff free of incumbrances created by her, Dickerson, and the defendant McK., or any of them. No costs of sale proceedings or of the action to be payable by the plaintiff. The defendant McK. to pay to the plaintiff and Jane E. Barker their costs of suit.

The question was raised, had Jane E. Barker, or her husband, who was her agent, such notice of the fraud, or notice calling for inquiry, as would disentitle her to the defence of being an innocent purchaser, for value, and without notice?

It was contended that the notice of intention to sell was not served as required by the Act; that, by her agent, Jane E. Barker employed to act for her the solicitor who had conducted the sale proceedings; that she was thereby attached with notice of everything that such solicitor knew, including the defendant McK.'s fraudulent scheme to get title to the lands; that the fact that Jane E. Barker was offered title through the wife of the mortgagee on the day of, or the day after, the mortgage sale, was in itself notice of fraud, or, at any rate, should have put her on inquiry.

Held, that the service of notice was good. The farm was the plaintiff's usual place of residence and his permanent abode. His short stay at his father's house before leaving the country could not be said to make that his usual place of residence.

2. The solicitor was only employed by Mrs. Barker's agent to draw the deed of block K.; he was not instructed to search title, etc. The rule as to a client being attached with notice of what his solicitor knows arises only from the presumption that, as it is the solicitor's duty to tell the client everything he knows that is pertinent, he will do so. Where it would be against the solicitor's interest to tell, no such presumption arises. The solicitor had himself conducted the sale proceedings, and it would not be presumed that he told Mrs. Barker's agent of any defect in them.

The fact that on the day of the alleged mortgage sale, or the following day, Mrs. Barker found that the mortgagee or his wife claimed to absolutely own the land, was notice enough to put Mrs. Barker on inquiry. As she did not make such inquiry, she could not avail herself of her ignorance of the fraudulent sale, if she was ignorant of it.

The best position Mrs. Barker could hold was that of an assignee of the mortgage.

A power of sale could not be exercised by an exchange of the land instead of by a sale for a price.

Smith v. Spears, 22 O. R. 286, dissented from.

E. Anderson and *H. Ormond*, for the plaintiff.

D. A. Macdonald and *A. E. Wilkes*, for the defendants.

[RICHARDS, J., 16TH APRIL, 1902.]

HULME v. CHANT.

Malicious prosecution—Charge of theft—Permission to take property—Damages.

Action for malicious prosecution. The defendant, a farmer, laid an information before a justice of the peace charging the plaintiff, who was a teacher at the public school in the district in which the defendant resided, with having stolen, in March, 1901, two loads of wheat straw, the property of defendant and of the alleged value of \$8.

A summons was issued and served, and the plaintiff was obliged to attend before the magistrate on four different days, and incurred expense and loss of time. The magistrate committed the plaintiff for trial; he was brought before the County Court Judge, and elected to be tried speedily, and pleaded not guilty: at the time fixed for trial counsel for the Crown entered a stay of proceedings under s. 732 of the Criminal Code, and the plaintiff was discharged from custody.

The plaintiff then brought this action for damages.

In August, 1899, the defendant let to the plaintiff a house and stable on part of the defendant's land, and the plaintiff from then until after the above prosecution occupied such house and stable as the defendant's tenant; when the plaintiff became tenant to the defendant, it was agreed between them that the defendant would give the plaintiff all the straw he required for his cattle and horses, and the defendant subsequently, when he threshed, placed a setting of straw near the plaintiff's stable. The plaintiff openly took the straw from the setting in question in the autumn of 1900; and again in March, 1901, openly took from the same setting the straw the defendant charged him with stealing. The defendant subsequently denied the giving, and demanded \$8, being \$4 a load; the plaintiff offered to pay \$1 for the two loads rather than have trouble, but adhered to his story that the defendant had given him

permission to take the straw, and the plaintiff took proceedings.

Wheat straw in ordinary years had no value, but there was an unusual scarcity that year, which possibly gave it some slight value.

The plaintiff alleged that he was, as a result of the prosecution by the defendant, dismissed from his position of a teacher, and obliged to take another school, at some distance from his home, at a smaller salary; and was obliged to incur the extra expense of paying board out of his salary.

The evidence strongly supported the plaintiff's contention that defendant gave him permission to take the straw.

Held, that \$400 was the proper amount to allow for damages. Judgment for the plaintiff for that amount, less \$25 admitted to be due to the defendant on his counterclaim. Costs on the King's Bench scale; no costs to be allowed the defendant on his counterclaim.

W. J. Cooper, K.C., for the plaintiff.

D. A. Macdonald, for the defendant.

BRITISH COLUMBIA,

In the Supreme Court.

[HUNTER, C.J., 4TH APRIL, 1902.]

WEHRFRITZ v. RUSSELL.

Arrest—Ca. re.—Form of writ—Summons to set aside—Appearance—Costs—Terms—Action.

Action for moneys alleged to be due in respect of unpaid cheque and salary. The defendant Sullivan was arrested on a writ of *capias ad respondendum*, the material part of which so far as this report is concerned was as follows:—

“We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take E. M. Sullivan if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action at the suit of Benjamin Wehrfritz, or until. . . .”

Held, on a summons to set aside the writ, that it was bad because it did not state the nature of the cause of action.

2. It is not necessary for a person arrested under a writ of *ca. re.* to enter an appearance before applying for his discharge.

3. The defendant having asked for costs, the order for his discharge should provide that no action be brought against the plaintiff or the sheriff by reason of the *capias* or the arrest.

Harold Robertson, for the defendant Sullivan.

Edgar Bloomfield, for the plaintiff.

[15TH APRIL, 1902.]

PIKE v. COPLEY.

Writ of summons—Special indorsement—Interest till judgment—Summary judgment—Order XIV.—Amendment of indorsement—Re-service or re-delivery of writ.

Summons for judgment under Order XIV., in an action for principal and interest due under a covenant in a mortgage. The statement of claim indorsed on the writ, in addition to the claim for principal and interest computed to a certain date previous to issue of writ, contained a claim for interest on the principal until payment or judgment.

Held, such claim for interest was not a subject of special indorsement under Order III., r. 6.

Held, also, that where, on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement, it is not open to the plaintiff to obtain an amendment and proceed, but a new summons must be taken out.

Where the indorsement of a writ has been amended, re-delivery but not re-service is necessary.

C. J. Prior, for the plaintiff.

G. H. Barnard, for the defendant.

[DRAKE, J., 12TH JULY, 1901.]

CITY OF VICTORIA v. BOWES.

Assessment and taxes—Land and improvements belonging to Dominion Government—Assessment of occupier of—Description—Municipal Clauses Act, s. 168, s.s. 4 (a)

The defendant was the occupier of one of several stores on the ground floor of a building belonging to the Dominion

Government, and was assessed under s. 168, s.-s. 4 (a), of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1, 605, and 1, 607, block 1; measurement 23 x 66; Government street; land, \$12,650; improvements, \$920; total, \$13,570."

Held, dismissing an action to recover taxes, that the defendant was an occupant of part of the improvements only and not of the land.

2. The assessment was invalid because the lands and improvements were insufficiently described.

3. The Act provides no procedure for such an assessment.

4. Where an assessment is illegal, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes.

J. M. Bradburn, for the plaintiffs.

Alexis Martin (Thornton Fell, with him), for the defendant.

[IRVING, J., 15TH FEBRUARY, 1902.]

REX v. JORDAN.

Summary conviction—Appeal—Notice of—Parties to be served.

Summons by prosecutors to prohibit HENDERSON, Co. J., from proceeding in an appeal from a summary conviction by a magistrate, whereby Jordan was convicted on the 20th January of an infraction of the Medical Act, and fined \$50, and in default of payment distress was to be levied, and in default of distress he was to be imprisoned for 30 days. On the 24th January Jordan deposited with the magistrate the amount of the fine and \$50 for security for costs.

Held, dismissing the summons, that a notice of appeal from a summary conviction (Provincial) served upon the convicting magistrate is not invalid because it is not also addressed to and served upon the respondent.

2. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody.

Quære, whether service of notice of appeal on the respondent's solicitor would not be sufficient in any event.

L. G. McPhillips, K.C., for the prosecutors.

W. J. Bowser, K.C., for the defendant.

[BOLE, LOC. J., 18TH APRIL, 1902.]

TAYLOR v. DRAKE.

Jury—Special—Fees of jurors when not serving.

Action against a sheriff by a special juror for fees.

Held, that a special juror who is summoned for the trial of an action in the Supreme Court is entitled to \$2 for each day's attendance at Court, although he does not actually serve, and notwithstanding the fact that he lives so near to the court house that he is able to live at home and visit his office occasionally during the day.

Judgment for the plaintiff.

F. McB. Young, for the plaintiff.

R. H. Pooley, for the defendant.

In the County Court of Westminster.

[BOLE, CO. J., 14TH APRIL, 1902.]

BLACK v. HUGHES.

Mechanic's lien—Clearing land.

The defendant employed a contractor, under a written contract, to clear a quantity of land for the purpose of cultivation.

Held, that the plaintiff, a labourer who worked for the contractor upon the land, was not entitled to a lien for his work, under s. 4 of the British Columbia Mechanics' Lien Act, as amended.

Myers Gray, for the plaintiff.

H. L. Edmonds, for the defendant.

Supreme Court of Canada.

ONTARIO.]

[6TH MAY, 1902.]

BALFOUR v. TORONTO R. W. CO.

*Street railways—Collision of car with vehicle—Negligence—Verdict—
General or special—Appeal—Matter of procedure.*

In an action against an electric railway company for damages arising from personal injuries caused by a collision between a street car and a waggon in which the plaintiff was riding, the grounds of negligence alleged against the company were: (1) that the car was running unlawfully down the eastern track; (2) that it was running at too great speed. The Judge at the trial charged the jury, in case they found for the plaintiff, to state what negligence they pointed to. The jury found the company responsible (1) because the car was on the wrong track according to the general custom; (2) because the motorman and his appliances were on the rear, instead of at the front, the car being reversed. A verdict was entered for the plaintiff on these findings. Before the Court of Appeal the company contended that the verdict was special, and reasons should not have been given, but only facts stated from which the Court could decide. The Court of Appeal (20th June, 1901, unreported) sustained the verdict, holding that it was general, not special. The company appealed to the Supreme Court of Canada.

Held, that the question whether the verdict was general or special was a matter of procedure only, in which the Court would not interfere.

Appeal dismissed with costs.

J. Bicknell, for the appellants.

John MacGregor, for the respondent.

MOWAT v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

Life insurance—Terms of contract—Delivery of policy—Payment of premium.

A contract for life insurance is complete on delivery of the policy to the insured and payment of the first premium.

Where the insured, being able to read, having ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, neglects to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

Judgment of the Court of Appeal, 27 A. R. 675, 21 Occ. N. 17, reversed.

A. H. Marsh, K.C., for the appellants.

W. R. Riddell, K.C., and *R. T. Harding*, for the respondent.

HOLMES v. TOWN OF GODERICH.

Contract—Construction—Sale of goods—Delivery—Place—"At," meaning of.

A tender by H. to supply coal to the town of Goderich, pursuant to advertisement therefor, contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto, where directed by you. (Meaning by a committee of the council.) The tender was accepted, and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from a vessel upon the dock, about 80 feet from the shed, and separated from it by a road.

Held, reversing the judgment of the Court of Appeal (15th November, 1901, unreported), that the coal was not delivered "at the coal shed," as provided by the contract signed by the parties, which was the binding document.

Held, also, that if the contract was to be decided by the terms of the tender, the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto."

(See, also, 20 Occ. N. 303.)

J. T. Garrow, K.C., for the appellants.

A. B. Aylesworth, K.C., for the respondent.

LANGLEY v. VAN ALLEN.

Bankruptcy and insolvency—Assignments and preferences—Extension agreement—Secret advantage—Voluntary payment—Insolvency of debtor—Action by assignee—Status.

S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due

and maturing, by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim, and took from S. notes, aggregating in amount \$708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for the benefit of his creditors, when the arrangement between him and V. first became known, and the assignee and other creditors brought an action to recover the \$708 from V. as part of the insolvent estate.

Held, affirming the judgment of the Court of Appeal, 3 O. L. R. 5, 21 Occ. N. 551, and that at the trial, 32 O. R. 216, 20 Occ. N. 437, that S., having paid the notes voluntarily without oppression or coercion, could not himself have recovered back the amount, and his assignee was in no better position.

Per TASCHEREAU, J.—As anything recovered by the assignee would be for the benefit of his co-plaintiffs only, who would thus receive what would have been an unjust preference, if stipulated for by the agreement for extension, the plaintiff had no *locus standi in curia*.

George Kerr, for the appellants.

G. Lynch-Staunton, K.C., for the respondents.

McNEVIN v. CANADIAN RAILWAY ACCIDENT INS. CO.

Appeal—Amount in controversy—Interest before action—60 & 61 V. c. 34, s. 1 (c)—Accident insurance—Baggage-man on railway—Conditions in policy—Hazardous occupation—Voluntary exposure to unnecessary danger.

A judgment for \$1,000 damages, with interest from a date before action brought, is appealable under 60 & 61 V. c. 34, s. 1 (c).

An accident policy issued to M., who was insured as a baggage-man on a railway, contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company.) "This insurance does not cover . . . death resulting from . . . voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakeman, whose occupation was classed by the company as more hazardous than that of a baggage-man.

Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 521, 21 Occ. N. 553, which sustained the judgment for the plaintiff at the trial, 32 O. R. 284, 21 Occ. N. 76, that, as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions.

Held, also, that as the evidence shewed that the insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition.

W. Nesbitt, K.C., and *A. E. Fripp*, for the appellants.

A. B. Aylesworth, K.C., and *T. W. McGarry*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Boyd, C.]

[8TH MAY, 1902.]

MONTREAL AND OTTAWA R. W. CO. v. CITY OF OTTAWA.

Railway—Highway crossing—Compensation to municipality—Private ownership of highway—Construction of railway—"At or near" city—Power to take through county—Statutory provisions.

The plaintiffs were authorized by 47 V. c. 84 (D.) to lay out, construct, and finish a railway, from a point on the Grand Trunk Railway in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott, and Russell, and also to connect their railway with any other railway having a terminus at or near the city of Ottawa.

Held, that "at or near the city of Ottawa" should be read as "in or near the city of Ottawa," and the plaintiffs were authorized to carry their line to a point in the city and to connect it with the line of the Canadian Pacific Railway Company in the city.

2. That the plaintiffs had power, by implication, to take their line into the county of Carleton.

3. That the portion of the Richmond road (or Wellington street) within the limits of the city of Ottawa which the plaintiffs' line crossed, was not the private property of the defendants, and the plaintiffs, having taken the proper proceedings under the Railway Act of Canada, and being duly authorized to cross that highway, were not bound to make compensation to the defendants for crossing it.

Judgment of BOYD, C., 2 O. L. R. 336, affirmed.

A. B. Aylesworth, K.C., and Taylor McVeity, for the appellants.

Wallace Nesbitt, K.C., and W. H. Curle, for the respondents.

MEREDITH, C.J.]

[12TH MAY, 1902.]

GUNN v. HARPER.

Judgment—Date of—Amendment—Death of plaintiff between argument and judgment.

The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument.

Turner v. London and South-Western R. W. Co., L. R. 17 Eq. 561, and *Ecroyd v. Coulthard*, [1897] 2 Ch. 554, followed.

T. D. Delamere, K.C., for the defendants.

FALCONBRIDGE, C.J.]

[29TH MAY, 1902.]

REX v. RICE.

Criminal Law—Murder—Prosecution of unlawful purpose—Common design of two or more persons—Criminal Code, s. 61 (2)—Evidence—Judge's charge—Finding of jury—Verdict—Mistrial.

The prisoner was indicted for the wilful murder of a constable. The evidence shewed that the prisoner and two

other men were being tried for burglary, and during the trial were being conveyed in a cab from the court house to the gaol, in the lawful custody of two constables; that the prisoner and the other two accused men were handcuffed together on the back seat, and the two constables were seated opposite; that a parcel containing at least two revolvers was thrown into the cab by an unknown person; that the prisoner and at least one, and perhaps both, of the other two, each obtained and armed himself with a revolver, whereupon a struggle ensued in which one constable was shot and killed by one of those whom he had in custody.

The trial Judge told the jury to consider whether the prisoner fired the fatal shot, and if they thought his was not the hand that did so, or if they thought there was sufficient reasonable doubt to give the prisoner the benefit of it, they were to pass to the consideration of the second branch of the case, as to which his charge was in part as follows: "When men go out with a common intent to commit a felony, and in pursuit of that unlawful purpose death ensues, it may or may not be murder on the part of those who do not actually strike the fatal blow. . . . Where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred. . . . There is no evidence on which you could convict the prisoner of conspiracy up to the time the parcel was placed in the cab. . . . There is no evidence of conspiracy or common design up to the moment the parcel is thrown into the cab; yet if, at that moment, before the shot was fired that killed the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other."

After retiring to consider their verdict, the jury returned into Court and stated that they wished to know definitely what the Judge had said on the subject of conspiracy or collusion, and he said: "I told you, gentlemen, there was no evidence upon which you could find that there was a conspiracy or collusion between the three men up to the time the parcel was thrown into the cab, . . . yet if, at that moment, or at any time up to the time of the shooting of the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other, and if you find that, between the throwing of the parcel and the shooting of the constable, there was such a resolution, even although one of the other men fired the shot, the prisoner can be convicted of murder."

The jury came into Court again and said that they had agreed on their verdict. The clerk asked them whether they found the prisoner guilty or not guilty. The foreman answered: "On the first *count* we disagree." The clerk: "How do you find on the second *count*?" The foreman: "On the second *count* we find the prisoner guilty." The verdict was recorded, with the consent of the jury given in the usual way, as follows: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

Held, upon the evidence, that immediately upon the parcel being thrown into the cab, the prisoner and at least one of the other men armed themselves with the revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody and of assisting each other therein, and that the shooting by one of them of the constable was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to be a possible consequence of the prosecution of such common purpose: Criminal Code, s. 61 (2): each of them was, therefore, a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of that offence, the evidence fully warranting their verdict.

2. That there was nothing in the charge, nor in the subsequent instruction to the jury, both of which must be read together, of which the prisoner could properly complain.

3. That the finding of the jury was a proper one, and there was no mistrial. The foreman of the jury in speaking of "counts" was referring to the two branches of the case; but their verdict was that recorded on the back of the indictment and acknowledged by them.

T. C. Robinette, for the prisoner.

J. R. Cartwright, K.C., and *Frank Ford*, for the Crown.

ROBERTSON, J.]

[10TH APRIL, 1902.]

FORD v. METROPOLITAN R. W. CO.

Street railways—Injury to person—Negligence—Failure to give warning of approach of car—Backing car in the dark.

The plaintiff, travelling by an electric railway car of the defendants along a country road in a southerly direction on a dark night, got off at a regular stopping place.

He then turned back along the road, and, after walking for some distance, the car by which he had travelled, backing northward, struck and injured him. It appeared that there was a light at both ends of the car, but that the current was very weak at the time, and the light given very slight, and the motorman came within four or five feet of the plaintiff before seeing him. The car was going along at the rate of only three or four miles an hour. The motorman did not sound the gong nor give any other warning of his approach.

Held, that the case could not properly have been withdrawn from the jury; that the accident was fairly and properly attributable to the defendants' negligence; and that there had been no misdirection; but that the sum awarded by the jury as damages, \$1,800, was largely in excess of what had been given in cases of much more serious injury, although it cannot be said that there is a standard of damages in such cases.

New trial directed unless the plaintiff would consent to the reduction of his verdict to \$900.

A. B. Aylesworth, K.C., and *I. F. Hellmuth*, for the appellants.

T. H. Lennox and *S. B. Woods*, for the respondents.

Co. J. OF CARLETON.]

[8TH MAY, 1902.]

REX v. D'AOUST.

Criminal law—Evidence—Accused testifying on his own behalf—Cross-examination—Previous convictions.

An accused person, who on his trial for an indictable offence is examined as a witness on his own behalf, is, except so far as he may be shielded by some statutory protection, in the same situation as any other witness as regards liability to and extent of cross-examination, and may be cross-examined as to previous convictions.

J. R. Cartwright, K.C., for the Crown.

POLICE MAGISTRATE FOR WINDSOR.]

REX v. HANRAHAN.

Criminal law—Keeping disorderly or common betting house—Race track of incorporated association—Betting at—Conviction—Criminal Code, ss. 197, 204.

The defendant was tried before a police magistrate upon a charge of keeping a disorderly or common betting house, found guilty, and convicted.

A case was stated by the magistrate after leave granted, in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper; that the accused appeared, and he found him to be the keeper; that the house was owned by a joint stock company, of which the accused was president, and was situated on the race track of an incorporated association; that there were about thirty persons betting with the accused and his assistants, some on races then in progress in the State of New York, with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association.

Held, that the offence was the keeping of a house for the purposes intended in s. 197 of the Code, and that the facts proved brought the accused within its danger, and he was rightly convicted.

Held, also, that s.-s. 2 of s. 204 of the Code stands by itself, and that the exception contained in it is expressly limited to the first part of that section, and it should not be read into s. 197.

J. R. Cartwright, K.C., and *Frank Ford*, for the Crown.
E. F. B. Johnston, K.C., for the accused.

[21st MAY, 1902.]

FRANKEL v. GRAND TRUNK R. W. CO.

Appeal—Supreme Court of Canada—Amount in controversy—Claim and counterclaim.

The plaintiffs claimed \$1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counterclaimed for \$1,223 demurrage. At the trial judgment was given for the plaintiffs for \$1,000, and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiffs' counsel stated that the plaintiffs' claim on the reference would be less than \$1,000, and contended that no appeal lay.

Held, however, that, as the plaintiff claimed \$1,500, and was not limited by the judgment of the Court of Appeal

to any particular sum, the matter in controversy on the appeal exceeded the sum of \$1,000, so that the appeal lay.

Held, also, that upon the counterclaim the sum of \$1,223 was involved, and that an appeal lay in respect thereof.

H. E. Rose, for the defendants.

James Baird, for the plaintiffs.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., 8TH APRIL, 1902.]

RANKIN v. STERLING.

Vendor and purchaser—Purchaser taking possession and making improvements—Requisitions on title—Waiver—Damages—Reference.

The plaintiff, under an agreement for purchase of land, paid part of the purchase money, went into possession, and made improvements, the defendant agreeing to furnish an abstract and make out a perfect title. An abstract was furnished which shewed the title in one R. V. N., who became the owner in 1862, and made a mortgage to his vendor W., which was not discharged; the plaintiff's requisitions on title pointed out these defects. The defendant proffered a declaration to shew title by length of possession, which was objected to as incorrect in its statement of facts as to the length of possession, and the plaintiff's solicitor wrote the defendant's solicitor that "it looks very like as though it would be impossible to get the title made right."

In an action for specific performance, alleging the making of permanent improvements by the plaintiff, in which the defendant set up that he had a good title, and was ready to convey, and that the plaintiff had waived his right to insist on a good title by his acts of ownership:—

Held, that the plaintiff having insisted upon a good title being shewn, and the defendant asserting a good title in himself, the plaintiff's remaining in possession and making improvements after the defects in the paper title had been called to his attention was no waiver of his right to insist on a good title being shewn.

Held, also, that this case came within the general rule which restricts the damages of the purchaser to the costs of the investigation of the title, and did not come within the doctrine that a purchaser is entitled to substantial damages from a vendor, who, to save trouble, or moderate expense, or from caprice, refuses or wilfully neglects to

perform his share of the contract—the rule being, in the absence of fraud or other special circumstances, that, “if a purchaser takes possession under a contract, and afterwards rejects the title, he must relinquish the possession, and equity cannot prevent the vendor turning him out by an ejectment, although he may have expended money in improvements;” and a reference as to title was ordered.

Judgment of MACMAHON, J., reversed in part.

J. J. Warren, for the defendant.

G. H. Watson, K.C., and W. L. Payne, for the plaintiff.

[26TH APRIL, 1902.]

MONRO v. TORONTO R. W. CO.

Infant—Lease made by—Repudiation of, on attaining full age—Partition—Parties—Exclusion of tenant in common—Mesne profits—Damages.

The plaintiff, while an infant, joined with an adult brother and sister in a lease to the defendants of a park property, in which all three were tenants in common, for a period of ten years. The defendants, a street railway company, pulled down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it, and brought crowds of people there.

During the term the plaintiff came of age, and at once repudiated the lease, refusing to be bound by it, and effected a partition with the other two tenants in common of the land, to which the defendants were not parties.

In an action against the street railway company only, to recover possession of the plaintiff's part of the land under the partition; for a declaration that the partition was binding, or for a new partition between him and the company; for a declaration that the lease was not binding on him, and that he had been excluded from possession; and for mesne profits and damages:—

Held, that the partition made could not be declared binding on the company, who were not parties to it.

Held, also, that the brother and sister were not necessary parties to any new partition between the plaintiff and the company.

Held, also, on the evidence, that the company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and that he

was entitled to recover mesne profits from the time he became of age, and damages; and a partition was ordered between him and the company for the residue of the term.

Judgment of MEREDITH, C.J., 1 O. W. R. 25, reversed.

C. Millar, for the plaintiff.

James Bicknell, for the defendants.

[MEREDITH, C.J., FERGUSON, J., 23RD APRIL, 1902.]

BASTON v. TORONTO FRUIT VINEGAR CO.

Contract—Acceptance—Purchase of goods—Acceptance by delivery.

The plaintiff, who had had previous dealings with the defendants, wrote to them on the 5th May asking them if they were going to buy cucumbers that year, and what they were going to pay for them; adding, "please let me know, as I want to make a contract with some one for them, as I want to put in quite a few this year." The defendants replied: "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties.

Held, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged.

Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, distinguished.

Judgment of FALCONBRIDGE, C.J., affirmed.

S. B. Woods, for the plaintiff.

The defendants were not represented.

[FALCONBRIDGE, C.J., STREET, J., 9TH MAY, 1902.]

CANADIAN BANK OF COMMERCE v. ROLSTON.

Execution—Fieri facias—Unassigned dower—Equity of redemption—Execution Act, ss. 90, 90. 33.

The defendant's husband died in 1899, intestate, leaving the defendant and two children surviving, and being owner

in fee simple of the equity of redemption in a farm, subject to a mortgage. Consequently, the defendant upon his death had her election, not yet exercised, between taking her dower in the equity of redemption or taking an undivided one-third of the land absolutely, subject to the mortgage, as tenant in common with her children, the heirs at law.

Held, that, in whichever way the defendant elected, her interest was not saleable by the sheriff under a writ of *feri facias*.

The interest of one of several shares in an equity of redemption cannot be sold under a *fi. fa.*; nor is there any authority under the statutes in a sheriff to sell a widow's dower in an equity of redemption.

A widow having a right to dower which has not been assigned, although she is entitled to redeem a mortgage to which her dower is subject, is not possessed of an estate in land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption," within s. 29 of the Execution Act. Her interest does not come within s. 30 of that Act, and therefore is not saleable, nor under s. 33.

Held, therefore, that the execution creditor should have proceeded under Rules 1016, 1017, and 1018, and not by action, to obtain the aid of the Court in respect to his execution.

H. J. Scott, K.C., for the plaintiffs.

M. H. Ludwig, for the defendant.

[*BOYD*, C., *MEREDITH*, C.J., 15TH MAY, 1902.

REX v. ST. PIERRE.

Municipal corporations—By-law—Transient traders—Taking orders for goods—Conviction—Certiorari—Statute taking away right to—Want of jurisdiction.

There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at an hotel and taking orders for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited.

Notwithstanding the amendment to s. 7 of the Ontario Summary Convictions Act, by s. 14 of 2 Edw. VII. c. 12, taking away the right to *certiorari*, a conviction made by a magistrate without jurisdiction may be removed by *certiorari*;

and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is not within the statute which gives the power to pass a by-law, there is such absence of jurisdiction as warrants the issue of a *certiorari*.

E. E. A. DuVernet, for the defendant.

A. B. Aylesworth, K.C., for the prosecutor.

[19TH MAY, 1902.]

In re SNURE AND DAVIS.

Landlord and tenant—Overholding Tenants Act—Summary order for possession—Review by High Court—Evidence—Breach of covenant in lease—Notice specifying—Necessity for.

Under the Overholding Tenants Act, R. S. O. 1897 c. 171, two things must concur to justify the summary interference of the County Court Judge: the tenant must *wrongfully* refuse to go out of possession, and it must appear to the Judge that the case is *clearly* one coming under the purview of the Act.

It is only the proceedings and evidence before the Judge, sent up pursuant to the *certiorari*, at which the High Court may look for the purpose of determining what is to be decided under s. 6 of the Act.

Where there was nothing in the evidence to shew that the tenant had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession.

Per BOYD, C.:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by s. 13 of the Landlord and Tenant's Act, R. S. O. 1897 c. 170, which is applicable to summary proceedings under the Overholding Tenants Act.

George Kerr, for the tenants.

Thomas Mulvey, for the landlord.

[BOYD, C., 19TH MAY, 1902.]

In re CANADIAN PACIFIC R. W. CO. AND CITY OF
TORONTO.

Landlord and tenant—Lessee of municipal corporation—Liability to pay taxes—Usual covenant—Assessment Act, s. 26.

Property of a city municipality, when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (Assessment Act, R. S. O. 1897 c. 224, s. 7, s.-s. 7); and such tax is a tenant's tax payable by him, and not in any event payable by the landlord as between him and the tenant.

Section 26 of the Act, as to tenants deducting taxes from their rent, has no application to such a case, as it applies only to taxes which can be legally recovered from the owner. The reason of the rule embodied in that section disappears when the property is in the hands of the landlord exempt, and becomes liable to be taxed only when in occupation of a tenant.

Semble, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner," within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee.

Where the municipality had entered into an agreement to grant a lease for a rent specified, but no mention had been made of taxes:—

Held, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity and exercising its sovereign power to lay taxes upon the property, when no longer exempt, by reason of its being under lease. Taxes and rent are distinct things and collectible by the corporation in different capacities, and the imposition of the yearly taxes is not a derogation from or inconsistent with the contract.

A covenant by a tenant to pay taxes is a "usual" covenant, and it lay upon the tenant here objecting to give it, to shew by competent evidence that it was not so in such a case as that in question here or in this country, which the tenant had failed to do.

E. D. Armour, K.C., and *Angus MacMurchy*, for the company.

C. Robinson, K.C., and *J. S. Fullerton*, K.C., for the municipal corporation.

IN CHAMBERS.

[BRITTON, J., 14TH APRIL, 1902.]

REX *ex rel.* TOLMIE v. CAMPBELL.

Municipal elections—Illegal voting—Electors voting more than once—Presumption—Affecting result of election—Corrupt practices—Illegal voting by respondent and relator.

At a municipal election for reeve, at which upon a large vote the successful candidate obtained a majority of six, it was shewn that a widespread belief prevailed among the electors of the right to vote at each sub-division in which the name of the elector appeared; that four electors had in fact voted twice; and that several others had received ballot papers within a polling booth, after having already voted for reeve.

Held, that the statutory presumption arising under the Municipal Act, R. S. O. 1897 c. 223, s. 162, s.-s. 3, did not apply in proceedings to set aside an election, and that as, owing to the destruction by the clerk of the ballot papers pursuant to the provisions of the Act, it was impossible to tell whether more than four voters had voted twice, the election should not be set aside, the voting twice by four electors not having, in the opinion of the Court, affected the result.

Held, also, that if, as alleged, the respondent had himself voted twice, this was not a cause for setting aside the election; voting twice not being in itself a corrupt practice, and the commission of that offence not being, under the statute, a disqualification for office during the current year.

Held, also, that, there being strong reasons to believe that the relator had himself voted more than once, and there being undoubted evidence that he had advised other electors to vote more than once, he could not successfully urge this objection against the validity of the election.

C. St. Clair Leitch, for the relator.

E. E. A. DuVernet, for the respondent.

In the Third Division Court in the County of Elgin.

[HUGHES, Co.J., 4TH JUNE, 1902.]

MEEHAN v. BERRY.

Limitation of actions—Goods sold and delivered—Division Court—Amendment of defence—Misleading particulars of claim.

Action to recover the amount of an account for goods alleged to have been sold and delivered to the defendant out of the plaintiffs' shop in the village of Port Elgin. Other persons of the same surname as the defendant lived in the village. In the particulars of the plaintiffs' claim the dates given as those upon which the goods were sold were all in 1896, and the action was brought within six years from the date of the earliest sale as given in the particulars. The defendant entered a dispute note which merely disputed the plaintiffs' claim, and did not give notice of an intention to set up the Statute of Limitations as a defence. When the plaintiffs' books were produced at the trial, they shewed that the entries were all made in 1895, more than six years before this action was begun.

The plaintiffs in person.

T. W. Crothers, for the defendant, asked leave to amend the defence so as to set up the Statute of Limitations, besides denying the purchase and receipt of the goods, contending that there was a right to amend because the particulars were misleading.

The case was tried and judgment was reserved, both as to the merits and the proposed amendment.

HUGHES, Co. J.—It is the policy of the law, and has been so for over one hundred years, to put a stop to litigation upon stale claims for damages and old demands for debts, beyond certain and reasonable periods of time; in fact, to presume that all such have been satisfied, paid, and settled for. It is known that memories fail, documents become lost or mislaid, or worn out, torn, defaced, or destroyed; that witnesses die, or forget facts, or become scattered, or, their minds being engaged or burdened during intervening years with other things, inaccuracy and forgetfulness become probable.

In this case the transactions were more than six years before the action was commenced. The very purpose

of the statute concerning claims for debt so long unsettled from the time of incurring the alleged liability, without any acknowledgment of their existence on the part of the alleged debtor, is to shut off the claims and treat them as paid, and the remedy therefor barred. One of the main purposes was to avoid what was presented on the trial of this case—contradiction in evidence. Two witnesses on either side contradicted each other on oath, and it is impossible to say whom to believe.

The defendant did not set up or give notice of a defence under the statute. At the trial his counsel asked for leave to amend. Looking at the amendment asked for as a matter of discretion—which it undoubtedly is—I have no hesitation in saying that, had I been fully persuaded that there was really an unpaid debt due and owing from the defendant to these plaintiffs, I should have hesitated to allow the defendant to amend, because it would be using discretion in the aid of dishonesty—when there may have been no idea of setting up such a defence in the first instance. But, where the evidence is so evenly balanced as is the case here, I think it my duty to allow the amendment.

By s. 312 of the Division Courts Act, R. S. O. 1897 c. 60, in any case not provided for by this Act or by existing Rules, the Judge may, in his discretion, adopt and apply the general principles of practice in the High Court to actions and proceedings in the Division Court. It was held by Armour, C.J., in *White v. Galbraith*, 12 P. R. 313, that this section affords ample authority for a Judge to permit a plaintiff to amend his claim in a Division Court action.

A plea of the Statute of Limitations has for more than one hundred years been held by the higher Courts to be a meritorious defence, and an amendment setting up such defence will be made at any time: see *Hamlyn v. White*, 6 F. R. 120; *Seaton v. Fenwick*, 7 P. R. 146; *Maddox v. Holmes*, 1 B. & P. 228; *Rucker v. Hanning*, 3 T. R. 124; *McIntyre v. Canada Co.*, 18 Gr. 367. [*Longbottom v. City of Toronto*, 27 O. R. 198, distinguished.] . . .

As a matter of fact, and in view of the requirements of the Division Courts Act, the particulars of the plaintiffs' claim, here, required amendment, because s. 98 of the Act forbids any evidence being given of any cause of action except such as is contained in the particulars furnished to the clerk. It is always my custom in the matter of dates to allow such amendments. The year in this case was of importance, as it turned out, and I allowed the plaintiffs to proceed with their evidence as if such amendment had been made, so I feel justified in allowing the defendant to amend.

Action dismissed.

NOVA SCOTIA.

In the Supreme Court.

[FULL COURT, 6TH MAY, 1902.]

MERRITT v. COPPER CROWN MINING CO.

Foreign company—Doing business in Nova Scotia—Compliance with requirements of foreign statute—Enforcement—Nova Scotia statute requiring filing of returns—Enforcement by private person—Fleeting—Admissions.

The plaintiff was a citizen of the United States, and was a shareholder in the defendant company, incorporated under the laws of West Virginia. The defendants had their principal place of business in Nova Scotia. It was alleged in the pleadings that by statute of West Virginia applicable to the company, the company should make an annual report to the shareholders shewing in detail the condition of the company, its debts, expenditures, shareholders, etc., and this allegation was admitted in the defence. Certain statutes of the Province of Nova Scotia require incorporated companies doing business in Nova Scotia to file with the registrar of deeds a list of shareholders, etc. Neither the West Virginia statutes nor the Nova Scotia statutes were complied with, and the plaintiff brought this action for a mandamus, or in the alternative an injunction, to enforce compliance with the said statutory enactments.

The action was tried before RITCHIE, J., who decided that the plaintiff was entitled to the relief prayed for. The company appealed to the full Court.

Mellish, for the defendants, contended that the Court could not enforce the West Virginia statute; that this statute was not properly before the Court, and the Court could not construe it; that the plaintiff, being an alien, was not entitled to relief; and that the Nova Scotia statutes were intended for the benefit of the public and could not be enforced by the plaintiff.

Borden, K.C., and *J. A. Chisholm*, for the plaintiff.

Held, that the Nova Scotia Court can maintain an action founded on the enactment of a foreign state: *Dennick v. Railroad Co.*, 103 U. S. 11; *Higgins v. Central Co.*, 155 Mass. 176. The alienage of the plaintiff is no bar to the action, and under English law he can maintain his action, the Court having jurisdiction over the company.

Held, also, that the admission in the defence was equivalent to the statement of an expert as to the foreign statute, and the Court can construe it, the rules of construction in both countries being presumed to be the same: *Davidson v. Hill*, [1901] 2 K. B. 617.

Held, also, that as to the Nova Scotia statutes the plaintiff cannot enforce compliance, as they are for the benefit of the public, and the judgment appealed from must be varied accordingly, but the defendants to pay the costs of the appeal.

REX v. ROBERTSON.

Municipal corporations—Mayor of town—Disqualification—Interest in contract—Solicitor for prosecutor appointed by town.

This was a proceeding by information in the nature of *quo warranto* against the mayor of the town of Westville. The Towns' Incorporation Act, R. S. N. S. c. 71, s. 54, disqualifies for the office of mayor "any person who directly or indirectly, by himself or by or with any other person as co-partner or otherwise, enters into or is directly or indirectly interested in any contract, express or implied, for the supply of any goods or materials or for the performance of any work or labour to or for the town."

R. S. N. S. c. 100, s. 181, enacts that the town shall annually appoint an inspector to enforce and carry out the provisions of the Canada Temperance Act, and authorizes the town to pay out of its funds the expenses of enforcing the Act.

On the 19th December, 1900, one Waters was appointed prosecutor under the Canada Temperance Act, and his salary was by resolution fixed at one-half the net proceeds of the fines, after deducting expenses. It was also resolved that the prosecutor should engage his own solicitor, whose fees were not to exceed \$5 for any one case. The defendant, a solicitor, acted for Waters in four cases before his

election as mayor, and his fees were paid on the 6th March, 1901. On the 8th February, 1901, the defendant was elected mayor, and thereafter he acted gratuitously for Waters in a number of cases.

The information came on for trial before MEAGHER, J., who decided in favour of the defendant. An appeal was taken to the full Court.

J. J. Power and *Mellish*, for the relator.

Borden, K.C., and *J. A. Chisholm*, for the defendant.

Held, on appeal, that the direct relation of agency was constituted between the town and the defendant, and that the defendant could recover directly from the town his fees: *Tilson v. Warwick Gas Light Co.*, 4 B. & C. 962.

Held, also, that the defendant had a direct interest in the contract with Waters.

The appeal was allowed with costs.

MANITOBA

In the King's Bench.

[RICHARDS, J., 5TH MAY, 1902.]

MURRAY v. SMITH.

Contract—Rescinding for fraud and misrepresentation—Secret commission to purchaser's agent—Collusion by him with vendor.

In September, 1900, the defendant, an immigrant newly arrived from England, went to Dauphin, taking with him a letter of introduction from the Dominion Immigration Department at Winnipeg to Charles Tomlin, an official of that department stationed at Dauphin. Tomlin's duties were to help immigrants to get settled to the best advantage and to give them the benefit of his experience and knowledge of the country and prices of land. Tomlin met the defendant at Dauphin, invited his confidence, and promised to act in his (defendant's) best interests; the defendant knew Tomlin to be an official of the department, and placed full confidence in him.

The plaintiff owned lands he wished to sell. Tomlin knew this, and told him the defendant wanted a farm. Subsequently Tomlin and the plaintiff's partner, Sparling, drove the defendant out to see several pieces of land, when one piece was selected; the plaintiff represented that 80 acres were under cultivation, and the price put in the list was \$1,800, on terms. The next day the defendant, on Tomlin's advice, agreed to buy the quarter section for \$1,850; \$250 to be paid in cash and the balance by crop payments; a written agreement was prepared by a solicitor, who was instructed by Tomlin; it contained a proviso that upon breach by the defendant of "any of his covenants hereinbefore written," the plaintiff might cancel the agreement and retake possession, and all payments made should be forfeited. The defendant executed the agreement, but did not read it, though part was read to him. Tomlin purported to be doing his best for the defendant, and the defendant relied on Tomlin as his agent and adviser, and left everything to him.

After signing the agreement it was represented by the plaintiff and Tomlin to the defendant that the cultivated ground was 80 acres; the defendant relied on that representation in agreeing to buy and in executing the agreement.

Within a few days after the agreement was signed the plaintiff paid Tomlin \$50, which was the amount of the difference between the price mentioned for the land in the plaintiff's list and the price the defendant bought at on Tomlin's advice; the plaintiff told Tomlin the \$50 was for getting him the sale of the land.

After getting possession the defendant found the broken ground was only 58 acres, but the plaintiff refused to cancel or make any allowance.

The defendant also complained to Tomlin, but he told him he had consulted a lawyer, and the only remedy the defendant had was to stay on the land and crop it and claim compensation later.

Believing he had no right to cancel, the defendant cropped the cultivated land in 1901, but did not deliver any of the grain to the plaintiff, who brought this action to have the agreement cancelled for non-performance of the defendant's covenants. The defendant claimed compensation for damages and loss resulting from the misrepresentation, and asked for cancellation of the agreement and repayment of the \$250.

Held, that the plaintiff's claim for cancellation should be dismissed and the defendant's counterclaim for cancellation allowed, and that the plaintiff should be ordered to pay to the defendant the \$250 paid by the defendant as part of the purchase money on the execution of the agreement for sale, and that the defendant should be ordered to deliver possession within one week after the payment of the \$250 and costs; the plaintiff to pay the defendant's costs of the action on the King's Bench scale; no costs of any kind to the plaintiff.

In such a case as this the Court will not consider the motive of the payment, but will presume that the agent was influenced against his principal's interest by the payment, or his expectation of the payment: *Hovenden v. Millhoff*, 83 L. T. 41.

It was argued that by putting in the 1901 crop, after he became aware of the shortage in the cultivated land, the defendant elected to maintain the contract and lost his right to rescind it for that cause, and having so elected he could not avail himself of the newly discovered fraud arising out of the collusion between the plaintiff and Tomlin and the payment of the \$50.

Held, that the defendant did not lose by inaction his right to repudiate because of the shortage in cultivated land. *Campbell v. Fleming*, 1 A. & E. 40, distinguished.

As a result of the newly discovered secret payment the defendant had the right to ask for cancellation of the contract and repayment of the \$250: *Panama Co. v. India Rubber Co.*, L. R. 10 Ch. 515.

C. W. Bradshaw and *A. E. Wilkes*, for the plaintiff.

J. H. Munson, K.C., and *A. B. Hudson*, for the defendant.

BRITISH COLUMBIA

In the Supreme Court.

[FULL COURT, 8TH JULY, 1901.]

FAWCETT v. CANADIAN PACIFIC R. W. CO.

Master and servant—Servant's duty—Contributory negligence—Nonsuit—Jury—Employers' Liability Act.

F., a conductor and brakeman in the employ of the defendant company, while turning the brake wheel, fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving.

Held, affirming the decision of IRVING, J., in an action by F.'s personal representatives to recover damages in respect of his death, that it was F.'s own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury.

New trial refused.

Charles Wilson, K.C., and R. S. Lennie, for the plaintiff.

E. P. Davis, K.C., for the defendants.

[Affirmed by the Supreme Court of Canada.]

[7TH NOVEMBER, 1901.]

In re FLORIDA MINING CO.

Company—Winding-up—Order for, whether final or interlocutory—Appeal—Security—Demand for, after expiration of time for furnishing—Waiver.

Section 27 of the British Columbia Companies Winding-up Act, 1898, requires, in an appeal from a winding-

up order, that the appellant shall, within eight days, make a deposit or give security to prosecute the appeal and pay such damages and costs as may be awarded the respondent. The solicitors for both the appellants and the respondent were unaware of this provision, and after the expiration of the eight days the respondent's solicitors demanded such security for costs as is usually given on an appeal from a final order. The appellants' solicitors offered such security as is usually given on an appeal from an interlocutory order, whereupon the respondent's solicitors, who had discovered the provisions as to security, wrote withdrawing their demand, and then took out a summons to dismiss the appeal. The appellants applied to fix the amount of security and extend the time for giving it. On the return IRVING, J., dismissed the appeal and discharged the appellants' summons, and the appellants appealed from both orders.

Held, that a winding-up order is a final order.

2. That the respondent had waived his right to take advantage of the security not having been furnished in time.

Appeals allowed.

S. S. Taylor, K.C., for the appellants.

E. P. Davis, K.C., for the respondent.

[15TH NOVEMBER, 1901.]

WATERLAND v. CITY OF GREENWOOD.

Trial—Indefinite verdict—Circumstances of case—Jury—Discharge—Recalling, and amending verdict—Effect of—New trial—Non-direction.

In an action for damages caused by water being backed up on to the plaintiff's premises, the jury did not answer the questions put, but answered: "We have not answered exactly in the form of the question. We find that the construction and grading of the street across Boundary creek caused the plaintiff damage in the sum of \$3,000;" without stating that the grading was done by the defendants. It appeared that the dispute at the trial narrowed down to whether it was the grading of the street by the defendant or the grading of an alley by one Fletcher that caused the damage. On the verdict judgment was entered for the plaintiff by WALKEM, J.

Held, on appeal, that from the circumstances of the case the verdict would support the judgment.

Where counsel at the trial abstains from asking the Judge to submit a point to the jury, a new trial will not be granted on the ground of non-direction as to that point.

After judgment was pronounced and the jury was discharged, at the direction of the Court the jury was recalled and asked certain questions as to the meaning of the verdict, and the verdict was amended accordingly.

Held, that whatever was done after the discharge of the jury was a nullity.

Appeal dismissed and new trial refused.

E. V. Bodwell, K.C., for the appellant.

Davis, K.C. (*W. A. Macdonald*, K.C., with him), for the respondent.

[22ND APRIL, 1902.]

McKELVEY v. LE ROI MINING COMPANY.

Master and servant—Injury to servant in mine—Mines (Metalliferous) Inspection Act—Statutory duty of owner to provide protection from falling cage.

Action for damages for personal injuries sustained by plaintiff, a miner, while working at the bottom of a shaft in the LeRoi mine. The cage or skip used for lowering and hoisting men fell and broke through the bulkhead or cage platform at the 800-foot level, and struck the plaintiff while working a few feet below.

Held, affirming the decision of *McColl*, C.J., that the cage or skip used for lowering and hoisting men is not "falling material," within the meaning of that term as used in Rule 20 of s. 25 of the Metalliferous Mines Inspection Act, and the amendment of 1899 (c. 49, s. 12) does not create any duty on the mine owner to provide protection from a falling cage.

A. H. MacNeill, K.C., for the plaintiff.

C. R. Hamilton, for the defendants.

[McCOLL, C.J., 22ND FEBRUARY, 1901.]

In re WATER CLAUSES CONSOLIDATION ACT.

WAR EAGLE MINING CO. v BRITISH COLUMBIA
SOUTHERN R. W. CO.

Water record—Applications for—Mining companies—Gold Commissioner—Industrial company—Land Commissioner—Notice of later application to prior applicant—Water notice—Posting in "office"—What is—Evidence on water applications.

Petition by way of appeal from an adjudication of the Assistant Commissioner of Lands and Works at Nelson, who granted a record of water to a company for industrial purposes, while an application for the same water for mining purposes was pending before the Gold Commissioner at Rossland.

Held, referring the matter back, that where an application for a record of water for mining purposes is pending before a Gold Commissioner, an application for a record of the same water for domestic, mechanical, and industrial purposes should not be adjudicated upon by an Assistant Commissioner of Lands and Works without express notice to the applicants before the Gold Commissioner.

A water notice posted on a board usually used for such notices, in a hall leading to the rooms occupied by the Commissioner and his staff, is posted in the office of the Commissioner within the meaning of s. 9 of the Water Clauses Consolidation Act.

Where an application is not contested, the Commissioner need not take evidence, but where it is contested he should have the evidence taken in shorthand.

A. C. Galt, for the appellants.

E. P. Davis, K.C., and *A. H. MacNeill*, K.C., for the respondents.

[IRVING, J., 1ST MAY, 1902.]

In re ASSESSMENT ACT.

Assessment and taxes—Income of locomotive engineers—Taxation.

Reference by order in council to a Judge of the Supreme Court of the question, "whether the earnings of railway locomotive engineers were income within the meaning of

that term as employed in the Assessment Act prior to the amendment of the said Act by the Assessment Act Amendment Act, 1901, and whether such earnings were liable to taxation."

Section 3 of the Assessment Act, R. S. B. C. 1897 c. 179, provides in effect that, with certain exceptions, the annual income of every person in the Province in excess of \$1,000 is liable to taxation, and before 1901 the Act contained no definition of "income." Prior to 1901 the earnings (in excess of \$1,000) of railway locomotive engineers who receive pay according to the number of miles they ran their locomotives, were assessed. The contention on their behalf was (1) that earnings not the result of capital, but the result of personal exertions, are not "income;" and (2) that, in order to arrive at amount of income, a deduction from gross earnings must be made for reasonable living expenses.

The question was answered in the affirmative.

Charles Wilson, K.C., for the engineers.

H. A. Maclean, for the Crown.

Supreme Court of Canada.

EXCHEQUER COURT.]

[6TH MAY, 1902.]

REX v. ALGOMA CENTRAL R. W. CO.

Decision.—Customs duties—Foreign built ship—Customs Tariff Act, 1897, s. 4.

A foreign built ship owned in Canada, which has been given a certificate from a British consul, and comes into Canada for the purpose of being registered as a Canadian ship, is liable to duty under s. 4 of the Customs Tariff Act, 1897.

A taxing Act is not to be construed differently from any other.

Judgment of the Exchequer Court, 7 Ex. C. R. 239, *ante* 85, reversed.

E. L. Newcombe, K.C., for the appellant.

W. Nesbitt, K.C., and *H. E. Rose*, for the respondents.

ONTARIO.]

JACKSON v. GRAND TRUNK R. W. CO.

Trial—Jury—Verdict—Weight of evidence—Negligence—Railway—Sparks from engine.

Fire was discovered on J.'s farm a short time after the passing of a train of the Grand Trunk Railway, drawn by two engines, one having a long, and the other a short, or medium, smoke box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a longer smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine, and they believed it was from that with the short smoke box; and that the use of said box constituted negligence in the company, which had not taken the proper means to prevent the emission of sparks.

Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 689, *ante* 12, that the latter finding was not justified by the evidence, and the verdict for plaintiff at the trial was properly set aside.

Christopher Robinson, K.C., and *J. D. Montgomery*, for the appellant.

W. Nesbitt, K.C., and *H. E. Rose*, for the respondents.

NORTH AMERICAN LIFE ASSURANCE CO. v. BROPHY.

Life insurance—Wager policy—Endowment—14 Geo. III. c. 48, s. 1 (Imp.)—Action for cancellation—Return of premiums.

If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit, and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. III. c. 48, s. 1 (Imp.).

The Act applies to an endowment as well as to an all life policy.

Judgment of the Court of Appeal, 2 O. L. R. 559, 21 Occ. N. 557, affirmed.

In an action by the company for cancellation of the policy under the Act, a return of the premiums paid will not be made a condition of obtaining cancellation.

Judgment of the Court of Appeal reversed.

Daniel O'Connell and *E. J. Butler*, for the appellant.

J. K. Kerr, K.C., and *J. A. Paterson*, for the respondents.

NEW YORK AND OTTAWA CO. v. COLLINS BAY RAFTING AND FORWARDING CO.

Contract—Divisibility—Completion.

By a contract to remove spans from a wrecked bridge in the St. Lawrence, the contractors agreed "to remove both spans of the wrecked bridge and put them ashore, for the sum of \$25,000, to be paid, \$5,000 as soon as one span is removed from the channel, and another \$5,000 as soon as one span is put ashore, and the balance as soon as the work is completed. . . . it being understood and agreed that

we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season."

Held, reversing the judgment of the Court of Appeal (21st September, 1901), TASCHEREAU and DAVIES, JJ., dissenting, that the contract was divisible, and the contractors, having removed one span from the channel and put it ashore, were entitled to the two payments of \$5,000 each, notwithstanding that the whole work was not completed in the second season.

R. T. Walkem, K.C., and *G. F. Shepley*, K.C., for the appellants.

A. B. Aylesworth, K.C., and *J. A. C. Cameron*, for the respondents.

QUEBEC.]

CITY OF MONTREAL v. CITY OF STE. CUNEGONDE.

CITY OF STE. CUNEGONDE v. CITY OF ST. HENRI.

CITY OF STE. CUNEGONDE v. TOWN OF WESTMOUNT.

Municipal corporations—Drainage—Inter-municipal works—Contract—Damages—Guaranty—Continuing liability.

The city of Montreal, having a sewer sufficient for all its purposes within its limits through lands lying on a lower level than those of the adjoining municipalities of Ste. Cunegonde, St. Henri, and Westmount, entered into an agreement in writing with Ste. Cunegonde by which the last named city was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and, by the same agreement, the city of Montreal consented that the city of Ste. Cunegonde should allow the two other municipalities to make connections with its sewers, so connected, in such manner that waters coming from such three higher municipalities should be drained through the Montreal sewer. The privilege was granted on condition that the connection with the Montreal sewer should be made by Ste. Cunegonde at its own cost and to the entire satisfaction of the Montreal engineers; that Ste. Cunegonde should guarantee Montreal against all "damages which might result whether from the connection of said sewers or works necessary" in connection therewith, as well to the city of Montreal as to other persons or corporations, and Ste. Cunegonde bound itself

to pay and reimburse to the said city of Montreal all sums of money that the latter might "be called upon and condemned to pay on account of such damages and the costs resulting therefrom." In case of the Montreal sewer becoming insufficient and its capacity requiring to be increased or a new sewer constructed, it was provided that Ste. Cunegonde should contribute proportionately to the cost of constructing the new works. The sewer of Ste. Cunegonde was accordingly connected with the Montreal sewer, and the other municipalities, upon entering into similar agreements, were permitted by Ste. Cunegonde to make connections with its sewers whereby their lands were also drained through the Montreal sewer, the agreements of the two last municipalities binding them as to the *arriere garants*, respectively, of the city of Ste. Cunegonde. In an action by the city of Montreal to recover from Ste. Cunegonde damages which it had been condemned to pay for flooding of cellars by waters from the sewer in question, the *arriere garants* were made parties by the principal defendant, by demands in warranty.

Held, that the guaranty bound the several higher municipalities for all damages resulting not only from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from time to time on account of the user by them of the Montreal sewer for the drainage purposes.

Held, also, that, as the city of Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by the city of Montreal.

Held, further, that the judgment awarding damages against the city of Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, the said city of Montreal was only entitled to recover by its suit against Ste. Cunegonde such damages as might be shewn to have resulted from the connection and user of the sewers under the agreement; that the city of Montreal when so sued was not obliged to summon its warrantor into the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not a condition precedent to action by the city of Montreal, by the terms of the contract, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between the city

of Ste. Cunegonde and the *arriere garants*, their contracts bound them respectively to pay such damages, interest, and costs in proportion to the areas drained by them respectively into the Montreal sewer.

Appeal by city of Montreal allowed with costs.

Appeals by city of Ste. Cunegonde allowed in part without costs.

Atwater, K.C., and *Ethier*, K.C., for the city of Montreal.

Adam, K.C., and *Mathieu*, for the city of Ste. Cunegonde.

Goderre, for the city of St. Henri.

Dunlop, K.C., and *Macpherson*, for the town of Westmount.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[30TH MAY, 1902.]

CENTAUR CYCLE CO. v. HILL.

Appeal—Court of Appeal—Order of Judge removing stay of execution—Rule 827—Discretion—Grounds for removal.

An appeal lies to the Court of Appeal from an order of a Judge thereof, in Chambers, under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal.

Such an order is not a purely discretionary one; a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause.

A Judge in Chambers having ordered the removal of the stay, his order was reversed by the Court, where the appeal appeared to be prosecuted in good faith and on substantial grounds, and the effect of an execution would practically be to close up the appellant's business.

W. E. Middleton, for the plaintiffs.

C. W. Kerr, for the defendant Hill.

W. E. Raney, for the defendant Love.

IN CHAMBERS.

[OSLER, J.A., 28TH APRIL, 1902.]

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

Appeal—Court of Appeal—Leave to appeal—Status of judicial officer.

Motion by the defendants for leave to appeal from an order of a Divisional Court (post 255), reversing an order of a Judge in Chambers, which stayed proceedings in these actions and dismissed a motion for a reference to the drainage referee as an official referee. The Divisional Court decided that the drainage referee was an official referee for the purposes of the Arbitration Act.

Held, that leave to appeal should be granted on the ground that the decision involved the status, jurisdiction, and authority of a judicial officer, and the validity of the proceedings which might be taken by him under the order of the Divisional Court.

J. H. Moss, for the defendants.

G. H. Watson, K.C., for the plaintiffs.

[MACLENNAN, J.A., 27TH MAY, 1902.]

PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

Appeal—Leave—Order striking out jury notice—Powers of Judge in Chambers—Conflicting decisions.

In an action of covenant upon two mortgages, the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused.

Held, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof: R. S. O. c. 51, s. 77, s.-s. (4), cl. (c).

The power of a Judge in Chambers to strike out a jury notice has never been doubted.

D. W. Saunders, for the plaintiffs.

W. H. Bartram, for the defendant.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., BRITTON, J., 17TH APRIL, 1902.]

McCLURE v. TOWNSHIP OF BROOKE.

BRYCE v. TOWNSHIP OF BROOKE.

Drainage referee—Official referee—Reference—Practice.

An official referee is only official in the sense of being an officer of the Court.

The drainage referee, being an officer of the Court, with all the necessary powers, is an official referee for the purposes and within the meaning of the Arbitration Act, and an action for damages in connection with the construction of drains may be referred to him.

Order of MEREDITH, C.J., reversed.

G. H. Watson, K.C., for the plaintiffs.

J. H. Moss, for the defendants.

[BOYD, C., MEREDITH, J., 17TH MAY, 1902.]

O'HEARN v. TOWN OF PORT ARTHUR.

Street railways—Negligence—Collision—Contributory negligence.

The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track, and the waggon was struck by a car which had been coming behind, at what was held to have been a reasonable rate of speed. The plaintiff said that one hundred feet from the point at which he had tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross.

Held, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages.

Danger v. London Street R. W. Co., 30 O.R. 493, applied.
Judgment of BRITTON, J., reversed.

Per BOYD, C.:—A driver of a vehicle, moving along a street in which cars are running, and who knows when and where he intends to cross the car tracks, is bound to be vigilant to see before crossing that no car is coming behind him. A greater burden in this regard rests on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension lest some one may at any moment cross in front of the moving car.

N. W. Rowell, for the defendants.

J. H. Moss, for the plaintiff.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 22ND MAY, 1902.]

LLOYD v. WALKER.

Assessment and taxes—Distress for taxes—"Owner"—Agent for mortgagees in possession—R.S.O. 1897 c. 224, s. 135, s.-s. 3.

Mortgagees in possession entered into an agreement with the plaintiff, reciting that they were about to take proceedings to foreclose their mortgage, and that the plaintiff had agreed to become the purchaser of the mortgaged land at a sum equal to the principal, interest, and costs, the purchase to be carried out so soon as the vendors should have obtained a final order of foreclosure, upon which event, and upon payment by the plaintiff of \$2,000, they would convey the premises to him, taking back a mortgage to secure payment of the balance of the purchase money; and in the meantime the plaintiff was to be allowed, as their agent, to manage the property, receive the rents, and make sales, subject to their approval, and to render accounts to them.

Held, that the plaintiff was not the owner of the premises within s. 135, s.-s. 3, of the Assessment Act, and the collector was not authorized to levy the taxes assessed against the property upon the plaintiff's goods.

Seemle, per BRITTON, J., that a mortgagee in possession would be an owner whose goods would be liable to seizure, and so would one who had an absolute agreement to purchase with the mortgagee, but in this case the plaintiff held only a conditional agreement for the sale of the property and was in the position only of agent for the mortgagee.

J. J. Warren, for the plaintiff.

S. B. Woods, for the defendant.

BATZOLD v. UPPER.

Evidence—Corroboration—Action against executor or administrator—"Some other material evidence"—Cestui que trust—R.S.O. 1897 c. 73, s. 10.

The material corroborative evidence required by R. S. O. 1897 c. 73, s. 10, in a proceeding by or against the executor of the will, or the administrator of the estate, of a deceased person, may be given by one who is interested as *cestui que trust* in the matter of the claim in question in the action. The interest of such a witness in the result may well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration.

Shirley Denison, for the plaintiff.

W. A. Wilson, for the defendant.

[STALEY, J., BRITTON, J., 2ND JUNE, 1902.]

DUNN v. PRESCOTT ELEVATOR CO.

Bailment—Grain elevator—Negligence—Storage—Duty of periodical examination—Fermentation of corn.

The defendants were keepers of an elevator, and on the 24th April, 1897, received from the plaintiff a quantity of corn for storage, and stored it in several large bins. On the 22nd May, 1897, desiring to use one of these bins (No. 49) for another purpose, the defendants removed the corn over into another bin, and in so doing discovered that it had become heated, whereupon, by exposing it to the air, they stayed the process of heating, and the corn recovered. They also notified the plaintiff by telegram on discovering the heating in the bin No. 49, but they did not themselves examine the remainder of the corn to see whether it also was becoming heated, nor did the plaintiff ask them to do so. When, on the 3rd June, the corn was run out to be shipped, a quantity of it was found to be in an advanced condition of fermentation.

Held, that the defendants had been guilty of negligence, under the above circumstances, and were liable to the plaintiff for the loss sustained by him.

G. F. Henderson, for the liquidator of the defendants.

James Leitch, K.C., for the plaintiff.

[FALCONBRIDGE, C.J., 26TH MAY, 1902.]

TOWN v. ARCHER.

Surgeon—Malpractice—Limitation of actions—Ontario Medical Act—Termination of services—Trial—Dispensing with jury—Finding of Judge on evidence.

An action against surgeons for malpractice was held to be barred by s. 41 of the Ontario Medical Act, R. S. O. 1897 c. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these occasions she did not go as a patient, but as a person with a grievance, she having previously consulted another surgeon, and also a solicitor.

Actions of malpractice are now more properly tried without a jury.

Upon the evidence, it was held, also, that the plaintiff, upon whom the burden rested, had failed to make out a case of negligent malpractice; and the action was dismissed.

N. F. Paterson, K.C., and S. S. Sharpe, for the plaintiff.

A. B. Aylesworth, K.C., J. H. Moss, and W. H. Harris, for the defendants.

[LOUNT, J., 5TH JUNE, 1902.]

SKILLINGS v. ROYAL INS. CO.

Fire insurance—Cancellation of policy—Notice of cancellation received after loss.

The insured sent to the company his policy, with an indorsed surrender clause executed, and a letter asking that the insurance be terminated, and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office, and did not reach the company till the morning after the insured goods had been destroyed by fire.

Held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt; and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt, that the

attempted surrender did not operate, and, therefore, that the company were liable for the loss.

W. R. Riddell, K.C., and *A. Fasken*, for the plaintiffs.

C. Robinson, K.C., and *C. S. MacInnes*, for the defendants.

IN CHAMBERS.

[BRITTON, J., 17TH JUNE, 1902.]

In re CHAPMAN.

Will—Construction—Gift “during natural life”—Absolute interest.

A testator gave \$500 to A. S., but limited the disposition of it so that she got for her own use absolutely, only the interest upon it. He provided that at her death this \$500 was to be given to her eldest son, E. C. S., and that he could use this sum “for his benefit during his natural life.” Then the testator purported to give to his wife all that remained after the \$500 was taken out, but he limited her for her own use absolutely to the interest only, and when the capital should be no longer needed to earn interest for his wife, he gave it to certain persons named, and in all cases “for their benefit during their natural lives.”

Held, that the testator intended to dispose of all his estate, and had carried out his intention by a payment over of the \$500 after the death of A. S., and by a division of the rest after the death of his wife; and that the sum of \$500 was an absolute gift to E. C. S., and upon the death of his mother he was to be entitled to it absolutely; and the testator did not die intestate as to any portion of his estate.

W. E. Middleton, for the executors of the will of Parish Chapman.

J. J. Maclaren, K.C., for the heirs.

N. W. Rowell, for the executors of the will of the widow.

F. W. Harcourt, for the infants.

[THE MASTER IN CHAMBERS, 15TH MARCH, 1902.]

DULMAGE v. WHITE.

Venue—Agreement before action.

A conditional sale agreement provided that "in case of any litigation arising in connection with this transaction, it is agreed that the trial will be held only in" (the place where the vendors carried on business).

Held, that this condition was binding, and in an action by the purchaser to recover damages because of the unsatisfactory condition of the article sold, an order was made changing the place of trial to the place agreed upon, although the balance of convenience was in favour of the place named by the plaintiff in his writ.

C. Swabey, for the defendants.

A. R. Clute, for the plaintiff.

[4TH JUNE, 1902.]

WHEELER v. TOWN OF CORNWALL.

Parties—Third party—Settlement of action.

After a third party had been brought in and the usual directions as to trial given, the action was settled as between the plaintiff and the defendants.

Held, that the defendants could not proceed to trial as against the third party, and the action was dismissed as against the third party with costs, without prejudice to the right of the defendants to bring an action against the third party.

J. H. Moss, for the third party.

D. W. Saunders, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[McDONALD, C.J., 6TH JUNE, 1902.]

GRANT v. ACADIA COAL CO.

Notice of trial—Time—Judgment granting new trial—Settlement of.

By the judgment of the Supreme Court of Canada an appeal in this action was allowed and a new trial granted. The judgment was read in open Court on the 27th May. The plaintiff's solicitor thereupon gave the usual ten days' notice of trial for the 10th June, 1902. The minutes of the judgment were not settled until the 3rd June, and when settled bore date the 27th May, 1902.

The notice of trial was set aside as premature.

Mellish, for the plaintiff.

† *Fullon*, for the defendants.

BARTLETT v. NOVA SCOTIA STEEL CO.

Appeal—Supreme Court of Canada—Order granting new trial—Stay pending appeal.

The defendant appealed to the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia, sitting *in banc*, granting a new trial. Security on the appeal having been given and allowed, an application was made by the defendant to stay execution and all other proceedings. No opposition was made to the stay of execution, but the plaintiffs objected to a stay of the trial and of all other proceedings.

Held, that the trial and all other proceedings should be stayed pending the appeal, and a Judge of the Court appealed from had jurisdiction to impose such a stay.

J. A. Chisholm, for the plaintiff.

Henry, for the defendants.

[TOWNSHEND, J., 28RD MAY, 1902.]**KINSMAN v. ONDERDONK.***Attachment of debts—Service—Officers of bank—Priorities.*

Interpleader proceedings were taken by the Bank of Nova Scotia to determine the priority of attaching process served on it by two creditors of an absconding debtor. Order IX., Rule 8, of the Judicature Act provides that process may be served on a corporation by serving the same on the principal officer thereof or on the clerk or secretary. One of the creditors served the president and secretary of the bank at its head office. The other creditor, before making any service in the same manner, and before the service of the first mentioned creditor, served the process on the manager of the branch of the bank in which the absconding debtor's money was deposited, and he contended that he thereby acquired priority.

Held, that priority must be given to the first service on the president at the head office.

Webster, K.C., for the bank.

Roscoe, K.C., and *Fulton*, for the contending creditors, respectively.

NEW BRUNSWICK.**In the Supreme Court.**[GREGORY, J., 12TH JUNE, 1902.]*In re KELLY.*

Extradition—Assault with intent to murder—Extradition Act—Treaty with United States—Evidence on inquiry before Judge.

Where a fugitive offender from the United States is charged with an assault with intent to murder, in an information laid under the Extradition Act, R.S.C. c. 142, the evidence must sufficiently establish the existence of the intent.

The prisoner was in custody under a warrant issued by the Chief Justice under the Extradition Act, R. S. C. c. 142, upon an information charging the prisoner with having on the 17th April last, in the county of Arrostook, in the

State of Maine, assaulted Frank W. Burns with the intent then and there feloniously to kill and murder him. At the hearing before GREGORY, J., evidence was given of the assault, and the question whether the intent to murder was sufficiently made out was argued.

A. B. Connell, K.C., for the prosecutor.

L. A. Currey, K.C., and F. B. Carvell, for the prisoner.

GREGORY, J.—One of the crimes mentioned in the Extradition Treaty between Great Britain and the United States is “assaulting with intent to murder.” The right to have the prisoner extradited depends upon the establishment of the prisoner’s intent to murder. The words “feloniously to kill” in the information are surplusage. No matter how serious the assault may be, unless it is accompanied with the intent to murder, the accused is not liable to be extradited. By s. 9 of the Extradition Act the Judge or commissioner before whom the fugitive is brought is directed to hear the case in the same manner as nearly as may be as if the fugitive were brought before a justice of the peace charged with an indictable offence committed in Canada. By s. 394 of the Criminal Code, after all the witnesses on the part of the prosecution and the accused have been heard, the justice of the peace is directed, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon trial, to discharge him, and by s. 596, if he thinks that the evidence is sufficient to put the accused on his trial, he is to commit him for trial. Doubtless, if the prisoner in this case was being examined before a justice of the peace on the offence laid against him, but committed in Canada, he would with propriety be committed for trial for some offence; but, I think, not for the offence of assault with intent to murder, for the reason that I can see no evidence upon which any Court or jury could hold that the assault was committed with intent to murder.

[He then referred to s. 11 of the Extradition Act, and proceeded :]

Under this section, before a Judge would be warranted in committing a fugitive, it would be necessary that such evidence should be produced as would, according to the law of Canada, justify the committal of the accused for trial for an extradition crime. It was urged upon me by counsel for the prosecution that it was beyond my duty to consider the evidence of intention on the part of the accused; that I am not authorized to consider any matter

of defence that the accused may set up, nor to enter into the question of intent. That, it was said, was a matter for the trial Court. I think it is properly contended that I am not to try the case or consider matters of defence, but if upon the evidence produced by the prosecution there is not sufficient evidence to establish an intention, such intention as is necessary to make an extradition crime, I am bound to discharge the prisoner.

Prisoner discharged.

MANITOBA

In the King's Bench.

[FULL COURT, 31st MAY, 1902.]

JONES STACKER CO. v. GREEN.

*Contract—Want of consensus ad idem—Misrepresentation of contents of
for ten documents.*

The action was brought in a County Court for the price of a "Jones Wind Stacker," which was alleged to have been ordered by the defendant of the plaintiffs, by a document partly written and partly printed.

The plaintiffs' place of business was at Carberry, but they employed an agent at Boissevain to obtain orders, and furnished him with printed blank forms to be filled up and signed by proposed purchasers, and then forwarded to the firm. The agent had no authority to accept or agree to carry out the orders, which only became binding upon an acceptance by the firm or its officials at Carberry. The defendant negotiated with the agent at Boissevain for the machine, and agreed to give an order for one. A printed form was filled up by the agent, signed by the defendant, and forwarded to the plaintiffs, who accepted it, and shipped the machine to the defendant. The latter tried it, was not satisfied with it, and returned it to the agent at Boissevain. The form of order contained a condition as follows: "If, upon one day's trial, the stacker should not work well, the purchaser shall give immediate notice to said Jones Stacker Company, stating wherein it fails, and allow time to send a person to put it in order. If the trouble is found to be clearly the fault of the stacker, no charge to be made.

. . . If it cannot then be made to work well, the purchaser shall return it at once to the Jones Stacker Company at Carberry, and all cash and notes received will be refunded. Continuous use of the stacker, or use at intervals through threshing season, or failure to notify the Jones Stacker Company, or to return the stacker as agreed, shall be deemed an acceptance of the machine by the undersigned."

The order was given hurriedly, it was not read by or to the defendant, and no duplicate was given him.

According to the defendant's evidence, when the order was being drawn up, he said to the agent: "Now, if there is anything in this order that binds me to keep the stacker if it does not give satisfaction, I won't sign it;" and the agent told him that there was not, that he could take the stacker out and keep it ten days, and if it did not give satisfaction, not to settle for it, but to bring it in and leave it on the platform. The agent did not deny this, but admitted that he thought at that time that the order gave a ten days' trial.

The County Court Judge entered judgment for the defendant, holding that there was no binding agreement between the parties. The plaintiffs appealed.

Held, that there was no such *consensus ad idem* as was necessary to create a binding contract: *Smith v. Hughes*, L. R. 6 Q. B. 597.

The defendant, under the circumstances, could not be taken to have intended to order the machine upon the terms of the printed form. If he had not been misled, but had signed the order without informing himself at all of its terms, he would have been bound by it. The defendant's mistake was induced by the language of the person employed by the plaintiffs to do just what he was then doing. He was to canvass for purchasers and obtain signatures to orders; he made the representation in the course of his employment; and he failed to carry out his express instructions to furnish to the defendant a duplicate of the order, which might have been read in time to enable the defendant to cancel the order, if he did not then desire to be bound by it. Under the circumstances the defendant should not be precluded from setting up that the proposed agreement was understood by him in a sense quite different from that in which the plaintiffs understood it.

The appeal was dismissed.

I. Pitblado, for the plaintiffs.

J. H. Munson, K.C., for the defendant.

[FULL COURT, 31st MAY, 1902.]

WHITLA v. ROYAL INSURANCE CO.

WHITLA v. MANITOBA ASSURANCE CO.

Fire insurance—Authority of agent to give interim receipt—Proposal to abandon prior insurance—Failure to do so—Executory contract—Note given for premium—Statutory conditions—Subsequent insurance.

The two appeals in these cases, from the decisions of KILLAM, C.J., *ante* pp. 69 and 72, were heard together.

Held, that both appeals should be dismissed with costs.

The prior insurance in the Manitoba Assurance Company was in force, and that company was liable for the loss, and the action was properly dismissed as against the Royal Insurance Company.

[FULL COURT, 31st MAY, 1902.]

DAVIDSON v. STUART.

Master and servant—Death of employee—Fatal Accidents Act—Reasonable expectation of pecuniary benefit—King's Bench Act, Rule 642—Powers of full Court on appeal—New trial.

Action by the parents and sisters of W. Davidson to recover damages for his death. The deceased was employed in the electric lighting works of the defendants, and the plaintiffs alleged that his death was caused by an electric shock received in consequence of defects in the appliances supplied by the defendants at the works.

The action was tried before RICHARDS, J., and a special jury, when the plaintiffs recovered a verdict for \$1,500. The defendants appealed, and urged, among other grounds, the want of evidence of damages entitling the plaintiffs to recover.

The father of deceased was rector of a small parish in another Province; it was not shewn that he had any other source of income; the deceased was an only son; there were three daughters, all over 21 years of age; they were all without means, and usually lived at home.

The son took a University course in Arts, and returned home when about 21 years old. For a time he remained at home earning nothing, then he was for a time in the insurance business, going home at times to take charge of the

sugar woods there, for which his father allowed him one-half the profits, which was what he usually did to any person. He subsequently left for Manitoba in search of occupation; he worked at first in the harvest fields, but subsequently obtained employment as a lineman in connection with electric works, and after being thus engaged for two years and a half, he was employed by the defendants to manage their electric lighting works at \$115 a month, out of which he was to pay all other necessary employees; he engaged an engineer at \$45 per month, and had at times to get other help. He had been thus employed about three months when he met his death.

During all the time of his being in Manitoba he contributed nothing to the support of the family, though his father stated that he sent them a few "affectionate remembrances;" he further stated that the son was "a very great help in every way, took charge and helped in the parish and in the home, and was in every way most helpful," though the particulars of the ways in which he gave assistance were not stated.

These appeared to be all the circumstances from which to draw the inference of reasonable expectation of pecuniary benefit to the plaintiffs from a continuance of the life of deceased.

Held, that the circumstances were not such as to warrant the inference. No doubt the rule is, as laid down in *Franklin v. South Eastern R. W. Co.*, 3 H. & N. 211, that it is not absolutely necessary to shew previous assistance, and that a reasonable expectation is sufficient. But in this case, there did not seem to be anything to shew that there should have been such expectation.

Damages are not to be allowed for injury to the feelings of the survivors, but for the loss of a life of substantial pecuniary value to the relatives entitled under the statute. Respecting compensation to families of persons killed by accident, R. S. M. c. 26, there must be evidence reasonably warranting the inference that the relatives have sustained a loss of that character. It need not appear that the deceased was under any legal liability to the survivors of which his death has prevented performance; it is sufficient that the circumstances were such as should give them a reasonable expectation of pecuniary benefit from the continuance of the life.

It is not sufficient in order to raise a case for the jury to shew the mere relationship and the circumstances of the family. The Court has first to determine whether there is ground for the necessary inference.

The verdict could not be sustained, and it seemed unnecessary to discuss other objections raised.

Counsel for the defendants sought to have the action dismissed, or to have a nonsuit, or a verdict for the defendants entered.

Held, that the Court had not power to do any of those things: Rule 642.

In Manitoba certain actions must be tried by a jury, unless the parties consent to the contrary. In other cases a jury is obtained by order. In either case the facts must be determined by a jury, and it did not appear that the Court could give the verdict because it considered there were not sufficient facts for the consideration of the jury.

The verdict should be set aside and a new trial directed, without costs of the former trial; costs of the motion to be costs in the cause, and to be paid by plaintiffs to defendants on the final disposition of the cause in any event.

H. M. Howell, K.C., T. Robinson, and W. F. Hull, for the plaintiffs.

J. S. Ewart, K.C., and F. H. Phippen, for the defendants.

[BAIN, J., 12TH MAY, 1902.]

BLACKWOOD v. PERCIVAL.

Principal and surety—Giving time—King's Bench Act, s. 39, s.s. 14—Surety prejudiced.

The plaintiffs sued to recover a balance on a joint and several promissory note for \$3,500, dated 5th August, 1897, made by the defendant and one G. H. Campbell, payable to the order of D. M. Blackwood, three months after date. D. M. Blackwood indorsed the note to the plaintiffs, and they also indorsed it and had it discounted and gave their cheque for the proceeds to D. M. Blackwood.

When the note was made, it was agreed that each of the three parties to it would pay one-third of its amount when it fell due. The plaintiffs had no knowledge of this agreement when they indorsed and discounted the note, but they were told of it by D. M. Blackwood about the time the note fell due.

The defendant paid the plaintiffs \$1,166.67, and D. M. Blackwood gave the plaintiffs his note payable to their order for \$2,000, and cash sufficient, with the proceeds of the discount of his note and Percival's payment, to make up the \$3,500; the plaintiffs indorsed and discounted the \$2,000 note, and then paid the bank the \$3,500 and took up the

note for that amount. D. M. Blackwood's note for \$2,000 not having been paid, the plaintiffs paid the bank, and charged the amount to D. M. Blackwood in their books. He not having paid any part of it, the plaintiffs brought this action against the defendant to recover the balance of the note for \$3,500. There was no agreement that the note for \$2,000 was to be taken in discharge of the other note, and when the plaintiffs took up the \$3,500 note they retained it.

The defence was raised that, as to the balance of the note, which was unpaid, the liability of the defendant to the plaintiffs was that merely of a surety for the payment of the shares of the \$3,500 which Campbell and D. M. Blackwood should have paid, and that, after the note came due, the plaintiffs, by giving time to D. M. Blackwood or Campbell, discharged the defendant from further liability.

The Queen's Bench Act, 1895, s. 39, s.-s. 14, provides that, while a surety shall be entitled to set up giving of time to the principal debtor as a defence, "the same shall be allowed in so far only as it shall be shewn that the surety has thereby been prejudiced." To meet the above provision, it was alleged that the defendant was prejudiced to an amount greater than the plaintiffs' claim by being induced to alter his position with relation to D. M. Blackwood and Campbell, in that he paid to each a large sum of money and was induced to settle the accounts between him and D. M. Blackwood and Campbell. The only evidence in support of this defence was that of the defendant himself, that D. M. Blackwood and Campbell represented to him that the note in question and other liabilities had been paid; he accepted their word and paid them an amount they claimed.

Held, that, even if it were clear that the defendant was a surety only, and that the plaintiffs gave time to Blackwood and Campbell, the defendant had not shewn that he had been prejudiced by the giving of time.

The onus of proving that he has been prejudiced must rest on the surety; and he must shew that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time; and the defence will avail him to the extent of the loss or damage he can prove; the defendant failed to establish any in the present case.

Judgment for the plaintiffs for \$2,000, interest, and costs.

C. P. Wilson and *G. A. Elliott*, for the plaintiffs.

H. M. Howell, K.C., and *J. S. Hough*, K.C., for the defendant.

[RICHARDS, J., 26TH MAY, 1902.]

MCBEAN v. WYLLIE.

Injunction—Railway—Right of crossing—Severance of ownership of adjoining lands—Fire limits by-law—Remedy for infringement of—Nuisance.

The plaintiff owned and resided in a dwelling house, the grounds attached to which adjoined the western limit of the right of way of the Winnipeg Transfer Railway Company, and she brought this action to restrain the defendant from completing a warehouse, part of which was erected on the right of way, in front of and distant about ten feet from the limits of her grounds.

She claimed an interest in the ground occupied by the defendants' building; alleged that it was being erected within the first class fire limits of the city of Winnipeg, of materials the use of which were, by city by-law 1615, forbidden in buildings within such limits; that it shut off the plaintiff's view of the Red river, and injured the value of her property; that it increased her risk of fire; and its erection created a nuisance.

The plaintiff's grantor once owned, in addition to what was the plaintiff's property, the land lying east of it to the Red river bank. That grantor conveyed to the railway company the part occupied by its right of way. As such right of way did not extend on the east to the river bank, the grantor was left with land on each side of the right of way, the piece on the east extending to the river bank. To get access from each of these remaining pieces to the other a four-foot-wide right of crossing from one to the other over the railway right of way was said to have been reserved in writing to the grantor, but its exact location was never settled, and there was no evidence that it was ever used. The plaintiff's grantor afterwards sold to the plaintiff the land west of the right of way, and later, to the defendant, that east of the right of way.

The above grantor did not, when selling to the plaintiff or the other purchaser, purport to convey such four-foot right of crossing.

The warehouse in question was erected on land leased to the defendant by the railway company, and was part of the company's right of way so conveyed to it by the plaintiff's grantor.

Held, that the plaintiff had failed to prove her alleged interest in the property the defendant was building on; there was no evidence that she acquired such right of crossing; it

ceased to be of any value or capable of being enjoyed when the ownership of the lands which it was to connect was severed; it must be assumed that the right was at most only intended to exist while such lands were the property of one owner.

The fact of the warehouse cutting off a view of the river could not in itself be actionable; the plaintiff, having bought her property with knowledge that it adjoined a railway line, had reason to expect that warehouses might be built on the right of way.

There was a provision in the fire limits by-law that "the inspector of buildings . . . may take down and remove, at the expense of the owner, every building or any part thereof, which may be put up, or may be contrary to the provisions of this by-law or any of them."

Held, that there was what seemed to be an adequate penalty provided: *Atkinson v. Newcastle*, 2 Ex. D. 441; when an adequate remedy is provided, the intention of the Legislature is, that such penalty shall ordinarily be the only remedy. In such case an individual cannot bring an action unless he shews that the infringement of the enactment will create a nuisance from which he will suffer.

The evidence of nuisance was very meagre; the suggestion that the defendant intended to store in the building calcium carbide was not proved.

Action dismissed with costs.

R. A. Bonnar, for the plaintiff.

H. J. Macdonald, K.C., and *A. Haggart*, K.C., for the defendant.

BRITISH COLUMBIA

In the Supreme Court.

[FULL COURT, 25TH APRIL, 1902.]

WILSON v. CANADIAN DEVELOPMENT CO.

Carriers—Special contract—Variation of, by bill of lading—Carriage of goods—Owner's risk. *

Appeal from judgment pronounced by CRAIG, J., in the Territorial Court of the Yukon, in favour of the plaintiff for \$28,855.85 and costs.

The defendant company, as a common carrier, in June, 1899, contracted with the plaintiff, a Dawson merchant, to carry for him from Puget Sound and British Columbia ports general merchandise, the rates being according to tariff annexed to contract. Three of the terms of the contract were: "Date of shipment—Throughout season of 1899. Consignees—T. G. Wilson, Dawson City. Quantity—Exclusive contract for season of 1899." Annexed to the contract was the freight tariff giving the rates to be charged on the different classes of goods, "with guaranteed delivery of shipments during the season of 1899." The company decided not to receive, after 20th August, any more freight with guaranteed delivery during 1899, and so notified one Pitts, a wholesale dealer of Victoria, of whom the plaintiff was a customer.

Pitts afterwards shipped goods to Dawson, consigned to the "Canadian Bank of Commerce, notify T. G. Wilson," and received from the company bills of lading marked with a special condition thus: "This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899." The company failed to deliver the goods, and Wilson sued for damages caused him by being deprived of the goods:—

Held, by the full Court (reversing the decision of CRAIG, J.), that the goods were not carried under the exclusive contract for the season of 1899, by which delivery was guaranteed that same season, but that they were carried under the terms of the bills of lading, and the company was not liable for the loss.

As the plaintiff's cause of action, if any, would be against the company for refusing to carry under the original contract, a new trial was granted with leave to the plaintiff to amend his pleadings.

E. V. Bodwell, K.C., and *L. P. Duff*, K.C., for the appellant.

F. Peters, K.C., and *A. G. Smith* (of the Yukon Bar), for the respondent.

[1st May, 1902.]

In re FLORIDA MINING CO.

Company—Winding-up—"Just and equitable"—Substratum gone—Shareholder's petition—Contributory—British Columbia Companies Winding-up Act, 1898.

An order for compulsory winding-up may be made under s. 5 of the Companies Winding-up Act, 1898 (B.C.), notwithstanding the winding-up is opposed by the company.

In winding-up proceedings instituted by a shareholder it appeared that shares had been unlawfully issued at a discount and at different percentages of their face value to different purchasers; that the substratum was gone and that the company was unable to carry on business; that there was a question as to the liability of the company to the principal shareholder, who had always been in practical control of the company.

Held, affirming an order of IRVING, J., directing a winding-up, that it was just and equitable that the company should be wound up.

S. S. Taylor, K.C., for the appellants.

E. P. Davis, K.C., for the respondent.

In the County Court of Westminster.

[BOLE, Co. J., 27th May, 1902.]

**BRITISH COLUMBIA TIMBER AND TRADING CO. v.
LEBERRY.**

Mechanics' Liens—"Owner"—Interest in land—Vendor and purchaser.

The plaintiffs claimed a mechanic's lien for \$633 against the estate and interest of John Leberry and H. R. Townsend in certain lots in the vicinity of New Westminster, for lumber furnished under the following circumstances:

Townsend, the registered owner of these lots, agreed to sell this land for \$1,200 to Leberry; \$50 was paid down, and the balance was to be paid immediately.

No agreement in writing as required by the Statute of Frauds was executed, but Leberry entered into possession of the premises and proceeded to fit up the buildings for the purpose of his business as a butcher for a slaughter house,

spending a large sum in so doing, and the lumber in respect of which the lien was claimed was used in building and repairing the slaughter house and putting up a fence on the land.

Corbould, K.C., for the plaintiffs.

R. L. Reid, for the defendant Townsend.

BOLE, Co. J.:—The main question for decision is, who is the owner for the purposes of this proceeding? Is it Leberry? Is it Townsend? Section 2, s.-s. 3, as amended in 1900, defines an owner thus: "‘Owner’ shall extend to and include a person having any estate or interest, legal or equitable, in the land upon or in respect of which the work is done, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, any such work is done or materials are placed or furnished."

Section 6 provides the procedure in case of liens against mortgaged premises, and s. 8 of c. 20 of 1900 amended s. 6 as follows: "(a) ‘Mortgage’ in this section shall include a vendor's lien and an agreement for the purchase of land, and for the purposes of this Act, and within the meaning thereof, the purchaser shall be deemed a mortgagor and the seller a mortgagee."

It seems to me that, bearing in mind the decision of the full Court in *Anderson v. Goodsall*, 7 Brit. Col. L. R. 404, especially the judgment of Mr. Justice Drake, at p. 408, the lien herein only attaches to the interest which Leberry had or has in the lands in question, which, as I understand, is that on payment of the balance of the purchase money, i.e., \$1,150, with legal interest computed from the date of sale, he, Leberry, may be entitled to receive from Townsend a conveyance in fee simple of this land free from incumbrances, and it appears to me that the plaintiffs are entitled to judgment against Leberry for \$603.08, and to a lien against whatever interest Leberry may have in these lands, with costs, but, as I think they have failed to sustain their claim against Townsend, he is entitled to judgment in his favour with costs.

Supreme Court of Canada.

EXCHEQUER COURT.]

[15TH MAY, 1902.]

BOSTON RUBBER SHOE CO. v. BOSTON RUBBER CO. OF MONTREAL.

*Trade-mark—Infringement—Use of corporate name—Fraud and deceit—
Evidence.*

Since 1885 the plaintiffs, incorporated in Massachusetts, had done business in the United States of America and Canada as manufacturers and dealers in india rubber boots and shoes under the name of "The Boston Rubber Shoe Company," having a trade line of their manufactures marked with the impression of their corporate name, registered as their trade mark, known as "Bostons," which had acquired a favourable reputation. The defendants were incorporated in Canada in 1896 by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods, on one grade of which was impressed their corporate name, these goods being referred to in their price lists, catalogues, and advertisements as "Bostons," and the company's name frequently mentioned therein as "Boston Rubber Company." In an action to restrain the defendants from continuing to use such impressed trade-mark, or any other similar mark, on such goods as an infringement of the plaintiffs' registered trade-mark:—

Held, reversing the judgment in 7 Ex. C. R. 187, 21 Occ. 517, that, under the circumstances, the use by the defendants of their corporate name in the manner described on goods of their own manufacture similar to those manufactured by the plaintiffs, was a fraudulent infringement of the plaintiffs' registered trade mark and calculated to deceive the public, and so, in bad faith, to obtain sales of their own goods as if they were the plaintiffs' manufactures, and consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark upon such goods manufactured by them in Canada.

Beique, K.C., and McGoun, K.C., for the respondents.

R. V. Sinclair, for the appellants.

QUEBEC.]

**MUTUAL LIFE ASSURANCE CO. OF CANADA v
GIRUÈRE.**

Life insurance—Delivery of policy—Payment of premium—Evidence.

The production from the custody of representatives of the insured of a policy of life insurance raises a *prima facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid, and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.

The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of Art. 1233, C. C.

Judgment of the Court below reversed.

Garrow, K.C., and Lane, for the appellants.

T. Chase-Casgrain, K.C., and A. Taschereau, for the respondent.

NEW BRUNSWICK.]

GRIMMER v. COUNTY OF GLOUCESTER.

Municipal corporations—Bond—Form of—Statute authorizing—Parish commissioners—Liability.

An Act of the New Brunswick Legislature authorized the county council of Gloucester county to appoint almshouse commissioners for the parish of Bathurst, in that county, who might build or rent premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality were empowered to issue bonds, to be wholly chargeable on the parish, under their corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed, and headed as follows: "Alms House Bond—Parish of Bathurst." It went on to state that "this

certifies that the parish of Bathurst, in the county of Gloucester, Province of New Brunswick, is indebted to George Grimmer . . . pursuant to an Act of Assembly" (the above-mentioned Act.) In an action by G. on the bond:—

Held, reversing the judgment of the Supreme Court of New Brunswick, that, notwithstanding the above declaration that the parish was the debtor, the county corporation were able to pay the amount due on the bond.

Currey, K.C., for the appellant.

Teed, K.C., for the respondents.

BRITISH COLUMBIA.]

BRIGGS v. NEWSWANDER.

Contract—Mining claim—Agreement for sale—Construction—Enhanced value.

By an agreement in writing, signed by both parties, B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should be immediately formed, and that B. should have a reasonable amount of the stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims, or that the agreement should be specifically performed.

Held, reversing the judgment of the Supreme Court of British Columbia, that the dual agreement above mentioned was for a transfer, at a nominal price, in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that on breach of said trust B. was entitled to a reconveyance of his interest in the claims and an account of moneys received, or that should have been received from the working thereof in the meantime.

J. Travers Lewis, for the appellant.

E. P. Davis, K.C., for the respondent.

QUEBEC.]

MUTUAL LIFE ASSURANCE CO. OF CANADA v
GIRUÈRE.

Life insurance—Delivery of policy—Payment of premium—Evidence.

The production from the custody of representatives of the insured of a policy of life insurance raises a prima facie presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid, and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.

The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of Art. 1233, C. C.

Judgment of the Court below reversed.

Garrow, K.C., and Lane, for the appellants.

T. Chase-Casgrain, K.C., and A. Taschereau, for the respondent.

NEW BRUNSWICK.]

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certifies that the parish of Bathurst, in the county of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer . . . pursuant to an Act of Assembly" (the above-mentioned Act.) In an action by G. on the bond:—

Held, reversing the judgment of the Supreme Court of New Brunswick, that, notwithstanding the above declaration that the parish was the debtor, the county corporation were liable to pay the amount due on the bond.

Currey, K.C., for the appellant.

Teed, K.C., for the respondents.

BRITISH COLUMBIA.]

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Contract—Mining claim—Agreement for sale—Construction—Enhanced value.

By an agreement in writing, signed by both parties, B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should be immediately formed, and that B. should have a reasonable amount of the stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims, or that the agreement should be specifically performed.

Held, reversing the judgment of the Supreme Court of British Columbia, that the dual agreement above mentioned was for a transfer, at a nominal price, in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that on breach of said trust B. was entitled to a reconveyance of his interest in the claims and an account of moneys received, or that should have been received from the working thereof in the meantime.

J. Travers Lewis, for the appellant.

E. P. Davis, K.C., for the respondent.

UNION S. S. CO. v. DRYSDALE.

Ship—Bill of lading—Limitation of time to sue—Damage from unseaworthiness.

On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date, after which the same should be completely barred.

Held, reversing the judgment in Brit. Col. L. R. 228, MILLS, J., dissenting, that this limitation applied to a claim for damages caused by unseaworthiness of the steamer.

E. P. Davis, K.C., for the appellants.

Sir C. H. Tupper, K.C., for the respondent.

COLLOM v. MANLEY.

Mines and minerals—Location of claim—Approximate bearing—Misstatement—“Minerals in place.”

Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other.

A prospector, in locating and recording his location line between No. 1 and No. 2 as running in an easterly direction, whereas it was nearly due north, does not comply with the statute requiring him to state the approximate compass bearing; and his location is void.

Coplen v. Callaghan, 30 S. C. R. 555, followed.

Before a prospector can locate a claim, he must actually find “minerals in place.” His belief that the proposed claim contains minerals is not sufficient.

Judgment in 8 Brit. Col. L. R. 153 reversed.

Marshall, K.C., and *Macdonald*, K.C., for the appellant.

Gallihier, for the respondent.

CLEARY v. BOSCHOWITZ.

Mines and minerals—Location—Certificate of work—Evidence to impugn.

A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent, and can only be impugned by the Crown.

Coplen v. Callaghan, 30 S. C. R. 555, and *Collom v. Manley*, ante, followed.

C., believing that the statutory work had not been done on mining claims, and that they were therefore vacant, located and recorded them under new names as his own, and brought an action claiming an adverse right thereto.

Held, affirming the judgment in 8 Brit. Col. L. R. 225, that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial.

J. A. Russell, for the appellant.

E. P. Davis, K.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[28TH JUNE, 1902.]

In re TORONTO PUBLIC SCHOOL BOARD AND CITY OF
TORONTO.

*Public schools — Expenditure — Annual estimates — Revision — Powers of
municipal council.*

Under the proper construction of ss. 65 (9) and 71 (1) of the Public Schools Act, 1 Edw. VII. c. 39—which provide that the public school trustees are to submit to the municipal council an estimate of the expenses of the schools under their charge for the current year, and that the council shall levy and collect upon the taxable property of the municipality such sums as may be required by the trustees, and shall pay the same to the treasurer of the public school board—the right of the school board, in preparing their estimate, is to include therein everything that in their best judgment may be needed to meet legitimate expenditure, that is, expenditure upon objects or for purposes within their lawful authority, and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are, and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* of the

school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this the council cannot go. The council has no voice in the control or management of the affairs which are committed by law to the school board: its duty is to levy and collect and pay out, from time to time, as required, the moneys shewn by the estimate to be necessary for lawful school purposes.

Judgment of a Divisional Court, 2 O. L. R. 727, ante 15, affirmed.

F. E. Hodgins, K.C., for the school board.

J. S. Fullerton, K.C., and *A. F. Lobb*, for the city corporation.

BOYD, C.]

[11TH APRIL, 1902.]

FOWLIE v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Insurance—Accident—Proofs of loss—Sufficiency of—Waiver—Death by accident—Finding of jury—Vagueness of.

Proofs of loss were furnished within the time limited by an accident policy, without any objection being then taken to their sufficiency, or further proofs asked for, the refusal to pay being based on the contention that the circumstances surrounding the death of the insured brought it within a clause of the policy providing against liability where the death was by suicide, duelling, &c., or from natural causes; objection to the sufficiency of the proofs having been taken for the first time in the statement of defence delivered a couple of years afterwards.

Held, that the proofs as furnished were sufficient; but, in any event, objection to their sufficiency, or the right to call for further proofs, was waived.

By the policy, the death was required to be by accidental bodily injury, caused by violent external means; while by s. 152 of the Insurance Act, R. S. O. c. 203, which is to be read with the policy, "accident" is defined as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The finding of the jury was that there was

no evidence to satisfy them that the deceased came to his death by his own hand, but that he came to his death by external injury unknown to them.

Held, that the finding was too vague to be construed as a finding of accidental death; and a new trial was directed.

Hamilton Cassels and *R. S. Cassels*, for the appellants.

G. Lynch-Staunton, K.C., and *L. F. Stephens*, for the respondent.

FISHER v. BRADSHAW.

Chattel mortgage—Valid agreement to give mortgage—Mortgage subsequently given—Right to rely on agreement—R.S.O. c. 148, s. 11.

Where an agreement to give a chattel mortgage is duly made and registered under R. S. O. c. 148, s. 11, and subsequently a mortgage is made and registered, the giving of such mortgage, whereby the legal estate becomes vested in the mortgagee, does not revest in the debtor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the legal mortgage is ineffectual for any purpose.

Judgment of *BOYD*, C., 2 O. L. R. 128, 21 Occ. N. 378, affirmed.

G. C. Gibbons, K.C., *A. J. Russell Snow*, and *L. F. Stephens*, for the appellants.

W. A. J. Bell, for the respondent.

FERGUSON, J.]

[28TH JUNE, 1902.

MCGARR v. TOWN OF PRESCOTT.

Way—Municipal corporation—Accident—Defective sidewalk—Notice of defect—Damages—Quantum.

Where a sidewalk on one of the principal streets of a town, on which there was considerable traffic, had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them:—

Held, that its condition was such as to impose on the corporation a constant care and supervision over it; so that

when one of the boards was proved to have been missing for a week, leaving a hole some six or eight inches deep, into which a person fell and was injured, notice to the corporation of such defect in the sidewalk must be assumed, and liability for the damage occasioned by the accident imposed on them.

The damages assessed at the trial, \$1,500, were reduced to \$900, the Court being of opinion that the latter was the more reasonable amount, having regard to the injuries sustained, a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date.

I. B. Clarke, K.C., for the appellants.

J. A. Hutcheson, for the respondent.

ROSE, J.]

[28TH JUNE, 1902.]

CUSHEN v. CITY OF HAMILTON.

Payment—Recovery back—Illegal license fee—Municipal corporations—By-law.

A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at \$10, and the by-law provided that a penalty of not exceeding \$50 might be imposed upon summary prosecution. The plaintiff, after some demur, took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed.

Held, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees, having been paid under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back.

Judgment of ROSE, J., reversed.

F. Mackelcan, K.C., and *J. L. Counsell*, for the appellants.

W. R. Riddell, K.C., and *J. G. Gauld*, for the respondent.

McMAHON, J.]

[8TH MAY, 1902.

FALLIS v. GARTSHORE-THOMPSON PIPE FOUNDRY CO.*Negligence—Dangerous premises—Want of screen or guard.*

While a teamster was delivering a load of coke on the premises of the defendants, an iron foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard; or, in the absence of a screen or guard, by the workman stopping work during the delivery of the coke.

Held, that the defendants were liable for the injuries sustained.

John Crerar, K.C., for the appellants.

J. W. Nesbitt, K.C., for the respondent.

STREET, J.]

[11TH APRIL, 1902.

MOORE v. J. D. MOORE CO.

Master and servant—Injury to servant—Negligence—Dangerous machinery—Want of guard—Factories Act—Workmen's Compensation Act.

The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up about a machine—called a dove-tailing machine, consisting of rapidly-revolving knives—carrying pieces of board therefor; and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine and was going for another load, when he was directed by the operator to straighten them out. On his proceeding to do so, and not observing that the machine was in motion, he put out his hand to remove some dust on it, when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time in actual charge of it, the operator having left it and standing some fifteen feet away looking out of a window.

The jury found that the cause of the accident was the negligence of the defendants in not having the machinery

properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff.

Held, that the defendants were liable.

Judgment of STREET, J., at the trial, reversed.

John Idington, K.C., and *J. S. Robertson*, for the plaintiff.

J. P. Mabey, K.C., and *E. W. Harding*, for the defendants.

STREET, J.]

[28TH JUNE, 1902.]

HOPKIN v. HAMILTON ELECTRIC LIGHT AND
CATARACT POWER CO.

Company—Electric light company—Works—Vibration—Nuisance—Injury to adjoining property—Injunction—Damages—Powers of company—Alienation of land—Private Act of incorporation.

Judgment of STREET, J., 2 O. L. R. 240, 21 Occ. N. 440, affirmed.

G. Lynch-Staunton, K.C., and *W. W. Osborne*, for the appellants, defendants.

D'Arcy Tate, for the plaintiff.

LOUNT, J.]

[28TH JUNE, 1902.]

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC
R. W. CO.

Way—Road allowance—Obstruction—Railways—Fences—Municipal corporations—Railway Committee.

An appeal by the defendants from the judgment of LOUNT, J., 3 O. L. R. 85, ante 63, was dismissed, the Court agreeing with the reasons for judgment reported below.

F. W. Chrysler, K.C., for the appellants.

George F. Henderson, for the respondents.

IN CHAMBERS.

[OSLER, J.A., 80TH JUNE, 1902.]

DAVIS v. HORD.

Appeal—Leave—Taxation of costs—Several causes of action—Judgment.

An application by the defendant for leave to appeal from an order of a Divisional Court (post p. 292), dismissing an appeal from an order of a Judge in Chambers upon appeal from taxation of costs.

The action was for slander. The statement of claim contained four paragraphs setting forth the slander in various ways. There was a verdict and judgment with costs for plaintiff on two paragraphs, and the same for the defendant on the other two. The defendant contended that the general costs should be apportioned throughout. But the taxing officer taxed to the plaintiff the general costs of the cause, less costs applicable to the paragraphs on which he failed, and to the defendant the costs of the issues arising on the latter, and his ruling was affirmed.

Held, not a cause in which leave to appeal should be granted. There is no good reason why a judgment framed as was the judgment here, should not lead to the same result as the former Rule of Court

Sparrow v. Hill, 8 Q. B. D. 479, and *Jenkins v. Jackson*, [1891] 1 Ch. 89, referred to.

D. L. McCarthy, for the defendant.

C. A. Moss, for the plaintiff.

[80TH JUNE, 1902.]

In re PRINCE EDWARD PROVINCIAL ELECTION.

WILLIAMS v. CURRIE.

Parliamentary election—Recount—Ballot papers—Absence of candidates' numbers.

Recount of votes cast at a Provincial election.

Held, that the candidate's number, mentioned in s. 69 (3) of the Ontario Election Act, R. S. O. 1897 c. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the

counterfoils, did so in such a manner that the candidate's numbers were left on the counterfoils, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected.

S. W. Burns and Eric N. Armour, for Williams.

C. H. Widdifield, for Currie.

[14TH JULY, 1902.]

***In re* CENTRE BRUCE PROVINCIAL ELECTION.**

STEWART v. CLARKE.

Parliamentary election—Petition—Copy—Service.

In the printed copy of the petition served upon the respondent the concluding prayer had, by mistake of a clerk, a pen stroke drawn through it.

Held, that, though the copy was not strictly a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given.

E. Bristol and E. Bayly, for the respondent.

A. B. Aylesworth, K.C., for the petitioner.

[MACLENNAN, J.A., 2ND JULY, 1902.]

***In re* NORTH GREY PROVINCIAL ELECTION.**

BOYD v. McKAY.

Parliamentary election—Recount of votes—Jurisdiction of junior Judge of County Court—Ballots—Irregular marking.

A junior Judge of a County Court has jurisdiction under the Ontario Election Act, R. S. O. 1897 c. 9, ss. 124-131, to recount votes.

Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by the County Court Judge on a recount, in consequence of each being marked with a cross in the divisions of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot after the county by the deputy returning officer.

A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first.

But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected.

A ballot marked for one candidate and having the name of that candidate written on the back, was rejected.

Ballots having, instead of a cross, a perpendicular line, a horizontal line, a straight slanting line, were rejected.

A ballot properly marked, but having on the back words written by the deputy returning officer, was allowed.

Ballots marked by placing the cross on the back were rejected.

Several tremulous connected marks in one division. Ballot allowed.

A strongly marked cross in one division, and a thin, faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Ballot allowed.

A distinct cross, and in the same division, in one case a slight, irregular pencil marking, and in another case a series of slight, cloudy, formless pencil markings. Ballots allowed.

A mark consisting of two lines lying very close to each other, both distinctly visible in one division. Ballot allowed, as there was evidence of an intention to make a cross.

Remarks of Ritchie, C.J., in the *Bothwell Case*, 8 S. C. R. 696, referred to.

S. H. Blake, K.C., and *W. D. McPherson*, for *Boyd*.

G. H. Watson, K.C., *W. H. Wright*, and *Grayson Smith*, for *McKay*.

[10TH JULY, 1902.]

In re NORTH GREY PROVINCIAL ELECTION.

McKAY v. BOYD.

Parliamentary election—Recount—Appeal—Notice of—Signature—Result of appeal—Majority.

The notice of appeal from the decision of a County Court Judge upon a recount of votes under s. 129 (1) of the

Election Act, R. S. O. 1897 c. 9, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf.

Where both candidates appeal from the decision of the County Court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority.

Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to.

G. H. Watson, K.C., W. H. Wright, and Grayson Smith, for McKay.

S. H. Blake, K.C., E. E. A. DuVernet, and Eric N. Armour, for Boyd.

[MOSS, J.A., 4TH JULY, 1902.]

***re* CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.**

Appeal—Leave—Public schools—Selection of school site—Grounds of Appeal.

Motion by the township corporation for leave to appeal from the order of a Divisional Court, post p. 291, allowing an appeal from an order of a Judge in Chambers and granting a mandamus to the corporation requiring them to pass a by-law for the issue of debentures for \$1,000 for the purchase of a school site and the erection of a school house.

Held, that the circumstance of the first order having been made in Chambers, and the additional fact that the applicants for leave to appeal were the respondents in the Divisional Court, and would have been entitled to appeal as of course if the motion had been heard in the first instance by a Judge sitting in Court, were material factors—when coupled with reasons of a substantial kind for questioning the judgment complained of—in affecting the discretion to be exercised. An important question was raised as to the true construction of a somewhat obscurely phrased section of the Public Schools Act. Plausible grounds of objection to the construction placed by the Divisional Court upon the legislative provisions in question were presented. Questions

relating to the validity or invalidity or binding effect or otherwise of an award purporting to be made in pursuance of these provisions were also involved; and the matter was of some public interest.

Leave granted upon the usual terms.

A. B. Aylesworth, K.C., for the township corporation.

W. R. Riddell, K.C., for the school trustees.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., LOUNT, J., 3RD MAY, 1902.]

BAILEY v. GILLIES.

Contract—Absence of writing—Statute of Frauds—Novation.

M., who had agreed with the defendants and a number of other lumber manufacturers to drive down their logs for them, the defendants' contract being a verbal one, arranged with the plaintiff to act for him; the obligation to drive the defendants' logs to continue to a named date, for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive, and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, a verbal agreement was entered into between M. and the defendants, whereby, in consideration of M. assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms.

Held, by ROBERTSON, J., that there was a new contract founded on new and substantial consideration, so that the Statute of Frauds did not apply.

On appeal to a Divisional Court the judgment was affirmed, on the grounds (1) of novation, or (2), even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a bind-

ing obligation to pay him, and that in either view the Statute of Frauds did not apply.

W. M. Douglas, K.C., for the appellants.

A. B. Aylesworth, K.C., for the respondent.

[MEREDITH, C.J., LOUNT, J., 14TH MAY, 1902.]

REX v. BENNETT.

Conviction—Motion to quash—Costs.

In a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under Provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate.

W. M. Douglas, K.C., for the defendant.

Frank Denton, K.C., for the prosecutor.

W. E. Middleton, for the magistrate.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 18TH MAY, 1902.]

REX v. MCGREGOR.

Municipal corporation—By-law—Prohibition against keeping certain quantities of coal oil, etc.—Statutes—Construction—Ejusdem generis rule—Constitutional law—Provincial legislation—Dominion legislation—Petroleum Inspection Act.

The defendant was convicted for a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or "other combustible or dangerous materials," should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under s.-s. 17 of s. 542 of the Municipal Act, R. S. O. c. 223, such section being headed, "Storing and Transportation of Gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and being one of a group of sections under division VI. of the Act, headed, "Protection of Life and Property," sub-division 3 of said division.

which included s. 542, being under the heading "Prevention of Fires."

Held, that s.-s. 17 authorized the passing of the by-law, and that the conviction could be supported thereunder, for that the words "other combustible or dangerous materials" were not limited by the *ejusdem generis* rule to gunpowder or other similar substances, but would include the substances set out in the by-law; and that such legislation was not superseded by Dominion legislation, for the Petroleum Inspection Act, 1899, 62 & 63 V. c. 27 (D.), dealing with the subject, was expressly made conformable thereto.

G. F. Shepley, K.C., for the applicant.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

W. M. Douglas, K.C., for the prosecutor.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 19TH MAY, 1902.

In re CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Public schools—Selection of school site—Award—Conditions precedent—Mandamus.

The words "selection of a site for a new school house," contained in s. 31 of the Public Schools Act, 59 V. c. 70 (O.), refer to a selection of a site in a newly established school section, and probably also to the selection of a site for an additional school house, while the words the "change of site of an existing school house," also contained in such section, refer to the case where a site has been chosen and a school house provided, but which it is deemed desirable to abandon, and to choose a new site, the section not applying to the case where the site selected is an existing site; but, in any event, before arbitration proceedings can be taken and an award made under the said section, the trustees must first select a site which the ratepayers decline to approve of on the matter being submitted to them.

An award made without such prerequisites having been complied with, is unauthorized and nugatory.

The fact that such an award is valid on its face is no answer to an application for a mandamus to compel a township municipality to pass a by-law to raise the amount

required for the purchase of a site and erection of a school house under steps subsequently taken therefor under the section, where all the requisites thereof were duly complied with.

Judgment of FALCONBRIDGE, C.J., reversed.

W. R. Riddell, K.C., for the appellants.

H. F. Hunter, for the respondents.

(Leave to appeal granted: see ante p. 288.)

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 12TH JUNE, 1902.]

DAVIS v. HORD.

Costs—Taxation—Distribution of costs—Several causes of action—Judgment.

The judgment in an action for slander provided "that the plaintiff do recover against the defendant in respect of the matters set forth in the 3rd and 5th paragraphs of the statement of claim the sum of \$1 and costs to be taxed," and "that the defendant recover from the plaintiff in respect of the matters set forth in the 4th and 6th paragraphs of the statement of claim his costs to be taxed."

Held, affirming the decision of MEREDITH, C.J., that the taxing officer rightly taxed under the judgment to the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the defendant only the costs of the issues upon which he succeeded, the latter being set off.

Sparrow v. Hill, 7 Q. B. D. 362, 8 Q. B. D. 479, followed.

D. L. McCarthy, for the defendant.

C. A. Moss, for the plaintiff.

(Leave to appeal refused: see ante p. 285.)

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 12TH JULY, 1902.]

McINTYRE v. TOWN OF LINDSAY.

Way—Non-repair—Injury to person—Municipal corporation—Sidewalk—Barrier—Trench dug by gas company—Consent of corporation—Liability of both.

Appeal by the plaintiff from the judgment of the County Court of Victoria dismissing the action as against the town

corporation with costs. Action against the town corporation and the Lindsay Gas Company to recover damages for injuries sustained by the plaintiff by stepping into a trench dug by the defendant company along the streets of the town, under the authority of a special by-law of the defendant corporation. The defendant company had agreed to indemnify the corporation for all damages which might arise therefrom, and to warn the public of the danger by lights, etc. The corporation were repairing their sidewalk at the point in question at the same time, and, in passing at night, the plaintiff, in going round a barrier constructed by the defendant corporation, fell into the trench and was injured. There were no lights put up by either defendant to warn the public of the danger.

Held, that the action was properly brought against both defendants, who were both negligent, and both liable to the plaintiff, the defendant corporation under R. S. O. c. 223, s. 606, for non-repair of the highway, and the defendant company under their special contract with the corporation, while their liability to the public was declared under R. S. O. c. 199, s. 26.

Appeal allowed.

William Steers, for the plaintiff.

H. L. Drayton, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 7TH JULY, 1902.]

WILDER v. WOLF.

Attachment of debts—Division Courts—Cheque—Stoppage of—Garnishee—Payment into Court.

Wolf sold Wilder a car load of junk, and in part payment therefor received three cheques for \$50 each. Instead of delivering the car load to Wilder, he sold it to Mehr, who bought in good faith, giving to Wolf his cheque for \$205 in payment. This cheque was drawn on the Bank of Ottawa in Toronto, but was cashed at the Canadian Bank of Commerce in Orangeville, on payment being guaranteed by Taylor, who indorsed the cheque. Later on, on Mehr's being served with garnishee proceedings by Wilder, and on his discovering the position of affairs, he immediately stopped payment of the cheque, and paid the amount into Court. The Canadian Bank of Commerce now looked to Taylor, who had guaranteed payment of the cheque, and he paid the

amount, and then claimed the money in Court to recoup himself.

Held, that he was entitled to it, for, having paid the amount to the Canadian Bank of Commerce, he was now in the position of the holder of the cheque. If the money in Court were to be paid out to Wilder, then Mehr, who paid it in, would be liable to pay it over again to Taylor, whereas the cheque in the hands of Taylor would be satisfied by the payment out of Court to him of the money which Mehr paid in.

E. E. A. DuVernet, for Wilder.

L. V. McBrady, K.C., for Mehr.

A. A. Hughson, for Taylor.

[STREET, J., 25TH JUNE, 1902.]

MACDONELL v. CITY OF TORONTO.

Municipal corporation—Local improvements—Petition for—Majority of petitioners—Exempt property—Value—Land—Buildings.

A petition for local improvements is sufficiently signed under s. 668 of the Municipal Act when signed by six out of nine owners to be benefited, who appear on the assessment roll, notwithstanding that the city within which the improvement is to be made also appears as an owner of property on the roll in respect to property which is exempt from taxation; and the value of the buildings as well as the land is properly taken into consideration in ascertaining the requisite one-half in value.

A. B. Aylesworth, K.C., and *C. A. Moss*, for the plaintiff.

J. S. Fullerton, K.C., and *T. Caswell*, for the defendants.

[26TH JUNE, 1902.]

ALLAN v. REVER.

Dower—Lease made by deceased husband—Priorities—Assignment of dower—Rights of executor and devisee—Devolution of Estates Act.

A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower. but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in

priority to persons claiming under leases created by her husband, without her assent, during the coverture.

Stoughton v. Leigh, 1 Taunt. 402, followed.

Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto:—

Held, that the conveyance was of no avail; for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act, R. S. O. 1897 c. 127, the whole inheritance of the testator vested.

W. H. Blake, for the plaintiffs.

A. Shaw, K.C., for the defendant.

[27TH JUNE, 1902.]

DOHERTY v. MILLERS AND MANUFACTURERS INSURANCE CO.

Fire insurance—Mutual plan—Annual renewal—Proposal for increased premium—Non-acceptance—Condition of payment in advance—Delivery of receipt—Waiver.

On the 31st October, 1898, the defendants issued their policy on the mutual plan to the plaintiffs for an insurance of \$20,000 upon their property, and on the 31st October, 1899, a further policy to the amount of \$10,000. The policies provided for insurances for the original period of one year, and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." Each of the policies was issued and delivered to the plaintiffs without prepayment of any cash premium, and without the previous delivery of the premium notes in consideration of which the policies purported to be issued; but cheques dated the 31st October, 1898, for the cash portion of the premium on the \$20,000 policy, and the 31st October, 1899, for the cash portion of the renewal of that policy and the first premium on the \$10,000 policy, were sent on or about their respective dates, along with the required premium notes, to the defendants.

On the 27th October, 1900, the executive officer of the defendants wrote to the plaintiffs enclosing a receipt for \$363.23, being the amount of the cash premium for the renewal of both policies. The letter was on a printed form, stating that a receipt "renewing" the policies was enclosed, and asking the plaintiffs to remit the amount of the cash premium. It also asked for new premium notes, and stated that the old ones were enclosed, as they were. The plaintiffs retained the receipts, but did not send the money or the notes until after the 20th December, 1900, when, in answer to a letter of the executive officer, they enclosed the notes duly signed, and stated their willingness to accept a sight draft for the cash renewal, which they afterwards honoured.

On the 28th October, 1901, the same officer again enclosed renewal receipts in a letter on the same form as above, but the amount of the cash payment was higher, and on the 6th November, 1901, the plaintiffs wrote to the defendants calling attention to the increase; the officer answered the next day that the defendants had been obliged to increase the rate; and on the following day the plaintiffs wrote as follows: "If you cannot do better we will have to accept, but we are going to ask you to reconsider the matter and meet us in this if at all possible. . . . Kindly give this your consideration, and let us hear from you." On the 11th November the officer wrote to the plaintiffs: "The consulting board carefully considered your risk before making the advance in the rate they did, and had no alternative but to do so to procure the re-insurance we required. Trusting this explanation will prove satisfactory to you." No answer was made by the plaintiffs to this.

On the 16th November, 1901, a fire took place, and damage was done to the property covered by the defendants' policies. Two days afterwards the plaintiffs sent the defendants a cheque for the amount of cash demanded and new premium notes, but the defendants returned them.

The defendants reinsured their risk as soon as the premiums became payable, and had not cancelled these re-insurances down to the time of the trial.

Held, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901.

Semle, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for

the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount.

W. Proudfoot, for the plaintiffs.

W. Barwick, K.C., for the defendants.

[9TH JULY, 1902.]

GILLETT v. LUMSDEN.

Trade-mark—"Cream yeast"—Protection—Acquisition of right by user—Abandonment—Injunction.

The words "cream yeast" are not the proper subject of a trade-mark, being common words of description.

Partlo v. Todd, 14 A. R. 444, and *Provident Chemical Works v. Canada Chemical Co.*, 2 O. L. R. 182, followed.

But the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have the defendants restrained from so using it.

The fact that the plaintiff had not for some years before action sold many boxes of the article did not shew an abandonment of the right to use the name in connection with the goods, the plaintiff having always been ready to furnish the article when it was asked for.

C. A. Masten and *J. H. Spence*, for the plaintiff.

F. C. Cooke, for the defendants.

[11TH JULY, 1902.]

NEELY v. PETER.

Water and watercourses—Injury to land by flooding—Claim for damages—Summary procedure—Costs of action—Erection and maintenance of dam—Liability of owners—Tolls—Liability of lumbermen using dam.

Action by the owner of land upon a river against the original defendants for flooding such land by a dam. At the trial it appeared that the dam was the property of an

improvement company incorporated under the Timber Slide Companies Act, R. S. O. c. 194, and that the original defendants had used it for the purpose only of floating logs down the river; and the improvement company were added as defendants.

Held, that, although (as decided in *Blair v. Chew*, 21 Occ. N. 404) a plaintiff is not bound to proceed summarily upon a claim such as this, under R. S. O. c. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of doing so.

2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.

3. Nor were the defendants assisted by ss. 15 and 16 of R. S. O. c. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.

4. But s. 1 of R. S. O. c. 142 places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by s. 15 of R. S. O. c. 194.

The action was dismissed as against the original defendants; and judgment was given for the plaintiff against the added defendants for \$142, but without costs, the defendants having paid that amount into Court.

O. M. Arnold, for the plaintiff.

W. L. Haight, for the defendants.

IN CHAMBERS.

[MACMAHON, J., 12TH MAY, 1902.]

REX *ex rel.* IVISON v. IRWIN.

Municipal election—Quo warranto—Tampering with ballots—Immediate delivery of ballot box to town clerk—Setting aside election—Supporting affidavits by viva voce evidence—Admissibility of evidence as to how voters voted—Cross-examining on affidavits after commencement of trial.

Where in a *quo warranto* proceeding under the Municipal Act, R. S. O. c. 223, before a County Judge, to set aside the election of a town councillor, it was found by the Judge upon a scrutiny of the ballot papers, having regard to the character of the evidence, both *viva voce* and by affidavit, that such ballot papers had been tampered with, and that there was also a breach of the Act in the deputy returning officer taking the ballot box to his own house, instead of directly to the town clerk, and it was impossible to say that the result of the election was not affected thereby, an order of the Judge setting aside the election was affirmed.

Affidavit evidence may be supported at the trial by *viva voce* evidence, although not mentioned in the notice of motion.

Regina ex rel. Mangan v. Fleming, 14 P. R. 458, referred to.

The provision of s. 200 of the Act that "no person who has voted at an election shall in any legal proceeding to question the election or return, be required to state for whom he voted," must be construed, in furtherance of the object of the Act, as absolutely excluding such testimony.

After the trial of such proceeding has commenced, it is discretionary with the Judge to allow a person who has made an affidavit to be cross-examined, though before the commencement of the trial cross-examination may properly be had.

A. B. Aylesworth, K.C., for the respondent.

J. H. Rodd, for the relator.

[3RD JULY, 1902.]

In re SNYDER.

Life insurance—Beneficiary certificate—Designation of beneficiaries—Indorsement—Will—1 Edw. VII. c. 21, s. 2, s.-s. (7)—Infant children of assured.

A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died; and he

then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder.

Held, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R. S. O. 1897 c. 203, s. 151, s.-s. (6), by 1 Edw. VII. c. 21, s. 2, s.-s. (7).

E. E. A. DuVernet, for the executors and adult children.

F. W. Harcourt, for the official guardian, representing the infant children.

[MEREDITH, J., 30TH JUNE, 1902.]

PEOPLE'S BUILDING AND LOAN ASSOCIATION v.
STANLEY.

Court of Appeal—Leave to appeal—Dismissal of motion for, with costs—Validity of order—Execution issued out of High Court—Authority to issue.

An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same were taxed and a certificate thereof issued, which, with the order of dismissal, was filed in the High Court, and a *fi. fa.* to levy the amount of such costs placed in the sheriff's hands for execution.

Held, that the order directing payment of costs was properly made under ss. 77 and 119 of the O. J. Act; and that execution was properly issued out of the High Court, under Rule 3, by analogy to the procedure under Rule 818.

W. H. Bartram, for the defendant.

J. C. Dromgole, for the plaintiffs.

[BRITTON, J., 28TH JUNE, 1902.]

In re PETTIT.

Dower—Election—Gross sum—Money in Court, proceeds of sale of testator's land.

The owner of land died intestate leaving a widow and an infant child. The widow administered, and, with the consent of the official guardian, sold and conveyed the land in

March, 1899, barring her dower in the deed of grant, and the whole of the purchase money was paid into Court to the joint credit of herself and of the official guardian, she reserving her right to elect between receiving the value of her dower or a distributive share of the estate, one of which it was clearly understood she would be entitled to be paid out of the fund in Court. In September, 1900, the widow executed a document wherein she elected to take the value of her dower in lieu of "any other interest she might have in her husband's undisposed of real estate." She died in April, 1901.

Held, that the administrator of the widow's estate was entitled to receive out of the moneys in Court the value of the widow's dower, computed according to the annuity tables.

T. R. Atkinson, for the Trust and Guarantee Company, guardians of the infant.

G. W. Wells, K.C., for the administrator *de bonis non* of the testator.

E. E. A. DuVernet, for the administrator of the widow's estate.

F. W. Harcourt, for the official guardian.

NOVA SCOTIA.

In the Supreme Court.

[WEATHERBE, J., 2ND JULY, 1902.]

CROCKETT v. ACADEMY OF MUSIC.

Company—Shares—Preferential stock—Interest—Dividends.

The Halifax Academy of Music, a body corporate, in pursuance of a resolution of shareholders to that effect, issued preferential stock, the same to be a first charge upon the property of the company and its earnings, and to bear "interest" at a stated rate, payable half-yearly. For a number of years there were not sufficient earnings to pay interest or dividends to either the preferred or common stockholders. Latterly, however, the earnings increased, and a contest arose between the holders of the preferential stock and the holders of the common stock, the latter contending that the former should not be paid interest or dividends.

for the years during which there were no sufficient earnings for the purpose. The action was tried before WEATHERBE, J., who

Held, that the holders of the preferential stock are entitled to receive out of the earnings what is called cumulative interest covering the past years in which dividends or interest remained unpaid on the preferential stock before any dividends are paid on the common stock.

Borden, K.C., for the plaintiffs.

Drysdale, K.C., for the defendants.

MANITOBA

In the King's Bench.

[FULL COURT, 5TH JULY, 1902.]

NORTHERN ELEVATOR CO. v. McLENNAN.

Practice—Application to stay action—Common Law Procedure Act, 1854, s.

11—Agreement to refer differences to arbitration.

The plaintiffs sued in respect of matters arising under the provisions of an instrument in writing between the plaintiffs and defendant, which contained an agreement that differences arising under it should be referred to arbitration. After filing a statement of defence the defendant applied, under s. 11 of the Common Law Procedure Act, 1854, for an order staying all proceedings in the action, alleging that there was no sufficient reason why the matters in question could not be referred to arbitration.

The time within which such an application may be made is stated in the section quoted to be "after appearance and before plea or answer." The defendant contended that under the present practice, the statement of defence took the place of the "appearance" under the old practice, and that, therefore, he could not have applied till after that statement was filed.

The plaintiffs contended that, under the present practice, the statement of defence is what the "plea or answer" was under the former practice, and that, by not applying before filing his defence, the defendant had lost his right to apply for a stay.

Held, by RICHARDS, J., that the present practice of the Court has, by abolishing the writ of summons and the appearance, placed a defendant, as to his right to take proceedings, in a position somewhat similar to that which he was in under the late Equity practice of the Court, in which there was no "appearance" required. Under that practice there were many proceedings which a defendant could take before answer filed, but to which he waived his right by filing an answer, as the right to apply for security for costs. For the purposes of the present practice, s. 11 of the Common Law Procedure Act, 1854, should be read as if it did not contain the words "after appearance and." If so, the application contemplated by that section can only be made before a statement of defence is filed.

Affirmed on appeal to the full Court.

J. S. Ewart, K.C., for the plaintiffs.

J. A. M. Atkins, K.C., and *E. L. Taylor*, for the defendant.

[KILLAM, C.J., 12TH JULY, 1902.]

MANITOBA FARMERS' MUTUAL HAIL INS. CO. v. FISHER.

Insurance—Hail Insurance Act, R.S.M. c. 106—Cancellation of policy—Performance of condition—Loss of policy.

County Court appeal. The action was brought by a company incorporated under the Mutual Hail Insurance Act, R. S. M. c. 106, for the amount of an assessment alleged to have been made upon the defendant as a member of the company.

On the 9th June, 1899, the defendant made application in writing to the company for indemnity against loss to crops by hail for the term of "five crop seasons, from noon of the 9th day of June, 1899," to the amount of \$800. The application embodied an undertaking by the defendant to pay an annual assessment and to be governed by the letters patent and by-laws of the company. A policy was issued but lost.

One of the terms of the application was that the contract might be cancelled in any year after the first year, between the 1st October and the 1st May, by returning to the company the policy and paying what was then due on it, if anything. The policy issued contained a provision

for its cancellation at any time between the 1st October and the 1st April. The by-laws provided that "any member may have his policy cancelled at any time between the first day of October and the first day of April following, providing he is not in arrears to the company. In case of his desiring to have his policy cancelled, he shall notify the secretary, who shall at once inform him of the amount due from him to the company, if any, when, upon payment of same and surrender of his policy to the company, he shall immediately cease to be a member." "No policy-holder shall be at liberty to cancel his contract with the company except in the manner and at the times provided . . . or, as shall be hereafter prescribed by the board of directors."

The defendant wrote the company to send his policy to him, as he wished to withdraw from membership. The manager replied: "I find you desire to cancel your policy, but as you have not returned the same to the office, it will be impossible for us to do so."

The Judge of the County Court gave judgment for the defendant, holding that he had, before the making of the assessment, ceased to be a member of the company or liable to assessment. The plaintiffs appealed.

The Judge of the County Court was of opinion that, the loss of the policy having rendered it impossible for the defendant to surrender it, he was excused from performance of that part of the condition.

KILLAM, C.J., was unable to concur in that opinion. This was not a case of an agreement to do something which had become impossible of performance. It was an agreement to do something upon performance of a condition. It is well established that the happening of circumstances rendering performance of the condition impossible does not entitle the party, who was to perform the condition, to the execution of the agreement: *Croockewitt v. Fletcher*, 1 H. & N. 893; *Cutter v. Powell*, 6 T. R. 320, 2 Sm. L. C. 1.

The defendant's only recourse was to inform the board of the circumstances, and ask to be relieved on other conditions.

But the action should have failed for want of proof of the terms of the policy. The policy differed from the application; it was not, then, a mere acceptance of the application. It might be inferred from the defendant's letters that he was a member of the company when they were written, but whether he continued so for any time, or for how long thereafter, depended upon the contents of the policy. It was not a case for an inference that a relationship once

shewn to exist continued until the contrary was shewn. It was for the plaintiff to shew the period and other terms of the policy, that the Court might decide whether the defendant continued to be a member liable to assessment.

On that ground, the appeal should be dismissed with costs.

C. P. Wilson and W. M. Crichton, for the plaintiffs.

C. H. Campbell, K.C., A.-G., for the defendant.

[KILLAM, C.J., 12TH JULY, 1902.]

DAVIDSON v. MANITOBA AND NORTH-WEST LAND
CORPORATION.

*Principal and agent—Commission—Payment promised by purchaser to agent,
but never received—Right of deduction by principal.*

Action to recover a commission for finding a purchaser of lands.

The defendant corporation had a quantity of lands for sale in the North-West Territories, and transacted its business through agents in Winnipeg, who were appointed under a written power of attorney giving very wide powers. One of these agents, Fry, agreed with the plaintiff to give him a commission if he would find a purchaser for a certain quantity of land. It was not disputed that Fry had authority to do this, and to bind the company to pay a commission for such a service. The plaintiff alleged that Fry agreed to give him what he called an option of a certain quantity of land for a definite period, by which was meant that Fry agreed to withhold that land from sale and sell it to the purchaser whom the plaintiff should find and bring to him during that period. The plaintiff entered into negotiations with certain persons, and, shortly after the expiration of the alleged period of option, took to the company's office one of three persons, and Fry negotiated a sale of the land to such person.

Upon the trial a point arose out of an intermediate transaction between the plaintiff and the proposed purchaser. The latter was not prepared to bind himself at once, but desired time to effect financial arrangements, and, at the same time, to have the opportunity kept open for him. The plaintiff represented to him that such an arrangement would involve some loss of the time allowed him for finding a purchaser, as a result of which he might not find one, and suggested that he should be remunerated therefor; he asked

\$200 as a consideration, to which the purchaser agreed, and the plaintiff then agreed to give and did give the time. The plaintiff stated that he reported to Fry the agreement to give this time, and Fry assented to it, but he did not inform Fry that it was made for consideration to himself. The consideration was never paid.

Held, that the plaintiff was entitled to judgment for the full commission of \$1,656 and costs.

The agreement relied on as a defence was wholly collateral. The plaintiff performed the services which were to entitle him to a commission. The agreement was in breach of duty, and the agent would be obliged to account to his principal for any payment received under it, as a profit made out of his employment. But, whether strict and absolute performance of or adherence to duty in a particular respect is a condition precedent to the right to recover compensation for services, must depend upon the nature of the contract under which the services are rendered.

That a stipulation for or receipt of such a collateral advantage, even in fraud of the employer, is not necessarily of itself a bar to recovery for the services is clear from *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339.

No authority was cited for compelling an agent to account for a benefit promised but not actually received; the agent might never receive it. There was no warrant to make such a deduction.

C. P. Wilson and G. A. Elliott, for the plaintiff.

J. S. Ewart, K.C., and C. W. Bradshaw, for the defendants.

[RICHARDS, J., 24TH JUNE, 1902.]

SPARLING v. HOULIHAN.

Contract—Rescinding for fraud and misrepresentation—Secret commission to purchaser's agent—Collusion by him with vendor.

The defendant, an immigrant newly-arrived from Ireland and knowing nothing of the value of lands in Manitoba, went to Dauphin in October, 1900, with a letter of introduction from the Immigration Department at Winnipeg to Charles Tomlin, an official of that department stationed at Dauphin. Tomlin's duties were to help immigrants in getting settled and to advise them how to act, and to look after their interests generally.

Tomlin invited the defendant's confidence, telling him that he could rely on him, and that he (Tomlin) would act in his interests. The defendant, knowing Tomlin's official position, gave him his confidence and trusted him implicitly.

Tomlin obtained from the plaintiff Murray a list of lands he had for sale, including the quarter section in question in this suit. The price was put by Murray in that list as \$1,400.

Tomlin took the defendant out to see the quarter section, telling him there were 30 acres of it under cultivation, and advised him to buy it for \$1,600 on the terms of \$200 cash down, the balance by delivery of one-half of the crop every year to an elevator.

An agreement for sale, for which Tomlin, purporting to act in the defendant's interest, gave the instructions, was drawn and executed by the plaintiffs and the defendant, but the latter did not receive a copy or duplicate of it.

The agreement provided that, on default of the performance of the defendant's covenants, the plaintiffs might cancel the agreement, in which case all payments made should be forfeited.

After the sale Tomlin received from the plaintiff Murray \$50 in cash and a note for \$50, which was afterwards paid. Murray told Tomlin that the cash and note were for making this sale to the defendant, and Tomlin so received them.

The defendant cropped the broken land, but did not deliver any of the crop to the plaintiffs, and omitted to break new land. The cultivated land turned out to be 22 acres, instead of 30; the defendant demanded compensation, but was refused. On the defendant failing to deliver the wheat at the elevator, the plaintiffs brought this action to cancel the sale to the defendant. The defendant alleged misrepresentation, and asked for damages, also for cancellation of the agreement and repayment of the \$200 paid to the plaintiffs by him, or a reduction of the purchase price by the \$100 paid Tomlin.

Held, that the defendant was entitled to a cancellation of the agreement and to have the \$200 which he paid on the purchase money repaid to him, with interest at 5 per cent. per annum from the 6th October, 1900, the date of its payment by him to the plaintiffs. See *Panama, &c., Co. v. India Rubber Co.*, L. R. 10 Ch. 515.

In view of the secret payment by Murray to Tomlin of the \$100, while knowing that the defendant relied on Tomlin, and that Tomlin purported to act for the defendant, it

would be hard to believe that the plaintiffs and Tomlin did not collude to make the sale to the defendant at a higher price than the farm could have been had for.

As the defendant cleared 70 acres of the land from scrub before he knew of the payment to Tomlin, he should be paid for so doing, as it was a permanent improvement. The value of the clearing was \$2.50 per acre or \$175 in all. On the other hand, the defendant was chargeable with an occupation rent, fixed at \$75.

The plaintiffs to pay the defendant's costs of action on King's Bench scale.

C. W. Bradshaw and A. E. Wilkes, for the plaintiffs.

J. H. Munson, K.C., and A. B. Hudson, for the defendant.

(See *Murray v. Smith*, ante 241).

BRITISH COLUMBIA

In the Supreme Court.

[FULL COURT, 22ND APRIL, 1902.]

COVERT v. PETTIJOHN.

Water record—Validity of—Ditch—Continuation of, into United States and back into Canada

The plaintiff and defendant were owners of adjoining ranches in Yale district, both bounded on the south by the international boundary line. The plaintiff's ranch lay to the east of the defendant's ranch, west of which the Fourth of July creek flowed in a southerly direction into the United States. In 1889 the plaintiff obtained a water record for agricultural purposes, and, under s. 41 of the Land Act then in force, constructed a ditch over land which was afterwards purchased by the defendant. By an extension of the ditch into the United States, the water was turned back into the original stream, and from a point below a ditch was run by one Peone, the owner on the American side, and the plaintiff by tapping Peone's ditch ran the water back to his ranch on the Canadian side. This diversion around through the United States was caused by an elevation over which it was impossible to run the water.

In the County Court, SPINKS, Co.J., dismissed the plaintiff's action for damages for interference with the ditch.

Held, per HUNTER, C.J., and MARTIN, J., on appeal, that the fact that a ditch constructed in intended compliance with s. 41 of the Act runs partly into the United States does not of itself prevent it from being a good ditch within the meaning of the Act.

Held, also, per IRVING and MARTIN, JJ., applying *Martley v. Carson*, 20 S. C. R. 643, that the plaintiff's water record was valid.

Appeal allowed, IRVING, J., dissenting.

S. S. Taylor, K.C., for the appellant.

Sir C. H. Tupper, K.C., for the respondent.

In the County Court of New Westminster.

[BOLE, Co. J., 5TH JULY, 1902.]

CICOGNIA v. McHEATHER.

Attachment of debts—County Court—Garnishee summons before judgment—Partnership action.

An application by the defendant to set aside a garnishee summons issued under s. 102 of R. S. B. C. c. 52, which enables a plaintiff at the time of issuing a summons for a debt or liquidated demand, or at any time previous to judgment, upon filing an affidavit, &c., to obtain a garnishee summons. The action was brought to have a partnership dissolved and for an account and payment.

Held, that the action was not for a debt or liquidated demand; and the garnishee summons was set aside.

Walter v. Rooke, 50 L. J. Q. B. 470, *Howell v. Metropolitan District R. W. Co.*, 51 L. J. Ch. 158. and *Randall v. Lithgow*, 53 L. J. Q. B. 518, referred to.

R. L. Reid, for the defendant.

Kennedy, for the plaintiff.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[FULL COURT, 21ST JULY, 1900.]

UNION BANK OF CANADA v. TOWN OF MACLEOD.

*Assessment and taxes—Personal property of bank—"Diligent inquiry"—
Statute—Imperative or directory—Burden of proof—Evidence as to
value of property—Fixtures—Promissory notes—Cheques on other banks.*

The bank was assessed in the municipality in respect of personal property for \$15,000. On appeal to the Court of Revision this assessment was confirmed. The bank thereupon appealed to ROULEAU, J., who, after hearing the evidence, referred the matter to the full Court.

James Muir, K.C., for the appellants.

C. F. Harris and C. A. Stuart, for the respondents.

The judgment of the Court (McGUIRE, RICHARDSON, WETMORE, ROULEAU, and SCOTT, JJ.), was delivered by

WETMORE, J.—One of the grounds of appeal is founded on s. 122 of the Municipal Ordinance (C. O. c. 70), which provides that "the assessor or assessors shall prepare the assessment roll after revision by the assessment committee, as in Form F in the schedule to this Ordinance, setting down in each column as accurately as may be, after diligent inquiry, the information called for by the heading thereof." It is urged that the evidence established that the assessor did not assess the bank "*after diligent inquiry.*"

Assuming for the purposes of this case that the evidence did establish this, we are of opinion that it is not fatal to the assessment, the provisions in this respect being merely directory.

We did not understand the learned counsel for the bank to contend that this omission on the part of the assessor rendered the assessment void; his contention was that it merely shifted the burden of proof as to the amount of assessable property, from the appellant to the respondent. Assuming this to be correct, we are of the opinion that the amount or value of the property assessable against the bank

was proved. Mr. Anderson, the manager of the bank at Macleod, was called as a witness and established that the bank was possessed of fixtures in the bank worth \$600 or \$700; that the amount of gold and silver would be about \$600; and that they held Dominion notes averaging about \$700. The counsel admitted that the bank was assessable in respect to those items, and he admitted that what was intended by fixtures was in the nature of what is usually termed shop or store furniture, such as counters and the like. So, admittedly, say \$2,000 worth of assessable property was proved against the bank. But the manager went further. He swore as follows: "I admit the bank has at least \$15,000 of assets in Macleod. It consists of notes, legal tenders, gold notes, and cheques of other banks." The evidence he gave before the Court of Revision was put in, and in that he swore in substance that the bank had \$15,000 of money, "consisting of gold, silver, and commercial paper in the bank at Macleod."

We think that all this abundantly established that the bank had assessable property of the value of at least \$15,000.

It was contended that the commercial paper, such as notes and cheques on other banks, was not assessable. Section 118 of the Ordinance provides that "all land and *personal property* and income in the Territories shall, where no other express provision has been made in this respect, be liable to taxation, subject to the exemptions hereinafter mentioned." The question that arises is: Are notes and cheques on other banks and property of that description "*personal property*" within the meaning of the Ordinance? Sub-section 4 of s. 2 of such Ordinance defines "land," "real property," and "real estate," respectively to include "all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any buildings as to form in law part of the realty, and all mines, minerals, quarries, fossils in and under the same, except mines belonging to Her Majesty."

Sub-section 5 of the same section defines "*personal estate*" and "*personal property*" to include "all goods, chattels, shares in incorporated companies, interest on mortgages, dividends from bank stock, income, and *all other property except land and real estate and real property as above defined*, and except property herein expressly exempted." It is urged that notes and cheques of other banks do not come within this definition. Notes and cheques of other banks are property. They have a commercial value. They are the subject of theft, and may be the subject of an action of trespass for an unlawful taking, or of an action for an

unlawful conversion, and the damages in any such action would be not merely the value of the paper on which they are written, but the commercial value of the security. In constructing s.-s. 5 of s. 2, it is impossible to narrow the broad definition therein given to the words by practically eliminating the language hereinbefore underscored. It has been urged that the effect of holding this will be to authorize a double assessment in some instances. Without admitting that it will have this effect, we cannot perceive that this can affect the interpretation to be given to s.-s. 5 before cited. The property in question is not included in any of the exteptions or exemptions specified.

We are of opinion that Mr. Justice Rouleau should be advised that the assessment of \$15,000 personal property should be confirmed.

As the counsel for the town has consented, in the event of the Court reaching this conclusion as to the personal property, that the appeal as to the assessment respecting the \$5,000 income should be allowed, my brother Rouleau should be advised to allow the appeal as to such \$5,000 income.

[FULL COURT, 4TH JUNE, 1902

YUILL v. WHITE.

Specific performance—Contract for sale of land—Option in lease under seal—Action against personal representative of vendor—Denial of contract—Tender—Bank notes—Consideration for option—Burden of proof—Non-acceptance in lifetime of vendor—Insertion of option clause after execution of lease—Evidence as to—Statements of deceased vendor—Inadmissibility—Inadequacy of price—Mistake.

An appeal by the defendant from the judgment of ROULEAU, J., in favour of the plaintiff in an action for specific performance of a contract for the sale of land. The facts are stated in the judgment.

The appeal was heard by MCGUIRE, C.J., RICHARDSON, WETMORE, SCOTT, and PRENDERGAST, JJ.

J. A. Lougheed, K.C., and R. B. Bennett, for the appellant.

James Muir, K.C., for the plaintiff.

MCGUIRE, C.J.—This is an action brought by Harry C. Yuill against Kate White, administratrix of the estate of

Alfred White, deceased, to enforce specifically an agreement contained in a lease between the deceased as lessor and the plaintiff as lessee, giving the latter an option of purchasing certain hotel property in Medicine Hat, being the premises demised by the lease. The lease is under seal, bears date the 1st May, 1899, and is executed by both parties. The term is two years; rental \$800 a year; payable monthly. The option clause relied on is as follows:—
“And the said Alfred White hereby grants to the said Harry C. Yuill at any time during the term of two years hereby granted the right of purchasing the said property at the sum of (\$2,500) two thousand five hundred dollars.”

The plaintiff went into possession as tenant, and paid rent as reserved in the lease. Shortly after the execution of the lease, early in June, White left this country for England, and died there. His widow took out letters of administration here to his estate on the 14th June, 1900. A notice, dated 19th June, 1900, was served on the defendant that plaintiff wished to exercise the option to purchase. The plaintiff says that on the 26th June, 1900, he tendered to the administratrix for execution a transfer of the land in question to him, and also a marked cheque for \$2,500, but she refused to accept it or to execute the transfer, on the ground that the price was to be \$3,500. He says that on the 11th October, 1900, he tendered her \$2,500 in bank notes of the Merchants Bank of Canada. She refused the money, and said she would not sell the place—that the money offered was not enough. On the 29th of the same month he says he again, in company with Mr. Mitchell, his advocate, saw the defendant, and again tendered her \$2,500 in notes of the same bank. Mr. Mitchell, he says, counted the money in her presence at her request, and he asked her to sign the transfer and accept the money, but she again refused. From the evidence of the defendant it appears that she alleged that the amount, \$2,500, was not the right amount, and she tendered in evidence letters received by her from her late husband, but which were objected to by the plaintiff, to shew the price was to be \$3,500. Evidence of two men to whom White spoke about the transaction was also given, subject to objection, that he told them he had leased his hotel with an option to purchase for \$3,500.

The defendant, besides asserting that there was no agreement to give an option for purchase for \$2,500, denies the legality of the tender of the \$2,500, on the ground that neither a marked cheque nor the notes of the Merchants Bank of Canada were legal tender. I think, on the evidence, there is no pretence for saying that her objection

was as to the character of the tender. I think the evidence establishes reasonably that she was unwilling to carry out the contract if the price was to be \$2,500, and that she would not have accepted \$2,500, no matter in what form tendered.

"The vendor is not relieved from his obligation because of the failure of the vendee to pay the purchase price, if such failure came about through the act of the vendor:" 22 Am. & Eng. Encyc. of Law, vol. 22, p. 913.

"All necessity for a formal tender disappears where the defendant denies or repudiates the contract—so if it is evident that a tender would be rejected. In such cases a simple offer to perform will meet the requirements of equity. A tender of performance need not be made where it would be wholly nugatory:" *ib.* p. 1040. "Where tender is in bank bills, the objection to the form of tender will be deemed to be waived if he objects to the tender on the ground of insufficiency in amount, or on some other ground, without making objection to the legality of the tender in point of form:" Encyc. of the Laws of Eng., vol. 12, p. 118. I think that this ground of defence is not good on the evidence here.

Another ground is that there is no evidence of any consideration for the agreement as to the option, and, therefore, the offer could be retracted at any time before acceptance—that the death of the lessor, which took place and was known to the plaintiff before any acceptance by the lessee, was a revocation of the option. This is, I think, a sound proposition of law, provided there was no consideration for the option. The plaintiff, however, points out that the lease of which the option clause was a part, is under seal and imports a consideration, and the option was therefore irrevocable. In the Encyc. of the Laws of Eng., vol. 9, p. 174, I find it laid down thus: "And at the present day the law remains that a promise made by deed is irrevocable, even before its acceptance (*Xenos v. Wickham*, L. R. 2 H. L. 296), and is enforceable without any consideration (*Ex p. Pollinger*, 8 Ch. D. 621)." "A man may without consideration enter into an express covenant under hand and seal:" per Lord Mansfield in *Shubrick v. Salmon*, 3 Burr. "If a man enter into a voluntary bond he shall not be allowed to aver want of consideration to evade the payment, for every bond, from the solemnity of the instrument, carries with it an internal evidence of good consideration:" 2 Bl. Comm. 446.

But was it a promise without consideration? Apart from the fact that the instrument is a deed and that the

option clause is a part of the lease, there is no express evidence as to any consideration given for this particular promise (the option), nor is there any to shew that no consideration was given—and even if, as the appellant contends, a deed is merely *prima facie* evidence of consideration, and that the fact can be disproved, the burden would appear to be on the defendant to establish the absence of consideration. Certainly, in the absence of any such proof, it being part of a lease in which there are mutual agreements, I do not think it can be inferred that the option was without consideration. In the Am. & Eng. Encyc., vol. 22, at p. 1021, there is a note: "But if such contract is a part of a lease or made at the same time with the lease and in consideration thereof, it will be enforced."

But, apart from the question of consideration, the defendant contends that an option such as this must be accepted in the lifetime of the party giving the option.

The authorities cited by the appellant's counsel do not, I think, bear out this proposition. *Dickenson v. Dodds*, 2 Ch. D. 463, 45 L. J. Ch. 777, was a case where there was no consideration for the option, and it was revoked before acceptance, as the other party was aware. Both James, L.J., and Mellish, J., speak of it as "*nudum pactum*." Mellish, J., said: "It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he dies—and parting with the property has very much the same effect as death of the owner. The parting with the property shews that the maker of the offer has changed his mind." James, L.J., in the same case said that the "plaintiff knew as clearly that Dodds was no longer minded to sell as if Dodds had gone to him and said 'I withdraw the offer.'" The true principle, as laid down by James, L.J., is this: "Two minds must agree at some one moment of time, i.e., that there was an offer continuing till time of acceptance; if not then no contract." By the terms of the agreement here White agreed that the offer should continue for two years; the acceptance was within two years. Had there been no time limit, the case might be otherwise. I do not see how a man can avoid an engagement by death which he could not revoke by an express act of revocation.

In *London and South Western R. W. Co. v. Gown*, 51 L. J. 193, 530, Jessel, M.R., held that an option to purchase was an "interest in the land." He said: "In the ordinary case of a contract for purchase there is no doubt of it; and an option to purchase in its nature does not differ." In another part of his judgment he asks: "Is there any substantial distinction between a contract for purchase, an op-

tion for purchase, and a limitation on condition or a conditional limitation?"

If, then, an option to purchase does not differ from a contract for purchase, let us see what the law is as to such a contract when one of the parties dies before completion. In Addison on Contracts, vol. 1, s. 451, it is said: "The personal representatives are responsible to the extent of the assets that come to their hands upon all the contracts of their testator or intestate, whether they are deeds or contracts by record or simple contracts, and whether the executors or administrators are named in the contract or whether they are not." In Williams on Executors it is said: "It is clear also that in many cases a liability may accrue after the death of the testator or intestate upon a contract made in his lifetime, although the executor or administrator be not named therein. For example, A. agrees to build a house for B., but dies before completion; his executors are bound to perform the contract." *Highgate Archway Co. v. Jeakes*, 40 L. J. Ch. 408, was cited as authority for the contention that, on the death of White, Yuill could no longer accept. In that case it was the person who was to accept who died, and that, moreover, was not a case of contract, but an obligation imposed upon a railway company by an Act of Parliament that the first opportunity to purchase must be given to a designated person or persons, and in the particular case, that person having died, there was no one to whom they could make the offer, and they were held relieved. If, in the present case, the contract had stipulated that the acceptance of the option should be made to Alfred White, it might be argued that the intimation of acceptance could be made to him alone, and no such intimation being made to him, his death made it impossible to be performed. But there is here no such provision. White grants to Yuill the right of purchasing the property—the only limitations being the price and the time within which he is to exercise the right. To say that one must read into it that the acceptance must be communicated to White himself, is no more to be allowed than to say that the rent reserved must be paid to White only, for it is not said in express words to whom the rent is to be paid. *Townley v. Bedwell*, 14 Ves. 591, 9 R. R. 352, and *Laves v. Bennett*, cited in the last case, are cases where the acceptance of the option to purchase was after the death of the person granting the option. In *Church v. Brown*, 10 R. R. 74, the omission of "assign" did not prevent the assignee from taking. In *Laves v. Bennett* there was no mention of executors or administrators or

assigns, and the agreement was merely a memorandum indorsed on the lease. The authorities cited above make it unnecessary further to deal with the contention that the omission to mention the personal representatives of the lessor had the effect of making an acceptance communicated to White's personal representatives of no validity. The contract was not a personal one in the sense in which a contract with an artist to paint a picture or with an author to write a book is so considered.

The question of fact must now be dealt with. Was there such an option clause in the lease when executed by White, and was the price to be \$2,500 or \$3,500? I think it will be conceded that the evidence of the plaintiff, as it appears in the appeal book, is singularly contradictory—particularly as to date—and is hard to reconcile in many respects with the evidence of some of his witnesses. Some facts, however, seem fairly well established, if any credence is to be given to the witnesses. First, the lease itself contains the clause as it is sworn by the plaintiff and several of the witnesses that White and he agreed upon. It is shewn to be in the handwriting of Mr. Parker, who drew the lease. An examination of the document affords some evidence that the written part of the body of the lease is in the same handwriting as the option clause. Albert Hughes, a witness called for the defence, says he knew well Parker's writing, and that that clause, as well as the writing in the whole document, is in his, Parker's, writing. The defendant admits in her evidence that Parker was her husband's solicitor in Medicine Hat, and the plaintiff and Thomas say that Parker drew the lease at the request of White. Unfortunately, Parker is also dead. There is an affidavit of execution indorsed on the lease, sworn to by Mr. Parker before Mr. Mitchell. It will be noticed that he swears it "was executed on the day of the date thereof," these words being in print, and the date appears to be the 1st May, "one thousand eight hundred and ninety," the word "nine" being evidently not filled in (the rest of the year being in print), for by the attestation clause it is said to have been "signed, sealed, etc.," by the parties "this first day of May, 1899."

The affidavit also states that he, Parker, is a "subscribing witness thereto," which appears to be incorrect, as far as "subscribing" is concerned, for, after the words "in the presence of," there is no name of anyone. There is an evident carelessness in the filling up of the forms, and too much stress cannot, therefore, be laid on the statement in the

affidavit that the lease was executed on the 1st May. As the lease was apparently to take effect from the 1st May, it might have been so dated, even though drawn on a day subsequent. The affidavit of execution is shewn to have been sworn to on the 29th May, 1899, proving that it was in his hands on that day, a fact which corroborates the plaintiff's evidence when he says that it was executed at the latter end of May.

There is a suggestion, but no evidence, that the option clause was inserted after the execution of the lease by the lessor. An inspection of the lease shews that this was by no means difficult to do, as there is a considerable blank space at that part of the printed form used for the lease—and if the option was in a different handwriting, or if there was anything in its appearance to indicate that it was written at a different time from the rest of the writing in the document, the evidence for the plaintiff is not of such satisfactory character as to make such a thing improbable. But if it were written in after execution, that could only have been done by the connivance, and probably fraudulent connivance, of Parker. There is no evidence to shew that Parker was other than a respectable advocate, but, on the contrary, Hughes, one of defendant's witnesses, says that Parker had the reputation of being a straight, honest, honourable man, and the fact that he was White's solicitor is a circumstance against the suggestion that he would deliberately commit a fraud against his client. It is suggested that Parker left his papers in Medicine Hat after his departure, so that they were accessible to the public; but, while that would be important if the option clause was in a handwriting different from the rest of the lease, it has no bearing on the question as the fact is. It might well account, however, for the disappearance of any duplicate retained by White, who, on leaving for England, might have left it with Parker. Mrs. White says she never saw a duplicate, though she made search for it. For the defence it was attempted to put in certain letters of the late Mr. White to his wife. These appear in the appeal book, having been admitted subject to objection. If they are evidence, then they put it beyond question that there was, in fact, an option to purchase "at any time within two years" (which is very much like the language of the option clause in the lease), but he says the price was to be \$3,500. The letter which contains this statement is dated the 23rd April, 1899.

The evidence under commission of William Carter and Albert Vokes, two friends of White, whom he is said to

have met in Winnipeg in June while on his way to England, was also put in, subject to objection. They say that he told them that the option to purchase was for \$3,500, and both of them say that he told them that the rent was \$75 per month, whereas, in fact, it was only \$66.66. I do not see how the statement made by White to these two men, in the absence of the plaintiff, can be evidence, and the same remark applies to the letters written to Mrs. White. The ground upon which it is sought to have them admitted is that they are statements made against White's interest, pecuniary or proprietary. They are not, in my opinion, against his interest. They merely amount to a statement "of an agreement which must be supposed to be made on fair terms, and consequently as much in favour of the maker's interest as against it." In Taylor on Evidence, s. 671, a case is referred to where this entry was sought to be used: "April 4th. A. came as a servant to have for the half year £2;" and it was not allowed on the ground above stated. Coleridge, J., pointed out that this was not against the maker's interest, unless the mere making of a contract be so, and if that were the case the existence of a contract would be against the interest of both parties to it. The conversation between Parker, White's solicitor, and Albert Hughes, not in the presence of the plaintiff, is also, I think, inadmissible.

The evidence, then, is all one way, and, even though the witnesses do not agree with each other in many respects, and the plaintiff's own testimony at different times is not consistent, yet we have the statements of three men on oath, all agreeing with each other, that White had agreed to give an option to purchase at \$2,500, and thus corroborating the document itself, and there is no evidence to contradict that given for the plaintiff on this point. It seems to me that there is no reasonable course left but to say that there is evidence that White did agree as the option clause sets forth.

It is further set up that the price, \$2,500, was inadequate, and that specific performance should be refused. The only evidence as to value is that the property was assessed in 1899 at \$2,500, and in 1900 at \$4,000, but reduced by the Court of Revision to \$2,500, and the testimony of Mr. Tweed, a former owner, that he sold it in 1896 to White for \$2,500. And there is, of course, the rent which Yuill agreed to pay.

I confess I find it hard to understand how a building which could bring a rental of \$800 a year would be sold by the owner for a little over three years' rent, but, even if the defendant's contention that the price was to be \$3,500,

that is, less than four and a half years' rent, be accepted, that, too, seems a very small figure. Possibly the goodwill of the business was an element which may account for the relatively high rental. On the other hand, it may be said that, in the absence of any evidence of an increase in value since 1896, the fact that White was getting \$1,600 rent and \$2,500 or \$1,100 in all, payable within two years, shews that he was getting a good price for the property, which had cost him only \$2,500 three years before. However that may be, it at least may be said that the evidence does not establish an "inadequacy of price such as shocks the conscience and amounts in itself to conclusive evidence of fraud in the transaction," and, therefore, it is not itself a sufficient ground for refusing a specific performance, as was laid down by Lord Eldon in *Coles v. Trevelthick*. 9 Ves. Jr. at p. 246.

As to the contention of the defence that there was a mistake in the amount mentioned in the option clause, the party seeking to establish such a mistake must produce evidence outweighing that which supports the agreement as written. In the present case the evidence is all in favour of the option clause containing just what was actually agreed upon.

I think I have dealt with all the ground urged for the defendant, and I have come to the conclusion that the appeal must be dismissed, and with costs of the appeal.

WETMORE, J., delivered a written opinion concurring.

RICHARDSON, SCOTT, and PRENDERGAST, JJ., also concurred.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MACMAHON, J.]

[28TH JUNE, 1902.]

DOIDGE v. ROYAL TEMPLARS OF TEMPERANCE.

*Insurance—Benevolent certificate—Alteration of constitution—Retroactivity
—Internal appeals—Domestic forum—Action.*

Appeal by the defendants from the judgment of MACMAHON, J. Action on a beneficiary certificate dated the 19th October, 1896, issued by the defendants, who were incorporated under the Benevolent Societies Act, R. S. O. 1877 c. 167, to the plaintiff, conditioned, inter alia, that he should comply with the constitution, rules, or orders governing, "or that might thereafter be enacted by the defendants to govern, the Order and its benefit funds," and by which the defendants agreed that, on the plaintiff attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount.

Held, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff was entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it.

Held, also, that the plaintiff was not bound before action to exhaust the intricate series of appeals within the society provided for by the rules, for, under R. S. O. 1897 c. 203, s. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proofs of loss, and any rules, conditions, or stipulations to the contrary shall, as against the assured, be void.

*G. H. Watson, K.C., and Z. Gallagher, for the defendants.
S. F. Washington, K.C., for the plaintiff.*

IN CHAMBERS.

[MACLENNAN, J.A., 4TH JULY, 1902.]

In re MUSKOKA PROVINCIAL ELECTION.

MAHAFFY v. BRIDGLAND.

*Parliamentary elections—Recount of votes—Ballots—Marking of—Initial-
ling of.*

Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with what might be taken for a "c," are properly marked and should be counted.

In initialling the ballots a deputy returning officer at one sub-division put as his initials H. G., instead of his full initials, H. C. G., and a deputy returning officer at another polling sub-division put McN., instead of his full initials, W. D. McN.

Held, that such ballots were sufficiently initialled within the meaning of the Act, the object of such initialling being merely the identification of the voter, which was effected, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and *semble*, that under these circumstances the ballots should not be rejected, even if not initialled at all.

C. A. Masten and *Eric N. Armour*, for Mahaffy.

R. A. Grant, for Bridgland.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., LOUNT, J., 18TH JULY, 1902.]

STACK v. T. EATON CO.

Fixtures—Vendor and purchaser—Shop fittings—Gas and electric light fittings.

Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light

fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood.

Held, that these articles became part of the land and passed by a conveyance of it to the defendants.

Bain v. Brand, 1 App. Cas. 762, *Holland v. Hodgson*, L. R. 7 C. P. 328, *Hobson v. Gorringe*, [1897] 1 Ch. 182, *Haggert v. Town of Brampton*, 28 S. C. R. 174, and *Argles v. McMath*, 26 O. R. at p. 248, followed.

Judgment of MACMAHON, J., affirmed.

W. R. Smyth, for the plaintiff.

G. F. Shepley, K.C., for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 31st JULY, 1902.]

In re WILLIAMS.

Trustees—Remuneration—Fixed annual sum—Solicitor-trustee—Profit costs.

Appeal by one of the trustees of an estate from the judgment of a Surrogate Court fixing his remuneration. The Surrogate Judge allowed five per cent. on the interest collected only, but nothing for any other services, on the ground that he had allowed two and a half per cent. in a former order for the taking over of the corpus.

Held, following *Re Berkeley's Trusts*, 8 P. R. 193, that an annual allowance should be made for looking after the corpus of the fund, and that it should not depend upon the amount collected and invested, but should be a fixed annual allowance, based on the nature of the property and the consequent degree of care and responsibility involved.

Held, also, that the Surrogate Judge, instead of allowing the trustees a percentage on the principal sum taken over, and nothing for the collection of the interest, should have allowed them nothing for the taking over of the estate, but a percentage on all interest collected and paid over, and an annual sum for the care of the estate.

Held, also, that the general rule is, that a trustee-solicitor is not entitled to charge the estate with fees for any professional services, but that an exception, which is not to be extended, has been established by the decision of Lord Cottenham in *Cradock v. Piper*, 1 Macn. & G. 664, under which a solicitor-trustee, who brings or defends proceedings in Court for himself and his co-trustee, is entitled to recover profit costs, and, therefore, to charge such costs to the estate.

G. F. Shepley, K.C., for the appellant.

J. A. Hutcheson, for the other persons interested.

[6TH AUGUST, 1902.]

CROSBY v. BALL.

Insurance—Life—Benefit society—Beneficiary—Supposed wife—"Dependent."

Appeal by the plaintiff from the judgment of BOYD, C., directing certain moneys to be paid to the defendant under an endowment certificate issued by the Supreme Tent of the Knights of Maccabees of the World. The plaintiff was the first wife of Philip Crosby, deceased, having been married in 1860. In 1886 the deceased went through a second ceremony of marriage with the defendant, who did not know that she was marrying a man whose wife was living. In 1900 the deceased made an indorsement on his certificate of insurance, revoking his former direction as to payment, and directing payment to be made to "Mary Ball, otherwise known as Mary Crosby." The defendant was the holder of the certificate, and claimed the money as a "dependent" of deceased.

Held, that the defendant Mary Crosby, having lived with the deceased, believing herself to be his wife, and being supported by him, was, under one of the rules of the society, No. 174, entitled to the fund as a "dependent" of the deceased.

Appeal dismissed with costs.

W. M. Douglas, K.C., for the plaintiff.

A. Weir, for the defendant.

[BOYD, C., 14TH APRIL, 1902.]

BROWN v. CITY OF HAMILTON.

Municipal corporations—By-law—Neglect to enforce—Injury to person—Liability—Nonfeasance.

The passing by a municipal corporation, under the powers conferred by the Municipal Act, of a by-law prohibiting the

setting off of fire-works, fire-crackers, etc., on the public streets, does not cast any duty on the municipality to see to its enforcement. An action to recover damages from a corporation on account of injuries sustained by the plaintiff by reason of the setting off of fire-works, in alleged contravention of a by-law, will not lie.

John G. Farmer and J. P. Stanton, for the plaintiff.

F. Mackelcan, K.C., for the defendants.

[FALCONBRIDGE, C.J., 17TH APRIL, 1902.]

TAYLOR v. MACFARLANE.

Will—Devise of hotel premises to widow—Benefit of children—Division of income—Transfer of license to widow—Creditors—Receiver.

A testator by his will devised hotel premises to his wife during widowhood, for the benefit of herself and four children, the income to be applied for their support and maintenance until the children became of age, and in case of daughters until marriage. On the widow marrying, the property was to go to the children, the widow being paid \$1,000. On the testator's death in 1896, the widow applied to the license commissioners and obtained a transfer of the license to her for the remainder of the year; and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and the children thereout, no money of the estate going into the business.

Held, that, after the testator's death, the license and goodwill of the hotel business belonged to the widow personally, and formed no part of his estate; and apart therefrom the income was divisible amongst the widow and children as in *Allen v. Furness*, 20 A. R. 34.

Held, also, that creditors of the widow were entitled to attach the widow's interest in the property, which could be reached by the appointment of a receiver.

C. H. Ritchie, K.C., for the plaintiffs.

A. C. McMaster, for the adult beneficiaries.

D. L. McCarthy, for the infants.

W. E. Raney, for the National Trust Company.

[MACMAHON, J., 17TH JULY, 1902.]

MORROW v. PETERBOROUGH WATER CO.*Company—Winding-up—Distribution of surplus—Shareholders—By-laws—Resolutions.*

A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and for payment of the liabilities and the costs of winding-up, etc., and directing that the surplus should be distributed amongst the members according to their rights and interests in the company.

By by-law of the company, holders of second preference shares were to be paid dividends at 6 per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders; but none of them exercised this option. The by-law also provided that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets."

Held, that the second preference shareholders were not entitled to share in the surplus assets.

Held, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares.

Birch v. Cropper, In re Bridgewater Navigation Co., 14 App. Cas. 525, followed.

G. F. Shepley, K.C., for the plaintiff.

R. E. Wood, for the defendants Rogers and Lewis.

L. M. Hayes, for the defendant Collins.

C. H. Bradburn, for the defendant company.

IN CHAMBERS.

[MEREDITH, C.J., 15TH JULY, 1902.]

In re THOMSON v. STONE.

*County Courts—Jurisdiction—Equitable relief—Amount in controversy—
Judgment creditor—Setting aside chattel mortgage—Prohibition.*

Where the plaintiff, having recovered judgment for \$92.05 and costs against the defendant in a Division Court, brought an action in a County Court to set aside as fraudulent as against him a chattel mortgage for \$520 made by the defendant:—

Held, on motion for prohibition, that the subject-matter involved was the amount due on the judgment—it not being alleged or proved that there were any other debts of the defendant than that due to the plaintiff; and the County Court had jurisdiction by virtue of s. 22 (13) of R. S. O. 1897 c. 55.

Forrest v. Laycock, 18 Gr. 611, followed.

Dominion Bank v. Heffernan, 11 P. R. 504, and *Re Lyons*, 10 P. R. 150, distinguished.

John MacGregor, for the defendant.

B. E. Swayzie, for the plaintiff.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 22ND JULY, 1902.]

BANK OF MONTREAL v. DUNLOP.

Mortgage—Construction—Interest.

The proviso for payment in a mortgage, given to secure an indebtedness, provided for the payment of "said overdrawn account and all promissory notes or bills of exchange (and interest upon the same) then due and payable."

Held, that the overdrawn account was made chargeable with interest.

W. B. Chandler, K.C., for the plaintiffs.

W. W. Allen, K.C., for the defendant.

AYER v. ESTABROOKS.

Will—Construction—Subject of devise—After-acquired property—Will speaking from death.

Testator by his will devised to his daughter "the homestead farm on which I reside," and the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as lot A, upon which he resided at the time of his death. By s. 19 of c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Held, that lot A was not included in the devise to the daughter.

M. G. Teed, K.C., for the plaintiffs.

H. A. Powell, K.C., for the defendants.

MANITOBA

In the King's Bench.

[FULL COURT, 31st MAY, 1902.]

DAVIDSON v. FRANCIS.

Contract—Architect's certificate—Finality—Action—Condition precedent.

Action to enforce a mechanics' lien. The plaintiffs agreed to erect a building for the defendant, the work to be done on or before the 15th August, 1899, to the satisfaction of an architect named, whose decision was to be final and conclusive. The defendant alleged that the certificate relied on by the plaintiffs was not such a certificate as the contract required to be given before the final payment became due.

DUBUC, J., gave judgment in favour of the defendant.

Both parties appealed; the defendant on the ground that his counterclaim for damages from delay in the completion of the work beyond the date fixed by the agreement, should be allowed.

The architect purported to give two final certificates. His first was as follows:—"I hereby certify that Davidson Bros. are entitled to \$416.36 in full for above contract and extras, less \$4.25, which amount may be held back till the items of work in the following list are done." The items were then specified. Then followed, "Note: I consider the guarantee in specification will cover any leak in roof."

On the 6th March, 1901, the architect further certified as follows:—"This is to shew that by certificate given by me on 23rd January, 1900, I certified that Davidson Bros. were entitled to \$416.36, from which the amount of \$4.25 was deducted to cover some small items left undone; these have now been attended to; and I therefore certify that Davidson Bros. are entitled to \$416.36 in full of contract and extras."

Held, that the two certificates must be read together, and, being so read, they shewed the troubles as to the roof and other matters, still unremedied; as to these items therefore it could not be implied that the architect had certified their completion to his satisfaction. The inference from the item as to the leak in the roof was, that the roof was not completed to the architect's satisfaction. The architect apparently considered that, owing to the guarantee, it was not necessary that he should certify as to the roof; but the guarantee could only be an additional security to defendant; it in no way dispensed with the plaintiffs' duty to complete the roof or put it in any position different from the rest of the work as to the necessity for the architect's certificate that it was completed to his satisfaction.

The provision that the architect should certify that the work was completed to his satisfaction was a condition precedent to the plaintiffs becoming entitled to the final payment. Such certificate must be as to the whole of the work: *Canty v. Clark*, 44 U. C. R. 222.

The plaintiffs' appeal was dismissed with costs, and, as the defendant's counsel stated that the appeal on the counterclaim would be abandoned if the plaintiffs' appeal should be dismissed, the defendant's appeal was dismissed without costs.

E. L. Taylor, for the plaintiffs.

J. S. Ewart, K.C., and *A. C. Ewart*, for the defendant.

[FULL COURT, 31ST MAY, 1902.]

IREDALE v. MCINTYRE.

Real Property Act—Allegations in petition—Conclusions of law.

Proceeding under the Real Property Act. An application was made by the caveator for an issue, when the caveatees demurred; the referee upheld the demurrer, but, on the application of the caveator allowed an amendment merely alleging that the tax sale under which the caveatees claimed was irregular, null, and void; and he directed an issue, the caveatees to be plaintiffs.

The caveatees appealed to a Judge in Chambers; the appeal was heard by KILLAM, C.J., who held that the amendment allowed did not aid the petitioner. It stated that "the petitioner *claims* that the said tax sales and all proceedings connected therewith under which the respondents claim title were illegal, null, and void," and that the respondents (caveatees) were not at the time of their application the owners of the land. The allegation that the petitioner made a certain claim was not an allegation of the facts claimed, and an allegation that the proceedings were illegal, null, and void would be an allegation of a conclusion of law. The order of the referee was discharged and an order made giving leave to the caveator to amend, upon terms.

The caveator then appealed to the full Court.

Held, that the order appealed from should be affirmed and the appeal dismissed with costs. The petition was plainly defective on its face. The petitioner, after setting up the title by which she claimed the lands in question, as an allottee of the Crown, went on to allege that the caveatees were claiming title under sales of the lands for arrears of taxes alleged to have been made, and she stated she was willing to reimburse them any sums legally expended by them in connection with the land, and there the matter was left. She did not deny that the sales took place, or allege any facts which would render them invalid if they did, and the petitioner did not shew *prima facie* that she was entitled to the estate in the land which she claimed. Whether it was necessary for the petitioner to have gone further in the petition than to set up her own title was a question. But, as she had thought it necessary to state the title or claim on which the caveatees were relying for a certificate of title, it was incumbent on her to go on and allege facts which *prima facie* would displace the adverse claim.

C. P. Wilson, for the caveator.

T. H. Johnson, for the caveatees.

[FULL COURT, 5TH JULY, 1902.]

BLACKWOOD v. PERCIVAL.

Principal and surety—Giving time—King's Bench Act, s. 39, s.-s. 14—Surety prejudiced.

An appeal from the decision of BAIN, J., *ante* 268, was dismissed with costs.

[FULL COURT, 12TH JULY, 1902.]

UNION BANK v. ELLIOTT.

Bills and notes—Action on note—Counterclaim by added defendants for amounts due on collaterals—Liability to account—Interest.

County Court appeal. The action was originally brought against Henry G. Elliott and A. E. Little as indorsers of a promissory note made by Elliott & Cowie in favour of H. G. Elliott. The original defendants obtained an order adding the firm of Elliott & Cowie as defendants. The added defendants filed a dispute note and also a counterclaim against the bank. Both sets of defendants set up the defence of payment by Elliott & Cowie. Subsequently the bank discontinued the action, but the counterclaim was brought to trial. When judgment was given for the added defendants as against the bank for \$28.03. The added defendants appealed, seeking to have the amount of the judgment increased.

The counterclaim was in respect of certain securities alleged by Elliott & Cowie to have been placed by them in the bank for collection. They alleged that they indorsed and delivered to the bank "notes or agreements in writing (commonly known as lien notes)" for collection on their account, which the bank agreed to endeavour to collect for them, and that the bank was to account to them for all moneys collected thereon, and that they demanded the notes and agreements of the bank, or an account of the moneys collected, but the bank refused to deliver them up or to account for moneys collected. They claimed payment of sums collected and a return of those unpaid or damages to the amount thereof. The notes or agreements had been put in the bank as collateral security for advances. The bank made collections of the collaterals, and gave credit therefor from time to time, and in some cases the collaterals were delivered up to Elliott & Cowie. About March, 1899, the account was closed, but

a certain number of collaterals remained with the bank unaccounted for. The collaterals were entered in a register which indicated that twelve of the notes were in the possession of the bank, but the manager was unable to account for them. To keep matters straight Elliott & Cowie gave the bank a demand note, on the understanding that the manager would look into the collaterals and credit what could not be accounted for.

The trial Judge found that the manager promised that any notes not accounted for would be credited on the note; that Elliott & Cowie gave the renewal note sued on relying on that promise, and had paid it; and he held that the bank were bound to "implement the manager's promise." On this ground he held the bank liable for the amounts of three of the collaterals, making with interest \$28.03, for which judgment was given.

The appellants sought to be allowed the full amounts of four more: Heppner, \$13.50; Watson, \$16; McKellar, \$16; Krockner, \$13.50; and a balance in respect of two others. As to the Heppner note, Elliott stated that before it was due. Heppner died and that he (Elliott) paid the note and took it out and afterwards received the money: Watson's note was paid to an agent of the firm and they paid the amount into the bank and trusted the bank to send out the note: both McKellar's and Krockner's notes were paid into the bank. The dates and particulars of the payments were not given; in most cases the entries shewed particulars identifying the amounts with particular collections, but in some cases there was nothing to shew from what source the amounts came or for what they were paid in. The bank did not appeal.

Held, that the appeal should be allowed, and the amount of the judgment for the defendants Elliott & Cowie, as against the plaintiffs, increased by \$65; the plaintiffs to pay the costs of the appeal.

There would be a case for the interposition of a court of equity, which would compel the creditor to deliver up the securities or account for them: the pledgors or transferors could, after payment of the principal debt, maintain an action in the County Court for moneys collected on the collaterals.

There being no distinct evidence of the dates of payment to the bank, or of the dates of payment of the principal note, or of the accruing of the bank's liability, interest was allowed

only from the date of filing of the counterclaim, 29th March, 1901.

J. A. M. Aikins, K.C., for the appellants.

C. P. Wilson, for the plaintiffs.

[FULL COURT, 12TH JULY, 1902.]

HUGHES v. CHAMBERS.

Sale of goods—Action for price—Defence that goods not properly measured or weighed—Weights and Measures Act—Illegality—Burden of proof—Voluntary payments—Mistake—Partnership—Retirement of partner—Assignment of assets—Chose in action—Proof of assignment.

County Court appeal. The action was brought in the name of Anna Maria Hughes and William Long, trading as Hughes & Long, but Long's name was struck out, and judgment given for A. M. Hughes alone for \$116.87. The defendant appealed.

Anna Maria Hughes was the wife of J. H. Hughes, who carried on business on his own account, but got into difficulties and handed over his assets to his creditors.

In 1894 Anna Maria Hughes, A. J. Hughes, and one Atkinson formed a co-partnership under the name of Hughes, Atkinson, & Co. In 1896 they dissolved; Atkinson retired, but A. J. Hughes and Anna Maria Hughes continued as Hughes & Co. until 1897, when A. J. Hughes withdrew, assigning all accounts to Anna Maria Hughes, who continued alone for a short time and then entered into partnership with Long as Hughes & Long, until June, 1901, when Long retired, transferring his interest to Anna Maria Hughes. The business had been a continuing one from 1894 to the present time.

In 1894 the defendant purchased goods from Hughes, Atkinson, & Co., for which, at the end of that year, he owed that firm a balance of \$128.22; the account so stood at the retirement of Atkinson, and the change of the firm name to Hughes & Co. The books of Hughes, Atkinson, & Co.'s business were left in the hands of Hughes & Co., and the latter firm continued to use them in their business. The accounts due Hughes, Atkinson, & Co. were collected by the succeeding firms, and the moneys collected were used in the business without objection by Atkinson.

There was no transfer in writing from Hughes, Atkinson, & Co. to Hughes & Co. J. H. Hughes stated he was at a meeting of the old firm when Atkinson retired; he could not say whether anything was said as to the transfer of the book debts, but that "the whole thing was transferred together."

In 1896 the defendant had dealings with Hughes & Co.; he purchased goods to the amount of \$50.70 and made two payments amounting to \$25; the accounts were entered in the old books in one continuing account. In 1899 the defendant made purchases from Hughes & Long amounting to \$302.17, and made payments amounting to \$253.55. In 1901 he made further purchases from Anna Maria Hughes, after Long's retirement. The action was brought in 1902 for a balance claimed in respect of all these accounts. The defendant admitted the correctness of the account, but claimed some further credits, and alleged that there had been some violations of the Weights and Measures Act in respect of goods supplied.

The first question related to the right of Anna Maria Hughes to recover for the account of Hughes, Atkinson, & Co., without further proof of an assignment to her. The trial Judge found that there was a sufficient equitable assignment from Atkinson to the remaining members of the firm.

Held, that there was evidence on which he might reasonably so find. To constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required. Any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient: *Row v. Dawson*, 1 Ves. Sen. 332; *Yeates v. Groves*, 1 Ves. Jun. 280; *Tibbits v. George*, 5 A. & E. 107. Where one member of a firm retires, leaving the business to be continued by the remaining partners and the old accounts to be collected by them, very little more is needed to warrant the inference that the ownership of those accounts, as well as that of the business, is transferred.

Unless the payments made in 1896 could be taken as made upon the whole account, the balance due in 1894 was barred by the Statute of Limitations. No appropriation was made by defendant, but the trial Judge found there was an appropriation by the creditors to the whole account which took the case out of the statute; and his ruling was upheld.

As to the question arising under the Weights and Measures Act, R. S. C. c. 104, a large number of items in the account were for lime claimed to have been sold and delivered

by one or other of the various firms to the defendant. The lime was charged for by the bushel, but the practice was to measure only quantities of ten bushels or less, and where greater quantities were ordered, to ascertain them by weight, allowing 70 pounds as a bushel.

The first point raised was that where the lime was measured, the measure was not stamped as required by the Act.

Held, that a party who sets up such a circumstance as rendering a sale wholly illegal and void and as rendering him free from liability to pay for goods supplied, must prove the facts: *Hanbury v. Chambers*, 10 Man. L. R. 167. There was no real evidence in the present case that the measure was not properly stamped. The onus was upon the defence to prove that the sales were illegal and void.

By the Act of 1898 the weight of lime equivalent to a bushel was fixed at 80 pounds; this was changed by the Act of 1899 to 70 pounds. In the interval before the latter Act came into force, several parcels of lime were supplied by weight and charged for at 70 pounds per bushel. It was held that these sales were wholly illegal, and that the plaintiff could not recover for this lime at all.

But some further questions arose in this connection. The portion of the account of 1899 which was for lime thus furnished during the period when the Act of 1898 was in force was greater than the balance found by deducting the payments of that year from the sales. It was held that the payments were made on that particular account and that the defendant could not recover the excess. The payments were wholly voluntary. The alleged illegality was in the acts of the sellers alone. If the payments were made with notice of the illegality set up, they could not be recovered back, since they were the voluntary acts of the defendant. If they were made in ignorance of the illegality and of the facts which would have entitled the defendant to dispute the account, then the right to recover them would be grounded on mistake and not on illegality. The onus was upon the party paying to shew that this was done under a mistake.

Appeal dismissed with costs.

G. R. Coldwell, K.C., for the plaintiffs.

J. F. Kilgour, for the defendant.

[FULL COURT, 12TH JULY, 1902.]

LEWIS v. BARRE.

Sale of goods—Acceptance of part—Rejection of residue as not in accordance with contract—Passing of property—Evidence as to quality.

The plaintiffs sued for the price of a quantity of butter sold and delivered to the defendant. The plaintiffs asserted that the contract was for all the butter they had on hand at the time, and such as they should manufacture during 1899, without warranty or condition. A quantity was accepted by the defendant, and the remainder was shipped according to the defendant's instructions, so that the property passed and the defendant became liable for the price. The plaintiffs contended that the defendant could not reject a part, when he had already accepted previous shipments under the same contract.

The defendant contended that by the terms of the contract there was a warranty, amounting to a condition, that the butter was, and was to be, "first class," or "fine;" that the onus was upon the plaintiffs to shew that the butter tendered was of that quality; that no proof of its being so was given; and that the property had never passed to him, and he had rejected it at the first opportunity.

The plaintiffs gave no evidence in chief as to quality; they tendered some in rebuttal, which was received subject to objection.

The action was tried before RICHARDS, J., who found that the contract was for "fine" butter only; that the evidence did not prove it to have been of that quality; that the property had not passed to the defendant; and he dismissed the action. The plaintiffs appealed.

Held, that the agreement as to quality was a condition of the contract. The onus was on the plaintiffs to shew that the goods were of the required quality, and evidence upon that point should not have been allowed to be given in rebuttal. The fact that the purchaser had accepted other car loads of "fine" butter did not bind him to accept one that was not.

Dyment v. Thompson, 13 S. C. R. 303, commented on.

While the contract was in part for specific and in part for future goods, it should be inferred from the circumstances and from the conduct of the parties that the property in the

portion already in existence was not intended to pass by the contract.

Appeal dismissed with costs.

H. M. Howell, K.C., and *T. G. Mathers*, for the plaintiffs.

J. S. Ewart, K.C., and *H. A. Robson*, for the defendant.

[KILLAM, C.J., 12TH JULY, 1902.]

HOFFSTROM v. STANLEY.

Mechanics' liens—Unpaid vendor—Lien subject to claim of—Costs.

Action to enforce a mechanic's lien for work done by the plaintiff for and at the request of the defendant Stanley upon lands of the defendants Donagh and McCulloch, agreed by them to be sold to Stanley. By the agreement the purchase money was to be paid on the 15th August, 1901, and in default of payment the vendors were to be at liberty, either to cancel the agreement, forfeiting any payments made on account, or re-sell and recover any deficiency from the first purchaser.

The purchaser, Stanley, entered into possession of the premises and commenced making certain stipulated improvements, in the course of which he employed the plaintiff as a carpenter, and it was for wages thus earned that the lien was claimed.

No part of the purchase money was paid; Stanley failed to make the necessary financial arrangements, and he discontinued work on the premises. The work was continued after the 15th August, with the knowledge and concurrence of the vendors.

In October McCulloch served Stanley with a written notice that, as he had not complied with the terms of the purchase as to time, his interest had ceased.

Held, that the parties must be treated as occupying relatively the positions of mortgagor and mortgagees.

Having allowed Stanley to continue the expenditure of money in making improvements after the expiration of the time for payment, the vendors could not cancel the agreement without giving further time.

The agreement was still subsisting when the plaintiff did his work, when he registered his claim to a lien, when he brought his action, and up to the time of trial.

Judgment declaring the plaintiff entitled to a lien upon the land in question, subject to a charge of the defendants Donagh and McCulloch for the purchase money unpaid under their agreement of sale to the defendant Stanley and interest thereon, with the usual inquiries and directions. The plaintiff having originally sought to charge the interest of Donagh and McCulloch, and they, after the amendment, having disputed the plaintiff's claim to any relief, neither should be allowed costs as against the other; but as against Stanley's interest the plaintiff was allowed costs and also judgment against Stanley personally for his claim and costs.

E. L. Taylor, for the plaintiff.

A. Haggart, K.C., for the defendants Donagh and McCulloch.

[RICHARDS, J., 22ND JULY, 1902.]

In re VIVIAN AND RURAL MUNICIPALITY OF WHITE-WATER.

Municipal corporation—Local option by-law—Application to quash—Want of seal and signature—Subsequent alteration in boundaries of municipality—Limitation of order to quash.

Application to quash a local option by-law of the former rural municipality of Whitewater, which was formed in 1886 by 49 V. c. 52, s. 30. It was abolished by the Municipal Boundaries Act of 1890, 53 V. c. 55. A new municipality of Whitewater was established in 1896 by 59 V. c. 18, s. 2; it comprised townships 5 and 6 in ranges 19, 20, and 21 west. The former municipality had covered townships 4, 5, and 6 in ranges 20, 21, 22, and 23 west.

The provisions in regard to local option by-laws were contained in the Liquor License Act, R. S. M. c. 90, ss. 58-60.

The Municipal Boundaries Act, R. S. M. c. 102, s. 84, provided that a local option by-law should remain in force, notwithstanding that the municipality which passed it should be abolished.

The application was made on behalf of Albert Vivian, a resident of a part of the present municipality of Whitewater, which had been included in the former municipality of that name.

The principal objection taken was that neither the local option by-law No. 43, nor by-law 42, providing for taking a

vote on by-law 43, were ever completed or brought into force, as neither by-law had ever been sealed with the seal of the corporation, or signed by the head of the corporation or by any one purporting to preside at the meetings at which the by-laws purported to have been passed.

Held, that the alleged by-law No. 13 was invalid and inoperative, and should be quashed without costs to any parties.

In the absence of a by-law to take the vote, the vote itself was invalid. The right to vote could not arise till a valid by-law was passed providing for it as required by law; there having been no valid vote taken, it was not in the power of the council to read the alleged by-law 43 a third time and enact it. Neither by-law was ever sealed.

It might be urged that where a by-law had been invalid from the beginning there was nothing to quash. But, in order that the municipal council might know distinctly how the matter stood, there should be a definite order.

Notice of the application had been served upon the then present municipality of Whitewater, the Attorney-General, and the Municipal Commissioner, but no one appeared for any of them.

The notice of motion had not been served on any of the other municipalities which contained territory which was included in the former municipality of Whitewater.

Held, that, as such other municipalities were not parties to the application, the order must be limited; it could not be made to affect the by-law other than so far as it purported to affect the then present municipality of Whitewater.

W. E. Perdue, for the applicant.

BRITISH COLUMBIA

In the Supreme Court.

[FULL COURT, 11TH JUNE, 1902.]

MERCHANTS BANK OF HALIFAX v. HOUSTON.

Costs—When allowed by Supreme Court of Canada—No power to stay taxation.

At the trial before MARTIN, J., the plaintiffs' action was

dismissed, but the full Court allowed an appeal by the plaintiffs. On appeal the Supreme Court of Canada allowed the appeal of the defendant Ward, and ordered the plaintiffs to pay him the costs of that appeal and also all costs in the Court below, except in so far as Ward was to be regarded as the representative of the mortgagor in an action to realize a mortgage security, which costs were reserved till final decree. By the same judgment the action was dismissed as against Ward, except in so far as it was considered to be in the nature of a mortgage action for the purpose of enforcing a security.

Held, reversing an order of IRVING, J., staying the taxation of Ward's costs of appeal to the full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a Judge of the Supreme Court of Canada instead.

L. P. Duff, K.C., for the appeal.

Sir C. H. Tupper, K.C., contra.

[FULL COURT, 14TH JUNE, 1902.]

McCUNE v. BOTSFORD.

Costs—Interlocutory appeal—"No order as to costs"—Meaning of.

Appeal from an order of IRVING, J., dismissing an appeal by the defendant Botsford from the taxation of the costs of the action, which was an adverse action under the Mineral Act. From an interlocutory order made in the action an appeal was taken. Before the hearing of the appeal, the plaintiff lost his interest in the case by allowing the mineral claim in question to lapse, and so the full Court "struck out the appeal—no order as to costs." Subsequently the plaintiff's action was dismissed with costs, and the defendants claimed the costs of the appeal, which the Registrar disallowed on taxation.

Held, by the full Court, dismissing the appeal, and following *In re Hodgkinson*, [1895] W. N. 85, that the statement "no order as to costs" means that each party must pay his own costs. So also where the Court refuses to make any order as to costs.

F. Peters, K.C., for the appeal.

Joseph Martin, K.C., contra.

[FULL COURT, 19TH JUNE, 1902.]

HARRIS v. DUNSMUIR.

Jury—Same juror sitting on former trial—New trial.

This action was originally tried in 1894, before a Judge with a special jury, and the plaintiff got a verdict for \$19,377. On appeal a new trial was ordered, and at that trial in 1897, also with a special jury, a nonsuit was entered. On appeal a new trial was ordered by the full Court (affirmed by the Supreme Court of Canada, 30 S. C. R. 334). The third trial took place before a Judge with a special jury in December, 1901, and on the verdict the plaintiff obtained judgment for \$9,667.62. The defendant before the last trial changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present at either the second or the third trial. James Muirhead was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of that fact until after the conclusion of the trial.

Held, refusing a new trial on this ground, that it was the duty of the solicitor to inquire who the first jurors were, an opportunity to do which is provided by s.-s. 5 of s. 59 of the Jurors Act.

Sir C. H. Tupper, K.C., and F. Peters, K.C., for the defendant.

E. V. Bodwell, K.C., and L. P. Duff, K.C., for the plaintiff.

[FULL COURT, 25TH JUNE, 1902.]

McNAUGHT v. VAN NORMAN.

Mineral claim—Seizure by sheriff of interest of co-owner—Lapse of debtor's mining license—Sheriff's right to renew.

Interpleader issue. McNaught and McKinnon were co-owners of mineral claims till the 31st May, when McKinnon's miner's certificate expired. Under an execution the sheriff seized McKinnon's interest on the 29th March, and on the 5th June he obtained a special free miner's certificate in McKinnon's name, for the purpose of reviving McKinnon's interest under seizure. McNaught claimed that under s. 9 of the Mineral Act the former interests of his co-owner were now vested in him.

Held, by the full Court, affirming the decision of IRVING, J., that a sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under s. 4 of the Mineral Act Amendment Act of 1899, in the name of the judgment debtor: neither has the sheriff power to renew a certificate before lapse.

Where some of the co-owners of a mineral claim allow their free miners' certificates to lapse, their interests at once vest *pro rata* in their former co-owners.

Sir C. H. Tupper, K.C., and John Elliott, for the appellants.

S. S. Taylor, K.C., for the respondent.

In the County Court of Vancouver.

[BOLE, Co. J., 21st JULY, 1902.]

BANK OF MONTREAL v. BURNS.

Chose in action—Assignment—Validity—Assignee not named—Evidence to supply omission.

By an informal instrument in writing an insolvent debtor professed to assign all his interest in certain specified property and "all moneys due to me from any source whatever," but did not in the operative part of the instrument name the assignee, who was indicated only by these words at the end of the document: "And I hereby appoint the said G. D. B. my irrevocable attorney . . . to receive any and all moneys owing to me from any source whatever." G. D. B. was the agent of the plaintiffs to whom the insolvent was indebted, and the insolvent sent the assignment to G. D. B. in an unsigned letter in his own handwriting, in which he wrote, "I have made an assignment of everything to you." A debt due to the insolvent having been attached by the defendants, who were also creditors, the plaintiffs claimed the amount under the assignment to their agent, and an issue was directed.

Held, that the letter could be looked at to aid the assignment, and the assignee's name should be read in; and, therefore, the plaintiffs were entitled to the money.

Newell v. Bradford, 37 L. J. C. P. 1, *Catling v. King*, 64 L. J. Ch. 384, *Warner v. Wilmington*, 25 L. J. Ch. 662. *Re*

Bacon's Will, 31 Ch. D. 460, *Turner v. Hellard*, 30 Ch. D. 390, *Pearce v. Gardner*, [1897] 1 Q. B. 688, and other cases, considered.

Charles Wilson, K.C., and *G. E. Corbould*, K.C., for the plaintiffs.

A. J. Kappeler, for the defendants.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[ROULEAU, J., 18TH JUNE, 1900.]

REGINA v. MELLON.

Indian—Selling intoxicating liquor to—Knowledge of licensee—Half-breed.

An appeal from a conviction of the defendant by two justices of the peace for the North-West Territories, for that he, the defendant, on the 19th January, 1900, supplied to one Charles Pepin, then being a treaty Indian, an intoxicant.

ROULEAU, J.—It is admitted by Mellon that he supplied intoxicating liquor to Charles Pepin; but he said that he never knew, and had no means of knowing, that Pepin was a treaty Indian. Daignault, who was present when Charles Pepin got the liquor, swore that he never knew that Charles Pepin "took treaty," although he knew that he was a half-breed. Charles Pepin himself was examined before me, and he swore that he never dressed like an Indian; that he had worked for one Donald McLeod freighting between Calgary and Edmonton for two summers; that he never wore moccasins; that he was driving a pair of horses and selling posts the day he got the liquor. In fact, Pepin speaks English fluently and dresses better than any ordinary white man; there is no indication whatsoever in his appearance, in his language, or in his general demeanour, that he does not belong to the better class of half-breeds.

It is a fact, though, that he "took treaty" about fifteen years ago. and, according to *Regina v. Houson*, 1 N. W. T.

Reps. 44, a half-breed having taken treaty is an Indian within the meaning of the Indian Act.

In *Fowler v. Paget*, 7 T. R. 509, Lord Kenyon says: "It is a principle of natural justice and of our law, that *actus non facit reum nisi mens sit rea*. The intent and act must both concur to constitute the crime." I find this principle fully discussed in all its phases in the case of *Regina v. Tolson*, 58 L. J. M. C. 97, and the conclusion arrived at by the Court there is, that there can be no crime without a tainted mind.

Although this is not an inflexible rule, as in the case of by-laws passed by municipal corporations, still an enactment must be construed with the qualifications ordinarily imported into the construction of criminal statutes, and the various circumstances that may make the one construction or the other reasonable or unreasonable.

Would it be reasonable in this case to think that the licensee was guilty of an offence which he had no intention to commit, or which he had no means to ascertain? Of course if there was any evidence to shew that he was not acting in good faith, or that he might have had some reason to think that this man was an Indian, or that he was suspicious and ran his chances, I should not then hesitate to affirm the conviction. Mellon was not doing anything morally or legally wrong when he sold liquor to Charles Pepin; he was doing only what he was entitled to do, in ordinary circumstances, according to the terms of his license. I find a case very much *ad rem* with this case in *Sherras v. De Rutzen*, [1895] 1 Q. B. 918, where it was decided that in order to convict the licensee of a public house under s.-s. 2 of s. 16 of the Licensing Act, 1872, for serving a constable with liquor or refreshment while on duty, *mens rea*, or knowledge on the part of the defendant that the constable was on duty, must be proved. The clause referred to in this decision is: "If any licensed person supplies any liquor or refreshment whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable, he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding for the second or any subsequent offence, twenty pounds."

In conclusion I may add what Wright, J., said in the case just referred to: "In the present case, if knowledge were unnecessary, no publican would be safe."

Conviction quashed.

[WETMORE, J., MAY, 1902.]

CONN v. FITZGERALD.

Lien—Thresher's lien on grain—Measurements—Weights and Measures Act.

This action was brought for breaking and entering the plaintiff's granary on his farm and wrongfully removing therefrom and converting to the defendant's use a quantity of wheat. The defendant was a thresher, and justified the act complained of by setting up that he was entitled to a lien upon the plaintiff's grain by virtue of the Ordinance respecting Threshers' Liens (C. O. c. 60), and the amendments thereto, and that he did the acts complained of for the purpose of satisfying such lien. The plaintiff in reply to this justification set up that the defendant agreed to thresh his grain at a set price per bushel, and that the grain threshed on account of which the lien was claimed was not measured or weighed, as required by s. 21 of the Weights and Measures Act, R. S. C. c. 104, and therefore that the defendant was not entitled to any lien.

Levi Thomson, for the plaintiff.

B. P. Richardson, for the defendant.

WETMORE, J.—There is practically no dispute as to the facts in so far as they affect the question. The defendant threshed the plaintiff's grain in the season of 1901. Such grain consisted of wheat and oats. The agreed price was four cents per bushel for wheat and three cents a bushel for oats. He commenced threshing on the 12th October and continued on the 14th, 15th, and 16th of that month. He then went away, and returned and finished the rest on the 16th, 17th, and 18th of November. The grain was seized and carried away by the defendant under his alleged lien on the 18th December. The defendant claims to have threshed 4,300 bushels of wheat and 1,100 bushels of oats at the first threshing, and altogether, including both threshings, 7,100 bushels of wheat and 1,100 bushels of oats. These quantities were not ascertained by any measure or other method authorized by the Weights and Measures Act. In fact, no measure whatever was used in ascertaining the quantities. They were ascertained in the following manner. The defendant took the number of cubic feet in each variety of grain threshed, and allowed 128 cubic feet to contain 100 bushels of grain. The usual practice among threshers, it seems, is to allow 125 cubic feet for one hundred bushels, but the defendant added three cubic feet "so as to be certain," as he expressed it. I

find this to be true. Does this means of ascertaining the quantities render the dealing void under s. 21 of the Act referred to? This question came before me in *Pheasant Creek Threshing Co. v. Teece*, decided by me on the 2nd October last. The mode of ascertaining the quantities of grain threshed in that case was almost identical with that pursued in this case, the only difference being that in that case 125 cubic feet were allowed to the 100 bushels, instead of 128 as in this case. I received more information in this case, however, than I did in fact. In that case the only material before me was the evidence of the plaintiffs' manager that eight-tenths of the cubic contents of the grain brought out the number of bushels in the bin. In that case the cubic contents of the grain was measured in bins, as I presume it was in this case. In the *Teece* case I had nothing more than the bare statement of the manager to that effect, together with the fact, also testified to, that that was one of the usual modes by which threshers arrived at the quantity of grain which they threshed, and also the fact that what the manager so testified to was not disputed by the other side, either by evidence or otherwise. No reason whatever was presented to me to shew why or on what principle this result followed. It occurred to me that it was a very arbitrary method of reaching such a conclusion. I held the dealing in that case void, and that the plaintiff was not entitled to recover the price of the threshing, and in doing so I was largely influenced by the judgment of Taylor, C.J., in *Macdonell v. Corrigan*, 9 Man. L. R. 284, and I also referred to *Manitoba Electric and Gas Light Co. v. Gerrie*, 4 Man. L. R. 210. However, in the case now under discussion, the defendant testified, speaking of wheat, "that a cubic foot of loose grain is estimated to weigh 49 lbs." and I was also referred to vol. 24 of the *Encyclopædia Britannica*, "Weights and Measures," which contains a table wherein a cubic foot of loose wheat is alleged to contain 49 lbs. Wheat measured in a bin would, I assume, be called loose wheat. Now, putting the weight of a bushel of wheat at 60 lbs., as provided by s. 1 of c. 26 of 1 Edw. VII. (1901), the section now substituted for s. 16 of the *Weights and Measures Act*, 49 lbs., the contents of the cube, would be very nearly eight-tenths or four-fifths of a bushel; four-fifths of 60 lbs. would be exactly 48 lbs. The table I refer to gives the weight of a cubic foot of several varieties of grain, and it will be found that on giving the number of pounds to the bushel to each such variety of grain, as provided by the section of the Act of 1 Edw. VII. referred to, the contents of the cube very closely approximates to the weight of four-fifths of the bushel. Now, allowing 125 cubic feet of

grain to 100 bushels would be just about tantamount to allowing four-fifths of the cubic contents of a bin in order to get at the number of bushels it contained, and I assume that it was because this was not exactly right, inasmuch as the cube was alleged to contain 49 instead of 48 lbs., that the defendant added the three cubic feet in order to arrive at the 100 bushels. All these figures, however, in this table giving the contents in weight of a cubic foot of grain, must be approximations, possibly very near, but nevertheless approximations; they cannot be anything else. It is evident, however, that the proportion will not always stand, because, if the grain measured is light in weight, say the wheat does not weigh 60 lbs. to the bushel, the weight of a cubic foot of such grain will be proportionately lighter. There is another table in the *Encyclopædia*, under the same heading, which, I presume, is more accurate, that lays it down that an English bushel, which is the same as the Canadian bushel (s. 15 of the Weights and Measures Act and s. 15 of the Imperial Weights and Measures Act, 1878), contains 2,218.19 cubic inches. Figuring it out on this basis, 125 cubic feet would make 97.37 bushels, and 128 cubic feet would make 99.70 bushels. It would appear, therefore, if what is laid down in the *Encyclopædia* is correct, allowing 128 cubic feet for 100 bushels is an exceedingly close approximation. Nevertheless it is a trifle short of the 100 bushels. Now, I have no means of testing the accuracy of what is laid down in the *Encyclopædia*. No evidence was produced to me to prove its correctness, and I am, to say the least, very doubtful whether I ought, under such circumstances, to give any weight to it, and in this connection I would draw attention to the fact testified to by the plaintiff and his witnesses, and uncontradicted, that, taking the whole quantity of that season's crop of wheat marketed, the quantity taken away by the defendant, and what remained on hand in the plaintiff's possession, which altogether represented the wheat the defendant threshed, there were only 6,400 bushels, or, in other words, it fell 700 bushels short of what the defendant claims he threshed, and yet possibly it might be explained on the theory that the defendant's allowances and results were according to measures of capacity, and the grain marketed was according to measures of weight, 60 lbs. to the bushel, and also dockages for dirt, etc., etc. The contention on the part of the defendant is that the agreement or bargain in this case, which was verbal, was merely to thresh the plaintiff's grain at so much per bushel, wheat at 4 cents and oats at 3 cents, and that, as nothing was stated or agreed to the contrary, it must, under s. 21 of the Dominion Act, be deemed that the price for the work was to be paid for by the

standard bushel, and that the method adopted for getting at the number of bushels was merely for getting at the number of standard bushels; that no other bushel was even contemplated. This argument appealed to me with very considerable force, and caused me some doubts whether my decision in *Pheasant Creek Threshing Co. v. Teece* was correct. *Manitoba Electric and Gas Light Co. v. Gerrie* is not conclusive as to the question I am now discussing; but it certainly affords great assistance in reaching a decision upon another question arising in this case, and which would arise in the *Teece* case. But the *Gerrie* case was decided on the ground that there was a penalty provided for fixing for use the gas meter then in question, which had not been verified or stamped as the law provided, and, therefore, the plaintiffs could not recover the price of gas supplied through such a meter. I cannot find, on looking through the Weights and Measures Act, that the defendant has by reason of his act in question rendered himself liable to any penalty; but *Macdonell v. Corrigan*, it seems to me, is decidedly in point. The plaintiff in that case, as far as I can discover, had not done anything to render himself liable to the penalty, unless the bags in which the grain was measured could be called a weighing machine, and so rendered him liable to a penalty under s. 29 of the Act. I do not think that these bags were weighing machines within the meaning of the Act. It is true that the judgment of Taylor, C.J., in that case is not very elaborate, but, giving the subject the best consideration I can, I have come to the conclusion that it is good law, and I am, therefore, unable to change the decision I reached in the *Teece* case. The agreement or bargain in this case respecting the threshing was one in respect of work which was to be done by measure, not by weight, and I call attention to the fact that s. 1 of the Act of 1 Edw. VII., referred to, is not applicable, because the contract or agreement was not one for the sale and delivery of the grain. The agreement was in respect of work which was to be done by measure; the measuring for the purpose of ascertaining the quantities was a dealing had with respect to such work which had been so done; and such dealing was not made or had according to any one of the Dominion measures ascertained by the Act in several respects. In the first place, no measure was used based on the unit or standard of capacity, as provided by s. 15 of the Act, or standard as required by s. 28, or dealt with as provided by s. 19. Section 21 provides that when the dealing is not in accordance with its provisions, it shall be void. This clause of the Act was not passed for revenue purposes, but for the protection of the public, but

whether it was or not is immaterial, because the section expressly declares that the dealing shall be void if not in accordance with its provisions, and it comes within the rule laid down by Benjamin on Sales, "that when a contract is prohibited by statute it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. It is enough that Parliament has prohibited it, and it is therefore void." In this case Parliament has not left the question to matter of inference; it has expressly declared the dealing to be void. It is respecting this branch of the case that *Manitoba Electric and Gas Light Co. v. Gerrie* is of assistance, because the learned Judge who delivered the judgment of the Court in that case has very ably marshalled authorities bearing on the question. I construe the word "dealing" in s. 21 of the Act, as more comprehensive than the preceding words "contract," "bargain," or "sale," and as embracing these words. The section, therefore, in providing that the "dealing" shall be void, voids and vitiates the whole transaction.

The defendant sets up other contentions, namely:

(a) That the plaintiff accepted and agreed to the defendant's measurement of the grain at the first threshing.

(b) That he testified at the first that there was no dispute as to the quantities of any of the grain threshed, and therefore I must reach the conclusion that the quantities as credited are correct and according to the standard.

There is no doubt that the defendant is correct as to the facts thus alleged. At the first threshing the plaintiff procured one Howe to ascertain from him the quantities of grain threshed at the first threshing, and Howe made them slightly more than the defendant did as regards both the wheat and the oats. The oats were also threshed at the first threshing, and the plaintiff admitted that he agreed to accept the defendant's measurements for the first threshing. It is equally true that the defendant testified that there was no dispute as to the quantities of the grain threshed. As a matter of fact, the real trouble between the parties seems to have been that the plaintiff claimed that he was damnified by some action of the defendant in and about the threshing which is not in question in this suit, and which the defendant declined to recognize, and the plaintiff seems to have resisted the defendant's claim to be paid for his work to get even with him. That, however, cannot affect my decision. The parties are entitled in their case to judgment according to the law and evidence,

quite irrespective of their motives. The defendant's contention cannot be allowed to prevail. The Act has declared the dealing void, and no amount of agreement or consent can give it validity; any consent or agreement which attempted to do so would be against the policy of the law, and could not be given effect to in the Courts.

It was further urged that the quantities of a portion of the grain threshed had been ascertained in the manner directed by the Act, namely, of such portions as had been marketed by the plaintiff and of the portions taken away by the defendant, which are as follows:

Sold by plaintiff to McCowan.....	1,092½ bushels of wheat
" " Grenfell Milling Co.....	3,332½ " "
" " Faulkner	707 " "
	5,132
Taken and sold by defendant.....	670
Making in all.....	5,802 bushels of wheat

And that the defendant had a right to recover for threshing that amount, and therefore had a right of lien in respect to the price for threshing that amount. This question was also raised in the *Teece* case so far as the right of recovery was concerned, but I held against the thresher. I am still of the same opinion. I do not wish to be understood as holding that, because a thresher has made a mistake and endeavoured to ascertain the quantities threshed in a manner contrary to the Act, he is precluded from correcting it, but I hold that if he can correct it he must do so by his own act, and he cannot avail himself of the act of a third person. As for instance, in this case, the ascertaining the quantities of grain threshed in the manner attempted was in a dealing between the defendant and the plaintiff, and the defendant cannot correct that by taking advantage of a measurement in a dealing between the plaintiff and third persons to whom he sold the grain, or of a measurement in a dealing between the defendant and a person to whom he sold some of the grain. To allow this would be also against the policy of the law. The policy of the Act is to protect the public by educating persons contracting for service or otherwise by weights or measures, to use weights, measures, etc., properly tested and certified to, and by insisting that they shall do so by voiding their dealings if they do not do so. To allow persons who do not comply with its provisions to escape the consequences intended to be visited upon them by the Act, by adopting the act of third persons, would void the intention of the Act. Another object the Act has in view is to provide at hand and ready for use

weights and measures which, being tested and properly certified, can be relied upon as correct without further inquiry, and that persons would not be driven to consult authorities in books of a somewhat complicated nature, and resort to abstruse calculations to verify the correctness of the method of measurement adopted. However, the method adopted for the purpose of ascertaining the quantities for the purpose of their sales by the plaintiff and defendant would, I assume, in the absence of evidence to the contrary, be by weight under s. 1 of the Act 1 Edw. VII., before referred to, because there was no evidence that "a bushel by measure" was specially agreed upon. As already pointed out, that section only applies to sales and delivery, and does not apply to services by work. The quantities of grain threshed should, therefore, to comply with the Act, have been ascertained by measure and not by weight.

There is another objection to the defendant's contention which has occurred to me, and I think is worthy of notice. This is an action for breaking and entering, and the defendant justifies under a lien. If his transaction has been rendered void, his lien is gone; that I am quite clear about. His transaction being voided, therefore, assuming that it would be restored by a correct measurement, must not the correct measurement be had before he would be justified in seizing under the lien? There was no evidence before me to shew when the grain was threshed by the plaintiff, whether before the seizure complained of, and the burden of establishing the justification was on the defendant. I do not consider it necessary to decide this question. I have decided sufficient for the purposes of the case without it. I merely throw the suggestion out. Of course if the defendant had done nothing to void the transaction, and had seized under his lien before he had ascertained the quantities, an entirely different question would be raised. I must, therefore, find for the plaintiff on the issue joined on the third paragraph of the plaintiff's replication.

The plaintiff by the second paragraph of his replication set up that the defendant was not entitled to the alleged lien because he agreed to thresh all the plaintiff's grain, and the plaintiff agreed to pay for it when it was completed, and that the defendant threshed only part of such grain and neglected and refused without justification or excuse to complete the threshing. Upon the issue joined as to that paragraph I find for the defendant. It was conclusively found, in that it was not questioned, that the defendant did complete the threshing before he made the seizure complained of. I am

not disposed under the circumstances of this case to award the plaintiff any more damages than I am actually obliged to under the law. The opening of the door of the granary, which was fastened with a lock, for the purpose of taking away the grain, was in law a breaking and entering. I will allow as damages the price at which the wheat taken was sold, that being admitted to be the market price.

670 bushels at 59 cents	\$335 00
Less the cost of marketing, admitted at.....	\$16 75
And less the amount paid to the advocate.....	1 25
	18 00
Amounting to.....	317 00
And for breaking and entering.....	1 00
	\$318 00

Judgment for the plaintiff upon the issue joined upon the third paragraph of the plaintiff's replication for \$318 damages, with the general costs of the action. Judgment for the defendant on the issue joined on the second paragraph of such replication, with such costs as are exclusively applicable to such last mentioned issue.

The costs taxed to the defendant to be set off against the costs taxed to the plaintiff, and the plaintiff to have execution for the balance.

Supreme Court of Canada.

[ONTARIO.]

[27TH MAY, 1902.]

MILLER v. GRAND TRUNK R. W. CO.

Master and servant — Injury to servant — Negligence — Railway train — Collision — Duty of engineman — Orders of conductor — Rules — Contributory negligence.

By rule 232 of the defendants, "conductors and enginemen will be held equally responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains, unless such orders involve violation of the rules or endanger the train's safety; and rule 65 forbids them to leave the engine, except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track, and when the time for starting arrived he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start, and did so. After proceeding about two miles his train collided with the regular train, and he was injured. In an action against the company for damages in consequence of such injury:—

Held, affirming the judgment of the Court of Appeal (31st December, 1901), that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone; that he was bound to obey the conductor's order to start the train, having no reason to question its propriety; and he was, therefore, not guilty of contributory negligence in starting as he did.

Walter Cassels, K.C., and *H. E. Rose*, for the appellants.

J. M. Clark, K.C., and *G. C. Campbell*, for the respondent.

CLERGUE v. MURRAY.

*Principal and agent — Sale of land—Authority to agent — Price of sale—
Specific performance.*

M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place: "Sell, if possible, writing particulars; will give you good commission." C. agreed to purchase it for \$600, and the solicitor telegraphed M.: "Will you sell three-quarter interest, sixty-seven acre parcel, Korah, for six hundred, hard cash, balance year? Wire stating commission." M. replied: "Will accept offer suggested. Am writing particulars, await my letter." The same day she wrote the solicitor: "Telegram received. I will accept \$600; \$300 cash and \$300 with interest at one year. This payment I may say must be a marked cheque at par for \$300, minus your commission, \$15, and balance \$300 secured." The property was incumbered to the extent of over \$300, and the solicitor deducted this amount from the purchase money, and sent M. the balance, which she refused to accept. He also took a conveyance to himself from the former owner, paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell:—

Held, affirming the judgment of the Court of Appeal (6th November, 1901), that the only authority the solicitor had from M. was to sell her interest for \$585 net, and the attempted sale for a less sum was of no effect.

Held, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone.

C. H. Ritchie, K.C., and A. H. Marsh, K.C. for the appellant.

A. B. Aylesworth, K.C., for the respondent.

[9TH JUNE, 1902.]

In re VILLAGE OF MARKHAM AND TOWN OF AURORA.

*Appeal—Right of—Order quashing by-law — Appeal de plano—Special leave
—Refusal by Court below.*

Appeals to the Supreme Court from the judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 V. c. 34, and no appeal lies as of right unless given by that Act. Therefore, there is no appeal *de*

plano from an order quashing a by-law, though an appeal is given in such case by the Supreme and Exchequer Courts Act.

The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal, and leave has been refused.

Application for leave to appeal from the decision in 3 O. L. R. 609, *ante* 205, refused.

A. B. Aylesworth, K.C., for the corporation of Aurora.

W. E. Raney, for the corporation of Markham.

[11TH JUNE, 1902.]

REX v. RICE.

Appeal—60 & 61 V. c. 34.—Criminal case.

The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court, 60 & 61 V. c. 34, applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code.

Motion by the prisoner for leave to appeal from the judgment of the Court of Appeal, 4 O. L. R. 223, *ante* 225, refused.

T. C. Robinette, for the motion.

J. R. Cartwright, K. C., and *H. Guthrie*, K.C., for the Crown.

QUEBEC.]

[14TH MAY, 1902.]

TOUSSIGNANT v. NICOLET.

Appeal—Jurisdiction—Annulment of procès-verbal—Matter in controversy.

The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès-verbal* establishing a public highway, notwithstanding that the effect of the *procès-verbal* in question might be to involve an expenditure of over \$2,000 for which the appellants' lands would be liable for assessment by the municipal corporation.

Dubois v. Village of Ste. Rose, 21 S. C. R. 65, *City of Sherbrooke v. McManamy*, 18 S. C. R. 594, *County of Verchères v. Village of Varennes*, 19 S. C. R. 365, and *Bell Telephone Co. v. City of Quebec*, 20 S. C. R. 230, followed.

Webster v. City of Sherbrooke, 24 S. C. R. 52, 268, and *McKay v. Township of Hinchinbrooke*, *ib.* 55, referred to.

Reburn v. Parish of Ste. Anne, 15 S. C. R. 92, overruled.

Appeal quashed with costs.

Lafleur, K.C., for the motion to quash.

Atwater, K.C., contra.

[15TH MAY, 1902.]

FINNIE v. CITY OF MONTREAL.

Pledge—Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Compensation and set-off—Restitution of thing pledged—Practice on appeal—Irregular procedure.

C., on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the city of Montreal as a guarantee of the good faith of J. C. & Co., in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits, at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company, and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit, which was refused by the city council, which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender, so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract.

Held, that the deposit so made was a pledge subject to the provisions of tit. 16 of the Civil Code of Lower Canada, and which, in the absence of any express stipulation, could

not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor, and the debtor was entitled to its restitution, although the obligation for which the security had been given had not been executed.

On a cross-demand by the defendant for damages, to be set off in compensation against the plaintiff's claim:—

Held, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by the citizens individually.

Held, further, that prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set off in compensation of the claim for the return of the deposit.

The Court also decided that, following its usual practice, it would not, on the appeal, interfere with the action of the Courts below in matters of mere procedure, where no injustice appeared to have been suffered in consequence, although there might be irregularities in the issues as joined which brought before the trial Court a *demande* almost different from the matter actually in controversy.

Judgment below reversed.

Lafleur, K.C., and *R. C. Smith*, K.C., for the appellant.

Atwater, K.C., and *Ethier*, K.C., for the respondents.

[15TH MAY, 1902.]

RENAUD v. LAMOTHE.

Will — Condition of legacy — Religious liberty — Public policy — Restrictions as to marriage — Education — Exclusion from succession.

In the Province of Quebec the English law governs on the subject of testamentary dispositions; and, therefore, in that Province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rights of any church recognized by the laws of the Province, and that the grandchildren should be educated according to the teachings of such church, and may also exclude from benefit under

his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages, or who may not have been educated as directed.

Judgment noted in 21 Occ. N. 392 affirmed.

Lafleur, K.C., and *White*, K.C., for the appellant.

Belcourt, K.C., and *Lamothe*, K.C., for the respondents.

[16TH MAY, 1902.]

BOISSEAU v. CANADIAN PACIFIC R. W. CO.

Master and servant—Injury to servant—Death—Negligence—Operation of railway—Lights on train—Failure in duty.

A conductor in the defendants' employment, while performing the duty for which he was engaged at the Windsor station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train, nor was there any person stationed there to give warning of the movement of the train.

Held, that, by omitting to have a light on the rear end of the train, the railway company failed in their duty, and this constituted *prima facie* evidence of negligence.

Judgment below reversed.

T. Chase-Casgrain, K.C., and *Frederick Meredith*, K.C., for the appellants.

Beaudin, K.C., and *Mignault*, K.C., for the respondents.

[9TH JUNE, 1902.]

HEVÉ v. ROYAL ELECTRIC CO.

Negligence—Operations of a dangerous nature—Supplying electric light—Insulation of electric wires.

The defendants, a company engaged in supplying electric light to consumers in the city of Montreal, under special charter for that purpose, placed a secondary wire, by which electric light was supplied to G.'s premises, in close proximity to a guy-wire used to brace primary wires of another electric company, which, although ordinarily a dead wire,

might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire. While attempting to turn on the light of an incandescent electric lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury:—

Held, affirming the judgment in 21 Occ. N. 442, that the defendants were liable for actionable negligence, as they had failed to exercise the high degree of skill, care, and foresight required of persons engaging in operations of a dangerous nature.

Atwater, K.C., and *Champagne*, K.C., for the appellants.

Brodeur, K.C., and *Bissonet*, for the respondent.

NOVA SCOTIA.]

[27TH MAY, 1902.]

GRANT v. ACADIA COAL CO.

Master and servant—Injury to servant—Death—Negligence—Working of mines—Statutory mining regulations—Fault of fellow-workmen.

The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected, and an explosion of gas occurred, from the effects of which he died. In an action for damages by his widow:—

Held, reversing the judgment below, TASCHEREAU and SEDGEWICK, JJ., dissenting, that, as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen.

Mellish, for the appellant.

Newcombe, K.C., and *Drysdale*, K.C., for the respondents.

NEW BRUNSWICK.]

[27TH MAY, 1902.]

CORNWALL v. HALIFAX BANKING CO.

Accident Insurance—Application—Beneficiary not named in policy—Right to proceeds—Accident policy—Act for benefit of wives and children.

Where, through error, and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy, he is, nevertheless, entitled to the benefit of the insurance; DAVIES and MILLS, JJ., dissenting.

Per SEDGEWICK, J.—The New Brunswick Act for securing to wives and children the benefits of life insurance (55 V. c. 25) applies to accident insurance, as well as to life.

Judgment of the Court below reversed.

C. J. Coster, for the appellant.

Armstrong K.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[29TH JUNE, 1902.]

REX v. SCULLY.

Mandamus—Malicious prosecution—Record of acquittal—Clerk of the Peace—General sessions—Fiat of Attorney-General.

The judgment of a Divisional Court, 2 O. L. R. 315, 21 Occ. N. 432, affirmed; ARMOUR, C.J.O., dissenting.

J. R. Cartwright, K.C., and *Frank Ford*, for the Attorney-General.

Frank Arnoldi, K.C., for the defendant.

FALCONBRIDGE, C.J.]

[28TH JUNE, 1902.]

COUNSELL v. LIVINGSTON.

Bills of exchange—Notice of dishonour—Sufficiency—Husband and wife—Agency.

Notice is merely knowledge, and notice to an indorser, who is also agent for another indorser, at once becomes in law the knowledge of the principal, with all its consequences.

In an action against husband and wife, indorsers on a promissory note given as one of a series of renewals during some years, under an agreement, of which the husband had knowledge, in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. T. C. L.'s note for \$3,500 in your favour, indorsed by yourself and wife, and held by our estate was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount, as there is no surplus on hand:" addressed and sent to the husband only:—

Held, on the evidence, that the husband was agent for the wife, and that such letter was a sufficient notice of dishonour to both the husband and wife.

Paul v. Joel, 3 H. & N. 455, followed.

Judgment of FALCONBRIDGE, C.J., 2 O. L. R. 582, 21 Occ. N. 563, affirmed.

A. B. Aylesworth, K.C., for the appellants.

E. Martin, K.C., for the plaintiff.

LOUNT, J.]

[28TH JUNE, 1902.]

TAYLOR v. GRAND TRUNK R. W. CO.

Railways—Passenger—Return ticket—Condition of identification—Neglect to comply with—Removal from train.

The plaintiff purchased an excursion ticket from Indian Head to Toronto and return, one of the conditions (which he signed) being that he should identify himself to an agent in Toronto before he set out on his return journey and obtain the agent's signature. On production of his ticket at Toronto, he secured his sleeping berth, had his luggage checked, was admitted to the train, and started on his return journey, but neglected to identify himself, and was put off the train by the conductor after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages:—

Held, that he could not recover.

Judgment of LOUNT, J., affirmed.

H. T. Beck, for the plaintiff, the appellant.

Walter Cassels, K.C., for the defendants.

IN CHAMBERS.

[OSLER, J. A., 14TH JULY, 1902.]

In re HALTON PROVINCIAL ELECTION.

NIXON v. BARBER.

Parliamentary elections—Recount of votes—Ballots—Irregular marking.

Upon the recount of ballots cast at the election of a member for the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted V, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke; the error in the head-note in *In re West Huron*, 2 Ont. Elec. Cas. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments.

Ballots marked in due form but with an indelible coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer.

J. W. Elliott and E. N. Armour, for the candidate Nixon.

E. F. B. Johnston, K.C., and W. I. Dick, for the candidate Barber.

[OSLER, J. A., 21ST AUGUST, 1902.]

In re LINCOLN PROVINCIAL ELECTION.

McKINNON v. JESSOP.

Parliamentary elections—Petition—Misdescription of electoral district—Surplusage—Amendment.

The petition and other papers in an election case were headed in the proper Court and purported to be under the

Ontario Controverted Elections Act, as to "the election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral district as Lincoln and Niagara existed, but there was an electoral district of Lincoln, being the district intended.

Held, that the misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment.

W. D. McPherson, for the respondent.

R. A. Grant, for the petitioner.

[MACLENNAN, J. A., 2ND JULY, 1902.]

In re LENNOX PROVINCIAL ELECTION.

CARSCALLEN v. MADOLE.

*Parliamentary elections—Recount of votes—Ballots—Irregular marking—
Ballots not objected to before deputy returning officer.*

A County Court Judge is not confined, on a recount, to the consideration of cases in which an objection was made before the deputy returning officer when counting the votes at the close of the poll.

Where a ballot was marked with a cross outside, but near the upper line of, the top division:—

Held, that it should be allowed. It is not essential to have a line on a ballot paper at all. Similarly all votes below the lower division must be counted for the candidate whose name is in it.

Where a ballot was marked with a circle, not a cross, nor any apparent attempt to make a cross:—

Held, bad.

Where a ballot was well marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross or any attempt to make a cross, nor a mark by which the voter could be identified:—

Held, a good vote for the candidate for whom the paper was well marked.

Where a ballot, though well marked, had, in the same division, the initials S. A. in small but legible capitals:—

Held, bad. Any written word or name upon a ballot presumably written by the voter, ought to vitiate the vote as being a means by which he may be identified.

Where ballot papers had a cross or crosses in the division of both candidates:—

Held, bad.

S. H. Blake, K.C., W. D. McPherson, and E. G. Porter, for Carscallen.

G. H. Watson, K.C., and Grayson Smith, for Madole.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 5TH JUNE, 1902.]

PATTISON v. TOWNSHIP OF WAINFLEET.

Way—Bridge—Non-repair—Liability of municipal corporation—Threshing engine—Traction engine.

An engine used for the purpose of operating a thresher or grain separator, is not a "traction engine" within the meaning of R.S.O. 1897 c. 242; and a municipality is bound to keep its bridges in such a condition that they will bear the weight of such an engine.

This action was brought in the County Court of Lincoln to recover \$100 damages.

The statement of claim alleged that on or about the 24th July, 1901, the plaintiff was the owner of a grain threshing machine and engine, and while the plaintiff with such machine and engine was lawfully passing along one of the public roads or highways in the township of Wainfleet and crossing a bridge thereon, by reason of the bridge being defective and out of repair, the plaintiff and his engine were dropped down through the bridge to the bed of the creek below, and the plaintiff was injured and his engine broken and damaged and parts of it destroyed; that it was the duty of the defendants to keep the bridge in repair, but they negligently allowed it to become and continue out of repair, with due knowledge of its defective condition.

The defendants denied that the bridge was out of repair, and said that if it was out of repair, they had no notice or knowledge of it, and the plaintiff knew of it before the

accident and was guilty of negligence in crossing it, or in not examining it before crossing and in not using extra timbers to strengthen it. The defendants also alleged that the plaintiff did not notify them of the alleged accident or the cause thereof, as required by s. 606, s.-s. 3, of the Municipal Act, R. S. O. 1897 c. 223. The defendants also pleaded "not guilty by statute," referring to R. S. O. 1897 c. 242, ss. 4, 5, and 10, and alleging that the engine used by the plaintiff was a traction engine, and the driving wheels were not 12 inches wide, nor were the wheels of the trucks or waggons drawn by such engine 4 inches wide, as required by the statute, and that the bridge was not strengthened by the plaintiff before running his engine and machine thereon, as required by the statute, and that no tolls were collected on the road where the accident happened.

The action was tried without a jury before the Judge of the County Court of Welland, the accident having happened in that county. The facts are stated in the judgment of the County Court Judge.

E. A. Lancaster, for the plaintiff.

L. C. Raymond, for the defendants.

11th January, 1902. FITZGERALD, Co.J.:—The plaintiff is the owner of a steam threshing machine used for the purpose of threshing the farmers' grain upon their farms. The engine was so constructed that it could move itself from one farmer's place to another, and could when necessary draw its tender and also the separator, although the separator was usually drawn by horses.

On the 24th July, 1901, the plaintiff was moving the engine and separator along a public highway in the defendants' municipality, and when crossing over a bridge the bridge gave way, and the engine fell into the bed of the creek.

The separator was drawn by horses, and had crossed over the bridge safely before the engine came on the bridge.

The engine was moving itself by means of its traction power, and was drawing its tender, and as soon as the engine came on the bridge it gave way and the engine fell into the bed of the creek, a distance of about 10 feet, and was damaged, and the plaintiff was at considerable expense in getting the engine out of the creek and for repairs, and he lost considerable time and lost the use of the machine for some time. The tender, which was attached to the engine, remained on the bank and did not go down.

The defendants say the bridge was not out of repair to their knowledge, and they also plead the statute R. S. O. c. 242, which is an act to authorize and regulate the use of traction engines on highways, and more especially they invoke the aid of s. 10 of the Act, which provides that it shall be the duty of persons proposing to run traction engines on any highway on which no tolls are charged, to strengthen at their own expense all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.

No tolls were charged on the road in question, and the defendants say that the plaintiff's engine was a traction engine and subject to the provisions of the statute, and that he was bound to strengthen the bridge at his own expense before attempting to cross it.

The bridge had been up about 18 years, was of about 20 feet span, with 5 stringers, which were supported in the middle by a needle beam, fastened to a top rail by iron bolts, the top rail in its turn supported in the middle by a cap or truss.

At the trial the ends of the needle beam were produced as exhibits. The parts of the needle beam so produced were so rotten that the heads of the bolts which fastened it to the top rail had drawn through, and it was clearly of no support to the bridge; and one witness said that he had examined it some time before the accident, and the heads of the bolts had drawn into the needle beam so far that it was hanging 3 or 4 inches below the stringers.

The defendants say that they inspected the bridge in June before the accident, and did not see anything wrong with it, and did not observe that it was out of repair.

Notwithstanding the defendants' statement and evidence, I have no doubt the bridge was unsound and out of repair, and was not in such a condition as to be safe for public use, and it had been so for a considerable time, and the examination given it by the defendants must have been very slight or casual, or they would have discovered its unsoundness and want of repair. The defendants contend that, even if the bridge was out of repair, they are not liable by reason of the statute—the plaintiff's engine being, as they contend, a traction engine.

The plaintiff, on the other hand, contends that his engine is not a traction engine in the proper sense of the term, and that the statute was never intended to apply to such an engine as his.

The weight of the engine was between 4 and 5 tons, and the plaintiff had crossed this bridge with it on former occasions, and there was some evidence to shew that the engine did not exceed the weight of loads frequently drawn by a team of horses, and a team of horses could have drawn this engine, and if it had been so drawn, the weight on the bridge would have been increased by the weight of the horses, perhaps another ton.

The purposes for which the plaintiff's engine was made was for threshing the farmers' grain, and, although it had also the power of locomotion, and had been employed for a few days in drawing a road scraper in the township of Pelham, it could only move at a very slow rate of speed, and was not employed for the purposes of conveying either passengers or freight, within the ordinary meaning of these terms, and I think the statute does not apply so as to relieve the defendants from an accident such as the plaintiff sustained. And I think the plaintiff had a right to assume that the bridge was in a proper state of repair and able to bear a load of ordinary weight, which he says his engine did not exceed, and if it had been in a proper state of repair, his engine would have passed over in safety.

I think that plaintiff is entitled to recover, and I assess his damages at \$75, and I give judgment for the plaintiff for \$75 and costs.

The defendants appealed, and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J., STREET, J., BRITTON, J., on the 2nd June, 1902.

L. C. Raymond, for the defendants, contended that the threshing engine was a traction engine within the meaning of that statute, and the plaintiff should have strengthened the bridge, and the defendants were not liable as they would have been if another vehicle, not a traction engine, had gone through the bridge.

E. A. Lancaster, for the plaintiff. The statute means, according to the ordinary use of the word "traction," and according to s. 1, which is in effect the interpretation clause, only engines built for the purpose of *drawing* after them freight and passengers, that is, doing a tramway or carrier's business, as was done in some parts of the country at the time the Act was originally passed in 1868, and does not apply to engines built for the purposes of threshing, and not doing the business of hauling, but only propelling themselves: *County of York v. Toronto Gravel Road Co.*, 11 A. R. 765, 12 S. C. R. at p. 521.

5th June, 1902. STREET, J.—I think the evidence of negligence on the part of the defendants was sufficient to justify the finding of the learned Judge below upon that point, and that the damages found by him are reasonable. The only question is, whether the engine in question was a traction engine within the meaning of R. S. O. c. 242, in which case it would have been the duty of the plaintiff before crossing the bridge to have strengthened it, under s. 10 of the Act. This question is one of fact, and I think it has been properly found by the learned Judge in favour of the plaintiff. It appeared from the expert evidence given at the trial, and not contradicted, that the engine was not a traction engine within the ordinary and accepted meaning of the term, although it was constructed so as to be able to move itself and draw its tender containing fuel and water for its own use. It was explained that it was built for the purpose of furnishing power to a thresher or separator, and that the gearing which gave it the power of locomotion was entirely different from and very much lighter than that used in engines built for traction purposes.

There was no evidence that the plaintiff in moving the engine in question along the highway from farm to farm was making an unusual or improper use of the highway.

In my opinion, therefore, the judgment should not be disturbed, and the appeal should be dismissed with costs.

See *Toronto Gravel Road Co. v. County of York*, 12 S. C. R. 517.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—The questions are questions of fact. I agree with the findings of the learned County Court Judge.

The duty of the municipality was to have this bridge strong enough for the ordinary traffic of the highway.

In a good agricultural township like Wainfleet, with farms well cultivated, the bridge should be sufficiently safe to permit of large loads of grain and farm produce and farm machinery being taken over it without risk. It was well known to the defendants how grain is separated and cleaned up, and it seems to me to make no difference whether by horse power or steam power, and, if by steam, whether the boiler and engine are taken upon a waggon and drawn by horses or propelled along the road by its own steam power—the bridge in either case should be sufficient to safely carry an ordinary

and reasonable load. I think the Legislature, in R. S. O. c. 242, intended by "traction engine" something very different in weight from the one owned by plaintiff.

The traction engine in that Act is an engine entirely different in construction and for a wholly different purpose from plaintiff's.

The whole Act is to protect the public and public highways where traction engines are to be employed "for the conveyance of freight and passengers, or both, on any public highway in this Province," and it does not apply to this case.

Appeal dismissed with costs.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 16TH JULY, 1902.]

REFX v. JAMES.

Fraud—Conviction for—Fruit Marks Act—Having in possession for sale—Fraudulent packing—"Faced or shewn surface"—Meaning of.

The mere having in possession for sale packages of fruit fraudulently packed within the meaning of s. 7 of the Fruit Marks Act, 1901, 1 Edw. VII. c. 27 (D.), is an offence thereunder, though no one is imposed on thereby nor any fraud intended.

Semble, that the "faced or shewn surface," within the meaning of the section, is not limited to the branded end of the package.

J. D. Montgomery, for the defendant.

R. B. Beaumont, for the prosecutor.

[MEREDITH, C. J., MACMAHON, J., 31ST JULY, 1902.]

MIDDLETON v. SCOTT.

Mortgage—Amount due—Waiver or dispensation of tender—Rate of interest post diem—Costs.

Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest due, amounting to \$396.48, and, on the mortgagee's solicitor failing to call, he wrote to the mortgagee that he was

prepared to pay the said sum; this was answered by the mortgagee's solicitor sending a statement claiming, in addition, certain disputed costs.

Held, that what took place did not amount to a waiver or dispensation of a tender of the amount due under the mortgage.

The payment of the principal money was to be made at the expiration of a named period, with interest at a specified rate, as well before as after maturity, until the said principal was fully paid and satisfied.

Held, that the interest at the rate specified was payable after as well as before the expiration of such period.

People's Loan and Deposit Co. v. Grant, 18 S. C. R. 262, distinguished.

In an action for redemption brought by the mortgagor, in which a tender was set up, the judgment was for a reference to a Master to ascertain the amount due, to make all necessary inquiries for redemption or foreclosure, and to report; the provision for costs being that if the mortgagor had made default in payment of the amount, if any, found to be due, he should pay the costs; and, if no greater sum than \$396.48 were found to be due, the defendant should pay the costs. Further directions were not reserved; nor were there any further directions as to costs.

Held, that the defendant was entitled to the costs of the action.

M. Wilson, K.C., and *J. B. O'Flynn*, for the plaintiff.

W. E. Middleton, for the defendant.

(Leave to appeal to the Court of Appeal was refused by OSLER, J.A., on the 23rd September, 1902.)

[MEREDITH, C.J., MACMAHON, J., 1st August, 1902.]

In re BRAMPTON GAS CO.

Company—Winding-up—Claims provable—Secured creditors.

Creditors holding fully secured claims and content to rely thereon, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in the winding-up proceedings under the Dominion Winding-up Act, R. S. C. c. 129, and have them adjudicated upon therein;

and where such creditors, without any intention to submit to such adjudication, had filed with the liquidator affidavits proving their claims, leave was given them to withdraw such claims, leave also being given to one of such creditors, who had an unsecured debt, to file a claim limited thereto.

G. F. Shepley, K.C., for the Bank of Montreal, creditors.

W. A. Skeans, for Blainey, a creditor.

Hamilton Cassels, K.C., for the liquidator.

[MEREDITH, C.J., FERGUSON, J., 22ND AUGUST, 1902.]

MASON v. LINDSAY.

Sale of goods—Conditional sale—Name of vendor—Agreement to purchase.

Upon a piano made by a company whose corporate name was "The Mason and Risch Piano Company, Limited," and place of business Toronto, claimed by them in replevin as against a mortgagee thereof, there were painted the words "Mason & Risch, Toronto."

Held, that if the transaction came within the Conditional Sales Act, R. S. O. 1897 c. 149, this was not a compliance with the provisions of s. 1 of that Act.

But *held*, also, that the transaction did not come within the Act, the mortgagor not being bound by the agreement under which the piano was in his possession, to purchase the piano, but having merely the option to purchase it.

Helby v. Matthews, [1895] A. C. 471, distinguished and applied.

Judgment of LOUNT, J., affirmed on other grounds.

Joseph Montgomery, for the defendant.

Strachan Johnston, for the plaintiffs.

[FALCONBRIDGE, C.J., STREET, J., 8TH SEPTEMBER, 1902.]

PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

Court of Appeal—Leave to appeal—Dismissal of motion for, with costs—Power of Court to award costs—Execution issued out of High Court—Authority to issue.

The decision of MEREDITH, J., *ante* 300, 4 O. L. R. 247, affirmed.

D. W. Saunders, for the plaintiffs.

W. H. Bartram, for the defendant.

[FERGUSON, J., 26TH AUGUST, 1902.]

LAISHLEY v. GOOLD BICYCLE CO.

Master and servant—Dismissal of servant—Damages—Percentage on sales.

The plaintiff, who had been employed by the defendants as manager, receiving a salary and a percentage on moneys received from sales, and had been dismissed upon the sale by the defendants of their business before the expiration of his engagement, was held entitled, *prima facie*, as damages to the amount of his salary for the unexpired term of his engagement and of the fixed percentage on moneys received after his dismissal in respect of sales previously made, but not to the fixed percentage upon the amount of sales which, it was contended, would have been made during the unexpired term had the business been carried on, the ascertainment of that amount being too speculative and uncertain.

But the plaintiff having, shortly after his dismissal, obtained other employment, and having received in respect thereof remuneration to a larger amount than the damages calculated as aforesaid, it was held, that his action failed; and it was dismissed with costs.

G. H. Watson, K.C., and S. C. Smoke, for the plaintiff.

Wallace Nesbitt, K.C., and H. S. Osler, K.C., for the defendants.

[LOUNT, J., 15TH AUGUST, 1902.]

BAXTER v. JONES.

Principal and agent—Insurance agent—Agreement to give necessary notices—Omission to do so—Liability.

An insurance agent who, in consideration of his being given the right of effecting a firm's insurance in companies represented by him, undertakes to attend to the insurances, to see that the policies are duly made out, and to give the necessary notices required to be given from time to time, but, upon a further insurance being subsequently effected, omits to give any notice thereof, whereby the firm is damnified, is liable to the firm in damages for his default.

W. R. Riddell, K.C., and L. F. Stephens, for the plaintiffs.

G. F. Shepley, K.C., and S. F. Washington, K.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 12TH SEPTEMBER, 1902.]

In re MURRAY.

Specific performance—Lease—Undertaking to build—Non-performance in lifetime of lessor—Devise to lessee—Damages.

By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of \$200 payable in October of each year, and undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease.

Held, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build.

Cooper v. Jarman, L. R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished.

Peter McDonald, for the executor.

J. W. Mahon, for John Robert Murray.

J. P. Mabee, K.C., for Andrew W. Murray.

A. S. Ball, K.C., for the official guardian.

[MEREDITH, C.J., 15TH JULY, 1902.]

MCGILLIVRAY v. WILLIAMS.

Lis pendens—Vacating—Ex parte application.

The plaintiff having registered a *lis pendens*, a local Judge, on the plaintiff's *ex parte* application, made an order vacating it, and the plaintiff registered the order within 14 days of its being made.

Held, that ss. 98 and 99 of the Judicature Act, giving a Judge the power to vacate a certificate of *lis pendens* where the plaintiff or other party at whose instance the certificate was issued does not in good faith prosecute the litigation, and allowing registration of the vacating order only, on or

after the fourteenth day from the date of the order, are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered. Where a party to an action registers a *lis pendens* for his own benefit, he may get an order vacating it at any time, and register the same.

F. A. Anglin, K.C., for the defendant.

W. E. Middleton, for the plaintiff.

[THE MASTER IN CHAMBERS, 16TH JUNE, 1902]

PLATT v. BUCK.

Discovery — Production of documents — Letters between solicitor and client—Privilege.

Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, which had passed into the possession of the defendant from the executor of the writer, after his decease, are not privileged from production.

H. L. Drayton, for the plaintiff.

C. A. Masten, for the defendant.

MANITOBA

In the King's Bench.

[RICHARDS, J., 18TH AUGUST, 1902.]

DIXON v. MACKAY.

Fixtures—Action for possession of buildings—Proof of County Court judgment—Entries by clerk in book—Irregularity—Execution—Seizure by bailiff—Sale—Adjournments—Notice.

The plaintiff sued for the delivery by the defendants of certain buildings erected by A. Mackay upon land at Berens River, the title to which land was, at the time of such erection, and continued to be, in the Crown.

The plaintiff claimed title through a sale made to her under an execution issued from the County Court of Selkirk on an alleged judgment recovered by the plaintiff's husband against the defendants, under which execution the bailiff purported to sell the buildings as chattels of A. Mackay, who erected them about 19 years ago and lived in them till about 1896; he did not actually reside in them at the time of the seizure under execution, but he took possession again before this action was brought.

The buildings were not so affixed to the freehold as to require that anything should be broken or separated by force in order to remove them. Mackay did not own the land.

Held, that the presumption was that it was not intended that the buildings should become part of the freehold: the onus was on Mackay to shew that it was so intended. If the buildings became part of the freehold, they became the property of the Crown, the owner of the freehold. But the evidence shewed that Mackay tried to sell the buildings to the Crown, his actions in so doing being those of an owner, and not of one seeking compensation for the buildings as a matter of grace.

To prove the County Court judgment the plaintiff produced the procedure book of the County Court shewing the entries therein of the different proceedings in the action in which such judgment was alleged to have been recovered, and also filed a copy of such entries, certified as a true copy by the clerk of the Court pursuant to s. 46 of the County Courts Act. Amongst the entries so proved was one of judgment by default against A. Mackay, which entry itself, by s. 103 of the Act, constituted the judgment of the County Court.

Held, that, as the entry of the judgment in the procedure book constituted the judgment, and as the Court itself was a court of record, the entry of the judgment became a record of a court of record. If so, its production, or the statutory proof of it by a certified copy, proved the jurisdiction of the Court over the matters in respect of which the judgment was recovered, and the recovery, existence, and validity of such judgment.

It was argued that the procedure book shewed on its face that the judgment was invalid, as it did not shew the note required by s. 105 to be made in such book.

Held, that the making of such note was only a ministerial act to be performed by the clerk; it was not a part of the judgment itself; the validity of the judgment did not depend on such note being made. The failure to make it would seem to be merely an irregularity.

The defendants contended that the bailiff did not make a seizure, as required by law, of the buildings, or that, if he did legally seize, he abandoned the seizure; that he did not give due notice of the sale, or at any rate of the adjournments; that the buildings were sold for an inadequate price; and that the writ had expired before the sale.

The bailiff went to Berens River, and found the buildings locked. He did not enter them, or put a man in possession, but put up written notices on the buildings stating that he had seized them, and mentioning the date when and the place where he intended to sell.

Held, reasonably sufficient to constitute a seizure as against Mackay, whether it would, or would not, have held the property as against a subsequent *bona fide* purchaser from the owner for value, without notice.

No notices of the several adjournments of the sale were made public at Berens River by the sheriff, but the debtor must be presumed to have known of the day fixed for the sale, as a solicitor, at the sale, on the defendants' behalf, gave the bailiff a notice forbidding the sale.

The seizure was made while the writ of execution was in force, and the sale then advertised was adjourned from time to time till the buildings were actually sold. The fact that the writ expired before the actual sale was, therefore, unimportant.

Judgment for the plaintiff for delivery of the buildings and payment by Mackay to the plaintiff of her costs of the action.

F. Heap, for the plaintiff.

J. S. Ewart, K.C., and *R. R. Sutherland*, for the defendants.

BRITISH COLUMBIA

In the Supreme Court.

[FULL COURT, 12TH JUNE, 1902.]

OPPENHEIMER v. SPERLING.

Parties—Partnership—Individual partners—Multiplicity of actions—Writ of summons—Election—Appeal—Costs.

Appeal by the defendant Horne-Payne from orders of IRVING, J., discharging summonses by the appellant to set aside writs of summons.

Sperling, Garbutt, and Horne-Payne were residents of England and members of the firm of Sperling & Co., which firm carried on business in England only. The plaintiffs issued two writs of summons (neither of which was for service out of the jurisdiction) in respect of the same cause of action, the defendants named in one being the firm and Sperling, Garbutt, and Horne-Payne individually, and in the other the three individuals only. The writs were served on Horne-Payne while on a visit to British Columbia, and he entered conditional appearances, and applied to have both writs set aside, and (in the alternative) as to the second action, to have it dismissed as vexatious.

Held, reversing the orders, that the name of the firm was wrongly inserted and should be struck out of the first writ, and that the plaintiffs should elect as to which action they would proceed with.

Before the hearing of the appeal, the plaintiffs gave notice that they were content that the name of Sperling & Co. should be struck out of the writ.

Held, that the defendant appellant was entitled to the costs of the appeal up to the time of the service of the notice, and the plaintiffs to the costs subsequent.

A. E. McPhillips, K.C., for the appellant.

E. P. Davis, K.C., for the plaintiffs.

[FULL COURT, 25TH JUNE, 1902.]

MACAULAY v. VICTORIA YUKON TRADING CO.

Writ of summons—Special indorsement—Foreign judgment—Interest till judgment—Liquidated demand.

A claim for interest "until payment or judgment" is not a claim for a liquidated demand within the meaning of Order II., r. 6, except where the cause of action is in respect to negotiable instruments, in which case the interest is, by s. 57 of the Bills of Exchange Act, deemed to be liquidated damages.

Interest claimed under a statute cannot be the subject of special indorsement, unless it is stated in the indorsement under what Act the interest is claimed.

A specially indorsed writ should state specifically the amount due, and when a claim is made for the taxed costs of a foreign judgment, the date of the taxation should be stated.

Decision of *WALKEM, J.*, 9 Brit. Col. L. R. 27, *ante* 154, reversed; *MARTIN, J.* dissenting.

L. P. Duff, K.C., for the appellant.

R. Cassidy, K.C., for the respondents.

[FULL COURT, 29TH JULY, 1902.]

BOYLE v. VICTORIA YUKON TRADING CO.

Foreign judgment—Action on—Proof of—Exemplification—Judgment founded on void contract—Right to question—Company—Extra-territorial contracts of carriage—Ultra vires—B. N. A. Act, ss. 91, 92

Appeal from judgment of *DRAKE, J.*, in favour of the plaintiff in an action on a judgment recovered in the Yukon

Territory. The defendants were incorporated in British Columbia, and were sued for damages on a contract to carry goods from Bennett, in British Columbia, to Dawson, in the Yukon Territory.

Held, that a default judgment obtained in a foreign jurisdiction, though liable to be set aside so long as it stands, is "final and conclusive," within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this Province.

In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous, such as being founded on an *ex facie* void contract.

The Province may create a company with power to undertake extra-territorial contracts of carriage, and so it is not *ultra vires* of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory.

Per MARTIN, J.—An exemplification of judgment under the seal of the Court in which the judgment was pronounced, is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary.

Appeal dismissed.

L. P. Duff, K.C., for the appellants.

F. Peters, K.C. (*W. M. Griffin*, with him), for the respondent.

IN CHAMBERS.

[MARTIN, J., 29TH JULY, 1902.]

FRY v. BOTSFORD.

Costs—Taxation—Review—Abandoned appeal—Briefs—Counsel fee—Rules 583, 790.

On the 20th May the plaintiffs gave notice of appeal. to come on at the November sitting of the full Court, from an order requiring them to give security for the costs of the action. On the 3rd June the appeal was abandoned.

Held, on a review of taxation, that the respondents were entitled to tax briefs and a counsel fee.

Counsel fee under the circumstances fixed at \$10.

A taxation may be reviewed under Rule 583, as well as under Rule 790.

Joseph Martin, K.C., for the appeal.

Sir C. H. Tupper, K.C., and *Duncan*, contra.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[19TH SEPTEMBER, 1902.

THORNE v. PARSONS.

*Will—General gift—Context confining it to real estate—Deleted words—
Right to look at.*

By one of the clauses of his will, a testator gave to his nephew his mill, tannery houses, lands, and all his real estate, effects, and property whatsoever and of what nature and kind soever, at a named place, chargeable with certain legacies.

Held, that the clause, when taken by itself, would include personal as well as real property, yet when read with other clauses of the will, and the whole context taken into consideration, the gift was limited to the real estate.

Order of a Divisional Court reversing the finding of the Master in Ordinary affirmed.

Quære, whether in construing a will, deleted words can be looked at.

D. O. Cameron, for the appellant Horace Thorne.

T. J. Blain, for the appellants Anna Maria Thorne and Catherine Thorne.

W. T. J. Lee, for the respondent W. H. Thorne.

S. H. Blake, K.C., for the respondents J. M. Thorne and W. H. Parsons.

D. W. Saunders, for the respondents P. M. A. Thomas and others.

ARMSTRONG v. CANADA ATLANTIC R. W. CO.

*Master and servant—Injury to servant—Workmen's Compensation Act—
Notice of injury—Absence of—Reasonable excuse—Meaning of—Cause
of injury—Matter of conjecture—Negligence.*

While the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160,

is for the employer's protection against stale or imaginary claims, and to enable him, while the facts are recent, to make inquiry, the injured workman, however, is the primary object of the legislative consideration; and therefore under that section and ss. 13 and 14, notice may be dispensed with where there is reasonable excuse for the want thereof, the employer not being prejudiced thereby.

What constitutes reasonable excuse must depend upon the circumstances of each particular case, and a reasonable excuse will be inferred where, as here, there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative, which they had stated they would take into their consideration, but to which no final answer had ever been given.

In an action against a railway company for alleged negligence, it appeared that the deceased was killed by being run over while shunting cars. The evidence shewed that the space between two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but that the tracks themselves were in good condition, and it was merely a matter of conjecture, whether, at the time of the accident, the deceased was on the tracks themselves, or on the space between them.

Held, that, under these circumstances, the accident could not be said to be due to the defendants' negligence, and the plaintiffs' action failed.

Judgment in 2 O. L. R. 219, 21 Occ. N. 497, reversed.

F. H. Chrysler, K.C., for the appellants.

A. E. Fripp, for the respondents.

BOYD, C.]

SAWERS v. CITY OF TORONTO.

Assessment and taxes—Distress—"Owner"—Agreement for purchase—Local improvement rates—Abandonment of distress.

The judgment of BOYD, C., 2 O. L. R. 717, *ante* 25, was affirmed.

J. W. McCullough and *S. W. McKeown*, for the appellant.

J. S. Fullerton, K.C., and *W. C. Chisholm*, for the respondents.

MEREDITH, C.J.]

PROVIDENT CHEMICAL WORKS v. CANADA CHEMICAL
MFG. CO.

Trade mark—Fancy name—Descriptive letters—Forum—Exchequer Court.

The letters "C.A.P.," standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trade mark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates."

Judgment of MEREDITH, C.J., 2 O. L. R. 182, 21 Occ. N. 467, reversed.

The amendments to the Exchequer Court Act since the decision in *Partlo v. Todd*, 14 A. R. 444, 17 S. C. R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trade mark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trade mark, its invalidity may be shewn.

F. P. Betts and *Hume Cronyn*, for the appellants.

G. F. Shepley, K.C., and *E. W. M. Flock*, for the respondents.

FERGUSON, J.]

BEAM v. BEATTY.

Infant—Bond—Void or voidable—Ratification.

The bond with a penalty of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant is void, and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority.

Judgment of FERGUSON, J., 3 O. L. R. 345, *ante* 58, reversed.

C. A. Masten and *F. C. McBurney*, for the appellant.

G. Lynch-Staunton, K.C., and *A. W. Marquis*, for the respondent.

STREET, J.]

RITCHIE v. VERMILLION MINING CO.

Company—Mining company—Purchase and sale of land—Irregularities in proceedings.

A mining company subject to the provisions of the Ontario Companies Act, R. S. O. 1897 c. 191, and the Ontario Mining Companies Incorporation Act, R. S. O. 1897 c. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, for there is nothing to prevent the business of the company being continued by the purchase of other land.

Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company, and are in carrying out the sale furthering the interests of that rival company.

Judgment of STREET, J., 1 O. L. R. 654, 21 Occ. N. 291, affirmed.

A. B. Aylesworth, K.C., and N. F. Davidson, for the appellants.

Wallace Nesbitt, K.C., W. R. Riddell, K.C., and Robert McKay, for the respondents.

LOUNT, J.]

NELSON COKE AND GAS CO. v. PELLATT.

Company—Preference shares—Creation of—Validity—Memorandum and articles of association—Subscription for shares—Contract by deed—Delivery to agent of company—"Issue" and "allotment" of shares—Calls—Resolutions and letters—"Offer"—Withdrawal—Formal allotment.

In an action by a company against an alleged subscriber for shares to recover the subscription price, the defendant contended that preference shares of the company had not been lawfully created, there not having been any special reso-

lution of the company for that purpose, as provided by s. 53 of the Companies Act of British Columbia, R. S. B. C. c. 44, under which the company was incorporated.

Held, that provisions for preference shares in the memorandum and articles of association were legal and valid features of the constitution of the company.

Ashbury R. W. Co. v. Riche, L. R. 7 H. L. 653, and *In re South Durham Brewery Co.*, 31 Ch. D. 261, followed.

The defendant signed and sealed a document in the form of a covenant or agreement with five named persons, described as the applicants for the company's charter, and with the company when incorporated, to become a shareholder in the company to the amount of 200 shares of common and 200 shares of preference stock, when the same should be issued and allotted to him, and to accept the stock when allotted to him, and to pay for the same when a call or calls should be made upon him by the directors.

The defendant afterwards signed and sealed a document contained in a stock subscription book, reading: "We, the undersigned, do hereby severally subscribe for, and agree to take, the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof, set opposite to our respective names as hereunder and hereinafter written, and to become shareholders in said company, to the said amounts, when and as the said stock so subscribed for by us, severally, shall be issued and allotted to us; and we do hereby severally covenant, each with the other and others, with the said company and the directors thereof, to accept the said stock when the same shall be allotted to us, severally, and to pay for the same, to the said company, at par, when and as a call or calls for payment shall be made upon us severally by the directors." The amounts were the same as in the first instrument.

The defendant and two other persons who had executed the first instrument, executed the new one a few days after the first. The other two struck their names out of the first instrument, but the defendant did not do so. He said that in executing the second document he did not intend it as a subscription for 400 shares in addition to the former.

Semblé, that the defendant's execution of the second document did not supersede the first; but nothing turned upon that question, the legal effect of both being the same.

When the defendant executed the agreement he was in constant communication with a director of the company, and

they were associated together in obtaining subscriptions for shares on behalf of the company.

Held, that the contract was one entered into by the defendant with the company, at the request of one of its directors, acting for and on behalf of the company; that it was to be treated as an ordinary contract between individuals; that it was something more than an application or request for shares; it had all the elements of a completed contract, by deed, for valuable consideration; the deed was not delivered in escrow, but was delivered to the company through its agent; the contract, being by deed, was not revocable, but was at once operative without the company's acceptance, and, not having been repudiated by the company, was valid and binding on both parties.

Xenos v. Wickham, L. R. 2 H. L. 296, followed.

The defendant's subscription was made in September, 1899, and on the 14th December following the board passed a resolution that the subscribed for preferred stock be called up in full, and that the treasurer notify all subscribers to pay the amount of their subscriptions on or before the 18th January, 1900. On the 16th December the treasurer wrote to the defendant notifying him that the directors had made a call upon the preference shareholders for the whole amount of the stock subscribed by them, and mentioning the date and place for payment and the number of shares and amount required. On the 13th March, 1900, the board passed a similar resolution with respect to the shares of common stock, and calling for payment in full on or before the 12th April, and the treasurer wrote to the defendant notifying him in the same way.

Held, that the defendant's contract being to take the shares when and as they were "issued" and "allotted," those words, taken together, meant no more than some signification by the company of its assent that the defendant was or had become the owner of the number of shares which he had agreed to take, and that the resolutions and letters were a sufficient issue and allotment of the shares, and the defendant thereupon became bound to accept and pay for them.

The defendant, being repeatedly pressed for payment, asked for time. In November, 1900, he assumed to withdraw his offer, and the company then made a formal allotment of the shares to him, and notified him thereof.

Semble, that the formal allotment, if necessary, was in time; the defendant could not get rid of the obligation of his deed by any mere notice of repudiation and withdrawal.

Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 440, distinguished.

Judgment of LOUNT, J., 2 O. L. R. 390, 21 Occ. N. 500, reversed.

G. H. Watson, K.C., for the plaintiffs, appellants.

H. J. Scott, K.C., and *H. H. Macrae*, for the defendant.

C.C. LAMBTON.]

[18TH SEPTEMBER, 1902.]

REX v. TREVANNE.

Criminal law—Evidence—Depositions taken at preliminary inquiry—Incomplete cross-examination—Waiver—Criminal Code, s. 687.

At a preliminary inquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, the prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. Meanwhile, after consulting the county Crown attorney, the magistrate determined to send the case to Sarnia, and so telegraphed to the prisoner's counsel, asking a reply whether he would come up or not. Counsel replied that if the magistrate intended to send the prisoner to trial at any rate, it would be no use his coming, and accordingly he did not further attend the proceedings. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the inquiry at his own office, the prisoner being present, but not the witness, and on the evidence already taken the prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, and her depositions taken as above were tendered by the Crown and admitted.

Held, that, in view of s. 687 of the Criminal Code, the depositions were improperly received in evidence, the prisoner's counsel not ever having had a full opportunity of cross-examining the witness, and not having waived that right, as contended by the Crown.

F. Ford, for the Crown.

W. J. Tremear, for the prisoner.

IN CHAMBERS.

[OSLER, J.A., 5TH SEPTEMBER, 1902.]

In re EQUITABLE SAVINGS, LOAN, AND BUILDING ASSOCIATION.*Appeal—Court of Appeal—Companies—Ontario Winding-up Act—Practice on appeal—Final order.*

Section 27 of the Ontario Joint Stock Companies Winding-up Act, R. S. O. 1897 c. 222, contains the code of proceedings on an appeal from any order or decision of the Court under that Act, no provision being made in the Consolidated Rules or elsewhere. There is no provision that reasons for and against the appeal are required, or any delivery or settlement of the proposed case.

The practice when the case has come before a single Judge has been to send up the original papers and have the appeal heard upon them.

Semble, that an order of a County Court Judge rescinding an order previously made by him under s. 41 of the above Act for the dissolution of a company, is a final order, and therefore an appealable one.

Motion to quash appeal dismissed.

C. D. Scott, for the respondent.

A. B. Aylesworth, K.C., for the appellant.

[MACLENNAN, J.A., 2ND OCTOBER, 1902.]

CENTAUR CYCLE CO. v. HILL.

Court of Appeal—Joint appeal of two parties—Security furnished by one—Payment into court—Abandonment of appeal—Motion for payment out—Costs—Set-off—Increased security—Limitation of amount—Rule 830.

Two defendants appealed to the Court of Appeal from a judgment of the High Court: the notice of appeal was a joint one; and \$200 was paid into Court, as security for the respondents' (plaintiffs') costs of appeal, by one of the appellants, but in the name of both and for the joint benefit.

Held, that the appellant who had paid the money in was not entitled, upon abandoning his appeal, to have the money paid out to him, the other appellant desiring and intending to avail himself of the deposit and to proceed with the appeal.

The first appellant's motion for payment out being dismissed with costs to the other appellant, and it appearing that by the judgment appealed against the first appellant was entitled to be indemnified by the other against all amounts payable by the first under the judgment, and to recover from the other any amount so paid and his costs of the action, etc.:—

Held, that the costs of the motion should be set off against anything the first appellant might already have paid, or might ultimately have to pay, under the provisions of the judgment referred to, as the result of the appeal.

Held, under the circumstances of the case, that the appeal would be more expensive than usual, and that the security should be increased to \$400, but that, upon the true construction of Rule 830, s.-ss. 1, 4, 8, where security is given by payment into Court, it cannot be increased to more than \$400.

W. E. Middleton, for the plaintiffs.

W. H. Blake, K.C., and *C. W. Kerr*, for the defendant Hill.

W. E. Raney, for the defendant Love.

HIGH COURT OF JUSTICE.

[STREET, J., BRITTON, J., 17TH SEPTEMBER, 1902.]

MERCHANTS BANK v. SUSSEX.

Arrest—Ca. sa.—Concurrent writ—Expiry of original writ—Invalid arrest—Application for new writ—Concealment of material facts—Setting aside order—Discretion.

A concurrent writ of *ca. sa.* should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 874, and a concurrent writ so issued will be set aside as having been improperly issued.

The right to make a motion to be discharged from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon the application founded upon Con. Rule 1047, is confined to the case of an order for arrest made before judgment, and does not extend to a *ca. sa.*

The defendant had been arrested under an invalid concurrent writ of *ca. sa.*, and was in the custody of a sheriff, to the

knowledge of the plaintiffs' solicitor, who prepared an affidavit entirely suppressing the fact of the arrest, upon which he obtained an order for and issued a new writ of *ca. sa.* Upon an appeal to a Divisional Court from an order of a Judge in Chambers refusing to set aside the latter order and writ and a motion to be discharged:—

Held, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application, having for its object the setting aside of the order and writ, must upon the authorities have failed: *Damer v. Busby*, 5 P. R., at p. 389. It was really an application to the undoubted jurisdiction of the Court to set aside, in its discretion, orders which had been made by the wilful concealment or perversion of material facts; and a clear case had been made out and the order and writ should be set aside and the prisoner discharged from custody.

Decision of FALCONBRIDGE, C.J., reversed.

J. E. Jones, for the defendant.

J. H. Moss, for the plaintiffs.

[BOYD, C., 26TH SEPTEMBER, 1902.]

QUIRK v. DUDLEY.

Injunction—Repetition of slander—Public entertainment—Imputation of murder.

Injunction granted until the trial to restrain the defendants, who professed to be mind-readers, from pretending to give information at their public entertainments as to the cause of the death of the plaintiff's husband, intimating, as they had done at such entertainments, that he met with his death at the hands of a supposed friend, and thereby suggesting the idea that his late partner and the plaintiff were concerned in the matter.

J. H. Couch, for the plaintiff.

M. F. Muir, for the defendant.

IN CHAMBERS.

[BOYD, C., 26TH SEPTEMBER, 1902.]

In re TURNER, TURNER v. TURNER.

Will—Construction—Devise to wife subject to condition of making a will in favour of children.

A testator devised his estate to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will providing for two of his children, "and if she should fail or neglect to make the will, it's my will that instead of my said estate being so devised and bequeathed to her, the same shall be equally divided, share and share alike, between my said two children, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give and devise and bequeath unto my said wife."

Held, that under the above devise the widow, who had complied with the condition by making the will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and the judgment should so declare.

W. Proudfoot, K.C., for the executors.

F. W. Harcourt, for the official guardian.

[STREET, J., 19TH SEPTEMBER, 1902.]

MACKAY v. COLONIAL INVESTMENT AND LOAN CO.

Writ of summons—Service out of jurisdiction—Foreign company—Transfer of assets in Ontario to Ontario company—Action to set aside.

On a motion to set aside a writ of summons, the order permitting service out of the jurisdiction, and the service thereunder, in an action brought in the Province of Ontario, by shareholders resident in the Province of Nova Scotia of a loan company incorporated in and with its head office and assets (real estate mortgages), except about \$1,200 in mortgages on land in Ontario, in the Province of Quebec, against the loan company and its liquidators, resident in the Province of Quebec, and a loan company incorporated in and with its head office in the Province of Ontario, to set aside an agreement transferring the assets of the Quebec company to the

Ontario company, and making the shareholders of the Quebec company shareholders in the Ontario company, and for distribution of the proceeds of the assets, etc., on the ground that the Courts in Ontario had no jurisdiction and that the case did not fall within any of the clauses of Rule 162:—

Held, that the action was not brought with reference to real estate in the same sense as *Henderson v. Bank of Hamilton*, 23 S. C. R. 716, and similar cases were; and that the case fell within Con. Rule 162, clauses (g) and (h).

Order of Master in Chambers affirmed.

A. B. Aylesworth, K.C., and A. McLean Macdonell, for the Ontario company.

W. M. Douglas, K.C., for the Quebec company.

W. E. Middleton and C. D. Scott, for the plaintiffs.

[Upon appeal a Divisional Court, on the 6th October, 1902, varied the order of STREET, J., and the order of the Master in Chambers, which dismissed the defendants' motion, by adding a clause to the effect that the dismissal was to be without prejudice to the defendants' right to plead want of jurisdiction.]

In the County Court of the County of York.

{McDOUGALL, McGIBBON, McCRIMMON, Co. JJ., 4TH OCT., 1902.

In re CITY OF TORONTO ASSESSMENT.

Assessment and taxes—Exemptions—Property of companies—"Plant and appliances"—Public streets of municipality.

The words "plant and appliances" used in s.-s. 4 of the new s. 18 of the Assessment Act, substituted by 2 Edw. VII. c. 31, s. 1, are confined to any plant and appliances located upon the streets, roads, highways, and other public places in the municipality, such words taking this limited meaning because they must be referred to the words "rolling stock" which immediately precede them in the same subsection, and because it was manifestly the intention of the Legislature in enacting a new s. 18 to deal only with the method of assessing so much of the property of the companies named in s.-s. 2 as was situate upon the public streets of the municipality.

Appeals by the Toronto Railway Company, the Consumers' Gas Company of Toronto, the Bell Telephone Company of Canada, the Toronto Electric Light Company, and the Toronto Incandescent Light Company, from the decision of the

Court of Revision for the City of Toronto confirming assessments.

J. Bicknell, K.C., for the Toronto Railway Company.

G. H. D. Lee, for the Consumers' Gas Company.

E. H. Ambrose, for the Bell Telephone Company of Canada.

H. O'Brien, K.C., and *J. S. Lundy*, for the Toronto Electric Light Company and the Toronto Incandescent Light Company.

J. S. Fullerton, K.C., and *W. C. Chisholm*, for the city corporation.

The judgment of the board was delivered by

MCDUGALL, Co.J.—The question to be determined in these appeals is as to the effect of the Ontario Assessment Amendment Act, 1902, 2 Edw. VII. c. 31, s. 1, whether the exception of exemption stated in s.-s. 4 extends to the rolling stock of street railways, and in the case of all the companies named in s.-s. 2 to all their plant and appliances belonging to such companies, save those existing on or situate upon the streets, roads, highways, lanes, and other public places of the municipality. Under s.-s. 9 of s. 2 of the Assessment Act, R. S. O. 1897 c. 224, "machinery or other things so fixed to any building as to form in law part of the realty" are to be deemed land for the purpose of assessment. Does s.-s. 4 of s. 1 of the Act of last session exempt machinery and buildings on the land of water, heat, light, and power companies, telephone, telegraph, street railway, and electric railway companies, from assessment or taxation? Are these to be favoured companies, and are they to be relieved from the burden cast upon all other corporate bodies using machinery in their business? The Act of 1902 repeals s. 18 of the Assessment Act, and ss. 18*a* and 18*b* of the Act of 1901, and substitutes this new s. 18, divided into six sub-sections. The first sub-section deals with the land of persons other than the companies named in s.-s. 2, and directs that such land shall be assessed in the municipality where it lies, and in cities in the ward in which it lies. Sub-section 2 deals with water, heat, light, and power companies, telegraph and telephone companies, and companies operating street railways and electric railways. The land of such companies is directed to be assessed in cities in the ward in which the company has its head office, or, if they have no head office companies, wherever situate within the municipal boundaries,

may be assessed in any ward of the city. Sub-section 3 declares (what the Courts have already held) that rails, ties, poles, wires, gas pipes, mains, conduits, substructures, and superstructures upon the streets, roads, highways, lanes, and other public places in the municipality, shall be land, and then proceeds to define upon what principle their value for assessment purposes shall be determined. The plant, poles, and wires used exclusively by a steam railway in running trains, and not for commercial purposes, is declared to be exempt from taxation. Sub-section 4 reads: "(4) Save as aforesaid rolling stock, plant, and appliances of companies mentioned in sub-section 2 hereof shall not be land within the meaning of the Assessment Act, and shall not be assessable."

Sub-section 3 limits the liability to assessment under the new basis of valuation to certain enumerated portions of the plant and appliances and fixtures of these particular companies situate or placed upon the streets, highways, etc. Sub-section 3, therefore, deals with the assessment liability of what may be broadly stated as the outdoor portion of the company's plant and appliances, and as to these a new method and basis of valuation is laid down. The sub-section does not deal with anything but the plant and appliances located on the streets, lanes, or public places. The contention which has arisen relates to the meaning and force of s.-s. 4, which in form is a saving clause purporting to except and exempt certain articles or things from assessment or taxation. The appellants contend that the meaning of s.-s. 4 is that, save as to the enumerated parts of their plant and appliances situate on the public streets, all plant and appliances of the companies, wherever situate, is now exempted from assessment and taxation. In other words, that the Legislature has expressly relieved them from the liability to assessment heretofore existing by force of s.-s. 9 of s. 2 of the Assessment Act. As to all other companies, s.-s. 9 of s. 2 still applies, and the machinery, plant, and appliances of all other companies continue liable to assessment and taxation. It is, however, urged that as to the companies named in the Act under consideration, s.-s. 9 of s. 2 has been repealed by implication. Such a construction of s.-s. 4 would be so unjust and inequitable, and so contrary to the principles underlying the Assessment Act, that it requires for its support the clearest authority, and the most cogent reasons. The Legislature has expressed its mind clearly in s.-s. 9 of s. 2 of the Assessment Act, that land, real property, and real estate, respectively, shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty. Further,

by s. 7 of the Assessment Act it is said that all property in this Province shall be liable to assessment. The Act also defines the word "property" as including both real and personal property, as defined in s.-ss. 9 and 10 of s. 2 of the Act. The language of every subsequent enactment affecting assessment must, therefore, be construed as far as possible giving due effect to the language of the foregoing sections, unless the language of such later enactments in express terms modifies or repeals them. The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it: *Cutner v. Phillips*, [1891] 2 Q. B. 267, per A. L. Smith, L.J. It is said in Maxwell, 3rd ed., p. 277, that a sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well settled rules of construction, but it may properly lead to the selection of one rather than the other of two possible interpretations whenever the language of the Legislature admits of two constructions, and, if construed in one way, it would lead to obvious injustice, the Courts will act upon the view that such a result could not have been intended unless the intention had been manifested in express words. Now, it is quite clear that s.-s. 4 refers to its immediate antecedent clause, s.-s. 3. Sub-section 3 enumerates certain specified portions of plant and appliances used or placed on the public streets; all the plant and appliances used or placed on the street are not enumerated. Rolling stock, for instance, which is part of the plant and appliances on the street, is not included in the enumerated articles. The exception reads, "save as aforesaid rolling stock, etc., etc., shall not be 'land' within the meaning of the Assessment Act." Here, clearly, the first exception or exemption relates to the class of property on the street declared to be liable to assessment as land, but express words are used for greater precision and to indicate clearly that the omission was advisedly made, and that rolling stock is intended to be freed from assessment or taxation. The particular words "rolling stock" are followed by general words "plant and appliances." It is in accordance with a well known principle of law that general words following particular words will not include anything of a class superior to that to which the particular words belong (Hardcastle, 3rd ed., p. 192). General words which follow particular words and specific words of the same nature as itself take their meaning from them, and are presumed to be restricted to the same genus as those words, or, in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there be something to shew a wider sense was intended (Maxwell,

3rd ed., p. 469). In *Seward v. Vera Cruz*, 10 App. Cas. 69, Earl Selborne uses the following language: "Now, if anything is certain it is this, that where there are general words in a later Act capable of a reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from, merely by force of such general words, without any indication of a particular intention to do so." And again: "It cannot be contended that a subsequent Act of Parliament will not control the provision of a prior statute if it were intended to have that operation, but there are several cases in the books to shew that when the intention of the Legislature was apparent that the subsequent Act should not have that operation, even though the words of such statute, taken strictly and grammatically, would repeal a former Act, the Courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction." Now, the object of the legislation in question here was to put an end to what was known as the "scrap iron" method of valuing plant and appliances of certain companies occupying the public streets of the municipality. One of the grounds assigned by the Court of Appeal for deciding that the so-called "scrap iron" basis of valuation was correct in principle, was, that the assessment of the outside plant of certain companies was directed by the Assessment Act to be made separately in each ward, and that, therefore, the plant could not be valued as a whole. The legislation of 1901 abolished separate assessment in wards, and made the whole plant on the streets assessable as if the entire system was in one ward only. This amendment, it was held, did not have the effect of abolishing the scrap iron basis of valuation. In the Act of 1902 all difficulties of assessing the plant of the named companies situate on the streets were done away with. This portion of the plant was taken out of the operation of s. 28 of the Assessment Act as to the method of its valuation; a new basis was established in which it was directed that certain enumerated portions of this plant should be assessed at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises in and from the municipality. Now, the whole scope and object of the Act of 1902 was to clear away the separate assessments in wards, and also to end the scrap iron theory. No one was complaining or had ever complained of the assessment against the companies of the portion of their machinery, plant, and appliances fixed or situate in the companies' buildings on land not forming a part of the public street or high-

way. No exemption, no special scrap iron theory, had ever been sought to be applied to such portions of the plant and appliances. The contest had been over the street portion of their property. Can it be assumed that the Legislature ever contemplated for a moment putting the named companies upon a better footing than other companies in reference to their assessment liability? On the contrary, the effort was to get legislation that would subject their street plant and appliances to assessment upon the same basis as their other plant, and the Act of 1902 was intended to accomplish this. With reference to the rolling stock part of their plant and appliances, different considerations prevailed. Street cars were first assessed in 1901; the rolling stock of no other railway company save electric railways had ever been assessed or sought to be made liable; their cars were always considered personal property, and like the personal property of all such companies was not liable to assessment or taxation. The rolling stock of steam railways was not liable to assessment, and it was felt that electric railways should fairly be put upon the same basis; hence the exemption in s.-s. 4. Therefore, looking at the whole history of the legislation, it is reasonably plain that with the exception as to rolling stock, it was intended to make the outside plant of the companies named liable to assessment at its cash value, and to remove the alleged injustice of the scrap iron method of valuation.

If the saving clause has the meaning argued for by the appellants, \$1,176,000 (as appears by the figures on the assessment rolls) will be added to the assessment on the one hand, while by the same Act \$1,385,000, the value of the plant heretofore assessed, will become exempt—this effect of the legislation thus shewing a net decrease to the municipality of \$209,000 of assessment value. If the scrap iron basis of value had not been disturbed at all, the municipality would have been the gainer to the extent of \$209,000 in assessment value. It would require distinct and unmistakable language to warrant such a conclusion. To my mind, the meaning of the clause is to be arrived at by considering the language of s.-s. 3, which is its antecedent. That sub-section deals with street equipment only. It must also be read in the light of its initial word "rolling stock," a portion of the plant solely used on the public streets, and the words following, "plant and appliances," would, upon this view, be restricted to "plant and appliances" on the streets, that is to say, rolling stock and all other plant and appliances upon the streets, and not enumerated in s.-s. 3, are not to be considered land or liable to assessment or taxation. This is the only

reasonable view of its meaning consistent with the chief object that the Legislature had in view, namely, to remove the alleged scrap iron grievance, a grievance existing only in regard to street plant and appliances. To apply the construction contended for by the appellants would produce a result and discrimination so unjust and inequitable as to shock the conscience of every ratepayer. The words "rolling stock, plant, and appliances," construed as above indicated, are given an intelligent meaning, consistent with what I believe was the true intention of the Legislature. "A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant; the law does not allow an exposition to revoke or alter by construction of general words any particular statute where the words may have their proper operation without it. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language." (Maxwell, 3rd ed., pp. 243-4.) "Acts which establish monopolies or confer exceptional exemptions, privileges correlatively trenching on general rights, are subject to the same principle of strict construction" (Maxwell, 3rd ed., p. 411). A case which clearly supports this principle, that large general words will frequently be cut down and given a very restricted meaning, is found in *Ashbury R. W. Co. v. Riche*, L. R. 7 H. L. 653. There the term "general contractors" following the term "mechanical engineers" in the memorandum of association was held to have a limited meaning. The words of the articles of association, after enumerating a number of special things the company could do, concluded with the words, "to carry on the business of mechanical engineers and general contractors." Lord Cairns, Lord Chancellor, stated: "It appears to me upon all principles of construction, these words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works, first, to make and sell or lend on hire railway carriages and waggons and all kinds of railway plant, fittings, machinery, and rolling stock, that is, an object sui generis and complete in the specification which I have read. The second is, to carry on the business of mechanical engineers and general contractors; that, again, is the specification of any object complete in itself; and, according to the principles of construction, the term 'general contractor' would be referred to that which goes immediately before, and would indicate the making generally of

contracts connected with the business of mechanical engineers, such contracts as mechanical engineers are in the habit of making, and are in their business required or find it convenient to make for the carrying on of their business."

The conclusion of the matter then is, that the words "plant and appliances" used in s.-s. 4 must be confined to any plant and appliances located upon the streets, roads, and highways, and other public places in the municipality, such words taking this limited meaning because they must be referred to the words "rolling stock" which immediately precede them in the same sub-section, and because it was manifestly the intention of the Legislature in enacting a new s. 18 of the Assessment Act to deal only with the method of assessing so much of the property of the companies named in s.-s. 2 as was situate upon the public streets of the municipality.

This is the unanimous finding of the board of Judges upon the construction of the statute of 1902, but it is not the formal judgment to be delivered upon the appeals pending. The formal judgment will be pronounced after hearing the evidence upon the appeals when the figures of the assessment of the property involved in the different appeals will be determined. The opinion of the Judges upon the construction of the statute is issued in advance at the request of the parties.

NOVA SCOTIA.

In the Supreme Court.

[TOWNSHEND, J., 2ND OCTOBER, 1902.]

ATTORNEY-GENERAL v. POWER.

Will—Bequest for support of religious order at particular place—Refusal of ecclesiastical superior to authorize introduction of order—Application of bequest cy-près—Intervention of Attorney-General.

Patrick Power died in 1881, having previously made his last will, whereby (after providing for certain specific legacies) he directed his executors to set aside the residue of his estate and invest the same, and out of the income thereof to pay out such portion thereof as his executors should think proper in the establishment of a reformatory. The will contained a further direction that the executors should apply

the remaining portion of the income "in the introduction and support of Jesuit Fathers in said city of Halifax." Provision was also made with respect to the accumulation of the income until the residue should be applied as aforesaid; and the testator made a further provision as follows:

"It is, nevertheless, my wish that said executors or the survivor of them shall have the right and power, notwithstanding anything in this clause hereinbefore expressed, to apply the whole of the income of such fund, together with the accumulated income therefrom (if any), in the promotion and support in the city of Halifax, or in its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic Church as my said executors or the survivor of them shall think proper." The portion of the residue intended for the reformatory was appropriated to that purpose. The Archbishop of Halifax from 1883 to 1889, with the concurrence of the executors, made several applications to the Jesuits looking to the establishment in Halifax of a college; but the Jesuits declined the offers. A few years later another religious order was introduced. In 1897 the Jesuits signified their willingness to come to Halifax, but the Archbishop declined to give his assent, on the ground that conditions had in the meantime changed, and that since the introduction of the other order there was no room for the Jesuits.

This action was subsequently instituted by the Attorney-General, on the relation of the Archbishop, against the executors for a declaration that the introduction of the Jesuits is impracticable, and that the Court should give directions for the application, *cy-près*, or otherwise, of the said income, and for the management of the said fund. One of the trustees appeared in person and submitted to the jurisdiction of the Court. The two remaining trustees defended the action, alleging that the introduction of the Jesuits could be accomplished, that the only obstacle in the way was the refusal of the relator himself to give his assent, and that pending such introduction the executors could deal with the fund as they saw fit.

W. B. A. Ritchie, K.C., and J. A. Chisholm, for the plaintiff.

Ross, K.C., and Mellish, for the defendants.

TOWNSHEND, J., decided that the refusal of the Archbishop to give his assent to the introduction of the Jesuits rendered that mode of applying the residue impossible. As to matters within his ecclesiastical jurisdiction, he is the sole

judge. The fact that as head of his diocese he decided to refuse his assent to the introduction of the Jesuits, ought not to preclude him from taking these proceedings as relator. The action is brought by the Attorney-General for the public. The trustees have held the fund for twenty years without appropriating it to some permanent institution. The case would be one for the application at once of the doctrine of *cy-près*, but for the clause in the will, above quoted, which explicitly gives to the trustees the right to formulate the scheme. The trustees must no longer delay. The plaintiff is entitled to directions as to how the income shall be applied. The trustees will be ordered to settle what charitable institution or religious order shall have the benefit of the income; but they must at once come to a decision, and in default of their doing so, the Court will take upon itself to formulate such a scheme as will best agree with the testator's wishes as expressed in the will.

Further directions reserved. Costs of all parties to be paid out of the fund.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[McLEOD, J., 9TH OCTOBER, 1902.]

STEWART v. FREEMAN.

Pleading—Bill—Demurrer.

A bill is not demurrable unless it absolutely appears that on the facts disclosed in the bill being established at the hearing the bill must be dismissed; and where the case for relief contained in the bill depends upon facts admitting of variation in their proof from their statement in the bill, demurrer will not lie, though no relief, or relief in modified form, may be granted at the hearing.

A. B. Connell, K.C., in support of demurrer.

D. McLeod Vince and J. C. Hartley, contra.

[PUGSLEY, A.-G., ARBITRATOR, 1ST OCTOBER, 1902.]

In re DE FOREST.

Vendor and purchaser—Contract for sale and purchase of land—Taxes—St. John Assessment Act, 52 V. c. 27, s. 131.

By agreement dated the 18th March, 1902, for the sale of land in the city of St. John, the vendee was to be given a "good title free of all claims on the 1st May," the date when possession was to be given. Section 131 of the St. John Assessment Act, 52 V. c. 27, enacts that "any assessment upon or in respect to real estate shall be a special lien on such real estate from the 1st day of April in the year of the assessment, being the date to which the assessment relates in any year, and such lien shall continue for two years from the time of the completion of the assessment list and the filing thereof in the office of the common clerk of the city of St. John, and such lien shall have preference over any claim, lien, privilege, or incumbrance thereon except as against the Crown, and shall not require registration to preserve it; upon any assignment or transfer of real estate that may be at the time of such transfer subject to any such lien, the assignee, purchaser, and holder of any such real estate, shall, during the continuance and existence of the lien, be liable to the payment of the amount of such assessment, and the same shall become a debt due by him under this Act." By 58 V. c. 49, s. 1, power is given to the city to sell real estate, on failure of the person assessed to pay taxes assessed in respect of the land. On the 1st May, 1902, the rate of taxation for the year from the 1st April had not been fixed by the assessors, and the rate was not determined, nor was the assessment list filed by the assessors with the common clerk until a number of weeks after the 1st May. The vendee contended that the taxes for the year beginning on the 1st April should be paid by the vendor, and the matter was referred to the Attorney-General, whose decision it was agreed should be final.

Held, that the vendee should pay the taxes, save one month's proportion thereof, to be borne by the vendor.

A. P. Barnhill, for the vendee.

A. G. Blair jun., for the vendor.

MANITOBA

In the King's Bench.

[KILLAM, C.J., 31st OCTOBER, 1901.]

SCHWARTZ v. WINKLER.

Parties—Action by assignee for creditors to set aside mortgage by assignor—Assignor not necessary party—Costs of examination of defendants.

Application by the plaintiff under Rule 932 of the King's Bench Act for a fiat to tax the costs of the examinations for discovery of the defendants Winkler and Wiebe, the action being by an assignee in trust for the creditors of Wiebe to set aside a mortgage by Wiebe to Winkler, as being preferential. See 13 Man. L. R. 493, 21 Occ. N. 574.

The question was as to the costs of the examination of Wiebe. He and Winkler separated entirely in their defences, and it was contended that Wiebe was not a necessary or proper party to the suit.

Although Wiebe put in a statement of defence, he did not defend at the trial, and no objection was then raised to his having been made a party.

Held, that Wiebe was neither a necessary nor a proper party to the action. He assigned the property to the plaintiff in trust for his creditors; he had no beneficial interest until his creditors should be paid. In no contingency had Wiebe any interest whatever in the question of the validity of the mortgage: *Weise v. Wardle*, L. R. 19 Eq. 171; *Bank of Montreal v. Black*, 9 Man. L. R. 439, 14 Occ. N. 189.

Gibbons v. Darvill, 12 P. R. 478, distinguished.

Costs of Wiebe's examination refused as against him as well as Winkler, but the costs of Winkler's examination allowed as against both. No costs of the motion.

S. J. Rothwell, for the defendant Winkler.

H. F. Maulson, for the plaintiff.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 11TH JUNE, 1902.]

UNION BANK OF HALIFAX v. WURZBURG & CO., LTD.

Writ of summons—Special indorsement—Promissory note payable at particular place—"Duly presented"—Summary judgment.

Appeal from an order of Irving, J., giving the plaintiffs leave to sign final judgment under Order XIV. The statement of claim indorsed on the writ stated plaintiffs' claim as being on a note dated . . . payable four months after its date to the order of M. L. Wurzburg & Company, at their office, Halifax, N.S., indorsed . . . and which said note was duly presented for payment and was dishonoured.

Held, a good special indorsement.

Cunard v. Symon-Kaye Syndicate, 27 N. S. Reps. 340, distinguished.

Sir C. H. Tupper, K.C., for the defendants.

E. P. Davis, K.C., for the plaintiffs.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[RICHARDSON, J., 30TH SEPTEMBER, 1902.]

GRAY v. GUERNSEY.

Detinue—Action for—Necessity for demand before action.

This action was brought to recover from the defendant a waggon and buggy, the property of the plaintiffs, which they alleged the defendant (on the 10th February, 1902, when the writ issued) had unjustly detained and then unjustly detained from them.

The defendant set up in defence a denial of the detention alleged, and none other.

T. C. Johnston, for the plaintiffs.

Ford Jones, for the defendant.

RICHARDSON, J.:—The ownership of the property in question, not being disputed by the defendant, is, by operation of Rule 114, admitted, and I have thus only to determine whether or not the plaintiffs have established that at the time the writ issued the defendant was unjustly withholding from the plaintiffs their property and preventing them from having possession of it. In my judgment, in order to succeed the plaintiffs must bring themselves within the rule laid down in *Clements v. Flight*, 16 M. & W. 48, approved in *Bryant v. Hubert*, 3 C. P. D. 389, by convincing the Court that the detention complained of was an adverse detention when the writ issued, by proof of request and refusal, this being the point in an action of detinue, as distinguished from actions of conversion, wherein request and refusal are evidence only.

This case followed *Jones v. Dowles*, 9 M. & W. 19. The plaintiff in an action of detinue, under the plea of *non detinet*, is entitled to a verdict on proof that the defendant has not returned the chattel to the plaintiff on demand.

Now, what are the facts here? These plaintiffs agreed to sell one Brown the waggon and buggy in question, on credit. The agreement appears by the terms of three lien notes, in each of which is a condition worded thus: "The title, ownership, and right of possession of the property for which this note is given shall remain in Gray & Smith (the plaintiffs) until the price is paid, and if default is made in payment . . . they have full power to . . . take . . . the said property."

Following the agreement, and subject to its terms, the purchaser, Brown, with the plaintiffs' assent, took possession of the waggon and buggy now sued for. But, failing to pay therefor as he had agreed, the right to exercise the power to take the property as provided for became vested in the plaintiffs.

It then appears that Brown, having become financially embarrassed, made on the 23rd January, 1902, an assignment of all his property which would be exigible under execution to the defendant, and delivered over, with other articles, the waggon and buggy sued for to the defendant, who on the 31st January posted notices of his intention to sell the same by public auction on the 12th February, 1902.

The plaintiffs having observed this notice of sale, the plaintiff Gray started, on the 4th or 5th February, to Brown's place for the purpose of taking on the plaintiffs' behalf the property, when, meeting Brown on the way, he was informed that the articles were in the defendant's possession. Gray then returned to the plaintiffs' residence, and nothing further appears to have been done by the plaintiffs until the 10th February, when this action was commenced by writ of summons, and, the claim being one provided for by Rule 426, obtained a writ of replevin, under which the waggon and buggy were taken by the then sheriff, and delivered to the plaintiffs.

It is beyond question that before suing out their writ no request was made by the plaintiffs, or anyone authorized by them, upon defendant, for delivery up of their said property, or any attempt to take the same; consequently the opportunity for refusing the request, which, by law, as I hold, the defendant was entitled to, was not given, and therefore the plaintiffs' right to bring detinue had not when the writ issued arisen.

The action must therefore be dismissed with costs.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.]

[9TH OCTOBER, 1902.]

HENNING v. MACLEAN.

*Will—Construction—Alternative disposition—Death of testator and wife
“at the same time”—Interpolation of words in will.*

The testator bequeathed to his wife all his estate, and appointed her his executrix. His will then proceeded: “In case both my wife and myself should by accident or otherwise be deprived of life at the same time I request the following disposition to be made of my property”—disposing of his estate and appointing executors. A few months after the making of the will the testator and his wife went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month.

Held, that the testator and his wife were not deprived of life at the same time; and, as the actual event was not provided for, there was an intestacy.

Held, also, that there was no power in the Court to interpolate any such words as “in case my wife does not survive me,” or “in case I should survive her.”

Judgment of a Divisional Court, 2 O. L. R. 169, 21 Occ. N. 434, affirmed; MACLENNAN and GARROW, J.J.A., dissenting.

A. B. Aylesworth, K.C., and A. S. Ball, K.C., for the appellants.

C. Robinson, K.C., H. J. Scott, K.C., H. O'Brien, K.C., and J. G. O'Donoghue, for the respondents.

FERGUSON, J.]

MUTCHMOR v. WATERLOO MUTUAL FIRE INS. CO.

Fire insurance—Conditions—Prior insurance—Subsequent insurance—Substitution of policies—Implied assent—Adjustment of loss—Waiver.

In an application for insurance, particulars of prior insurance in two other companies of \$4,000 in each company were given, but in the policy in question prior insurance for only \$4,000 was assented to, neither company being named. The defendants pleaded as a breach of the statutory condition non-disclosure of prior insurance for \$4,000 in one of the two companies.

Held, that the plea must be read strictly and without amendment, and that so read the assent in the policy to insurance of \$4,000 might be treated as an assent to the prior insurance complained of in the plea; and *semble*, that, had the defendants not intended to assent to the prior insurance of \$8,000, they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application.

Held, also, that to a subsequent insurance for \$4,000, in another company, in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary.

Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was held to be sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted.

Judgment of FERGUSON, J., affirmed.

A. B. Aylesworth, K.C., for the appellants.

Wallace Nesbitt, K.C., and T. A. Beament, for the respondents.

STATED CASE.]

In re LEACH AND CITY OF TORONTO.

Assessment and taxes—Local improvements—Sidewalk.

Under an agreement of the 20th March, 1889, entered into by the Crown as representing the University of Toronto, and the city of Toronto, confirmed by 52 V. c. 53 (O.), College

street in the city of Toronto has become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction as a local improvement of a sidewalk in front of the leased land, even though the lease has been made before the agreement.

John A. Paterson, K.C., for the lessee.

J. S. Fullerton, K.C., and *W. C. Chisholm*, for the city corporation.

IN CHAMBERS.

[OSLER, J. A., 10TH NOVEMBER, 1902.]

In re LENNOX PROVINCIAL ELECTION.

PERRY v. CARSCALLEN.

Parliamentary elections—Controverted election petition—Affidavit of petitioners' bona fides—Commissioner—Qualification—Agent of solicitor.

The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof and of the affidavit of bona fides and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioners' solicitors, the petition was presented.

Held, that the commissioner was not disqualified.

C. A. Masten, for the respondent.

R. A. Grant, for the petitioners.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., LOUNT, J., 7TH OCTOBER, 1902.]

CROW'S NEST PASS COAL CO. v. BELL.

Libel—Pleading—Defence—Fair comment—Absence of justification—Striking out defences.

In an action for alleged libel contained in an article in the defendants' newspaper, the defendants pleaded fair comment,

but did not attempt in any way either to set up the facts upon which it was alleged the article was fair comment, or allege that the statements of fact in the article complained of were true.

Held, that the defence was bad, and should be struck out.

It is clear upon the authorities that a man may not invent his facts and then comment on them, and succeed upon the ground that, the facts being assumed to be true, the comment is fair.

G. G. S. Lindsey, K.C., for the plaintiffs.

A. E. Knox, for the defendants.

OTTAWA GAS CO. v. CITY OF OTTAWA.

Costs—Right to against opposite party—Liability of client to solicitor—Corporation solicitor paid by salary—Change in by-law of corporation.

By arrangement between the defendants and their solicitor he was to receive a salary of \$1,800 a year, for all services, including the costs of any litigation in which the defendants should be engaged.

The present action against the defendants was dismissed with costs on the 14th September, 1901, and the defendants brought in their bill for taxation.

Held, following *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, and *Stevenson v. City of Kingston*, 31 C. P. 333, in preference to *Galloway v. Corporation of London*, L. R. 4 Eq. 90, and *Henderson v. Merthyr Tydfil Urban District Council*, [1900] 1 Q. B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiffs

Held, also, that the rights of the defendants must be governed by the circumstances which existed on the 14th September, 1901; and a by-law of the defendants subsequently passed could not affect those rights. ●

H. T. Beck, for the plaintiffs.

J. H. Moss, for the defendants.

[9TH OCTOBER, 1902]

MILLIGAN v. JAMIESON.

*lander—Verdict for defendant notwithstanding proof of defamatory words
—New trial—Aggravation of damages—Evidence—Pleading.*

Motion for a new trial in an action of slander upon the ground that the verdict was perverse. The defamatory words were proved, but the jury, nevertheless, found a verdict for the defendant, instead of giving nominal damages to the plaintiff.

Held, that a new trial should not be granted in order that the damages which the jury ought to have assessed should be assessed to the plaintiff.

Another ground of the motion was that the Judge had refused to admit evidence offered by the plaintiff and directed to aggravate the damages.

Held, that, inasmuch as there was no allegation in the plaintiff's pleading to entitle him to give evidence of the acts of the defendant on which he wanted to rely to aggravate the damages, a new trial should not be allowed on this ground.

It would be a highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of, without having set them forth in his pleading, and which might, if unanswered, seriously affect the damages.

W. R. Riddell, K.C., and *T. B. German*, for the plaintiff.

A. B. Aylesworth, K.C., for the defendant.

[*BOYD*, C., *STREET*, J., *MEREDITH*, J., 15TH OCTOBER, 1902]

***In re* SCADDING.**

Will—Construction—Legacies—Interest.

A will directed that the estate, real and personal, should be sold, and that the executors should hold the proceeds in trust to pay an annuity of \$800, and then to pay all the residue of the income to the testator's widow for life, and on her death to divide the corpus, paying to two grandchildren \$1,000 each, and dividing the residue amongst the testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest, and directed that they

should be paid when the grandchildren should attain twenty-one, but in case the estate should be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow.

Held, that interest on the legacies should be paid by the estate only from the death of the widow.

Toomey v. Tracey, 4 O. R. 708, distinguished.

Decision of *MACMAHON*, J., reversed.

C. A. Masten, for the executors.

W. Bell, for the legatees.

[22ND OCTOBER, 1902.]

PEOPLE'S BUILDING AND LOAN ASSN. v. STANLEY.

Execution—Judge's order for costs—Direction for set-off—Service of allocatur—Issue of execution—Production of order.

Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set off *pro tanto*, the deduction should be made before execution issues on the Judge's order.

It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable.

When execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody of the book in which the order is entered.

D. W. Saunders, for the plaintiffs.

W. H. Bartram, for the defendant.

IN RE RITZ AND VILLAGE OF NEW HAMBURG.

Municipal corporations—Application to quash by-law—Countermand—Substitution of another ratepayer.

A summary application to quash a municipal by-law was made at the instance and upon the behalf of nine interested

ratepayers, who combined to make the necessary deposit, and put forward R., one of their number, as applicant. R. duly launched the application, but afterwards gave the respondents notice of discontinuing it. After the three months allowed by the Municipal Act for making such an application had expired, the application of R. not, however, having been dismissed, one of the remaining ratepayers applied to be added or substituted as an applicant.

Held, that he should be allowed to continue the proceedings in R.'s name, on the usual terms of indemnifying him against costs.

E. E. A. DuVernet, for the applicant.

A. B. Aylesworth, K.C., for the village corporation.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 27TH OCTOBER, 1902.]

ABBOTT v. ATLANTIC REFINING CO.

Principal and agent—Undisclosed principal—Action by agent—Addition of principal as party—Building contract—Guarantee—Breach—Representation as to ownership—Damages.

A husband who was superintending for his wife the erection of a building on her property, after correspondence with contractors in which the building was referred to by them as "your building" and by him as "my building," took a guarantee from them that "your roof . . . will remain water-proof." In the correspondence and contract the expression "your town" was also used. The wife was not mentioned. The roof proved defective.

In an action by the husband and wife for damages:—

Held, that the expressions employed did not necessarily imply that the husband was the owner of the roof or the building, but were used as conveniently descriptive of the matter under discussion, and that it was competent for the wife to shew that he was her agent, and to recover damages for its breach.

Held, also, that the husband, not being either a party or privy to the contract, could not recover for its breach.

Lucas v. De la Cour, 1 M. & S. 249, and *Humble v. Hunter*, 12 Q. B. 310, distinguished.

Judgment of the County Court of Simcoe varied.

W. M. Boulbee, for the defendants.

J. C. Brokovski, for the plaintiffs.

[FALCONBRIDGE, C.J., STREET, J., 8RD NOVEMBER, 1902.]

In re THOMSON v. STONE.

County Court—Jurisdiction—Equitable relief—Amount in controversy—Judgment creditor—Setting aside chattel mortgage—Prohibition.

An appeal by the defendants from the judgment of MEREDITH, C.J., 4 O. L. R. 333, *ante* 327, refusing an order for prohibition, was dismissed with costs.

John MacGregor, for the defendants.

B. E. Swayzie, for the plaintiff.

[BOYD, C., 25TH SEPTEMBER, 1902.]

In re ALLEN AND TOWN OF NAPANEE.

Municipal corporations—Powers—Trimming of trees in streets—Resolution—Necessity for by-law.

Motion to quash resolution of the council of the town of Napanee that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed."

Held, that under s. 574, s.-s. (4), of the Municipal Act, R. S. O. 1897 c. 223, municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by s. 575 of the Municipal Act.

C. R. W. Biggar, K.C., for the applicant.

W. E. Middleton, for the town corporation.

[BRITTON, J., 30TH OCTOBER, 1902.]

ELLIOTT v. HAMILTON.

Bankruptcy and insolvency—Assignments and preferences—Judgment—Execution—Sheriff—Sale of land.

Under a writ of *fiery facias* a sheriff seized the interest of a judgment debtor in certain lands, and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R. S. O. 1897 c. 147. The assignee gave notice to the sheriff of the assignment, and asked for a statement of the costs incurred to that

time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale, and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the land to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent.

Held, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void, and the sheriff's vendee entitled to possession of the land.

Gillard v. Milligan, 28 O. R. 645, followed.

D. B. Simpson, K.C., for the plaintiff.

R. D. Gunn, K.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 22ND SEPTEMBER, 1902.]

FAIRFIELD v. ROSS.

Administrator ad litem—Action by heir-at-law to set aside transfer—Locus standi.

The only living issue and heir at law of an intestate brought this action to set aside, on the ground of undue influence, a transfer of property made by the intestate to the defendant; and now applied for an order under Rule 194 or 195. appointing him administrator or administrator ad litem of the deceased.

Held, that the order could not be made under Rule 194, for the reasons given in *Hughes v. Hughes*, 6 A. R. 373, 380, nor under Rule 195, which was not applicable to a case of a plaintiff who without right or title has commenced an action, and then seeks to legalize his illegal act by an order of the Court.

H. L. Drayton, for the plaintiff.

R. C. Clute, K.C., for the defendants.

In re YATES.

Will—Legacy—Charge on land—Interest—Statute of Limitations—Legatee also administrator with will annexed.

A legatee of money charged on land, whose legacy was to be paid six months after the death of the testator, was ap-

pointed administrator with the will annexed, but did not sell the land to pay herself the legacy, and held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties, some eight years after the death of the testator.

Held, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was still a subsisting claim with interest as accessory for the period till the fund was in hand for payment.

J. Hoskin, K.C., for the applicant.

D. W. Saunders, for the legatee.

[MACMAHON, J., 10TH NOVEMBER, 1902.]

STANDARD TRADING CO. v. SEYBOLD.

Costs—Security for—Præcipe order—Increase in amount.

Under Rule 1208, the fact of the defendant having obtained a præcipe order for security for costs by which a definite amount of security is provided for, binds him to no greater extent than if he had in the first instance made a special application for security; in either case the defendant must shew facts disclosing a proper case for increased security; and no reservation in the first order of leave to apply again is necessary.

Where the defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, \$200 paid into Court in compliance with a præcipe order, was ordered to be increased by a bond for \$600 or payment into Court of an additional sum of \$300.

C. J. R. Bethune, for the defendants.

G. E. Kidd, for the plaintiffs.

[STREET, J., 26TH SEPTEMBER, 1902.]

REX *ex rel.* MCFARLANE v. COULTER.

Appeal—To Judge of High Court—Order of County Court Judge quashing quo warranto proceedings—Right of appeal—Power to make order.

In a *quo warranto* proceeding, in which the fiat giving leave to serve a notice of motion to set aside the election of a town-

ship reeve had been granted by a County Court Judge, and the proceedings were intituled in his County Court, a motion was made before him to set aside all the proceedings upon the relation, and he made an order setting them aside and quashing them with costs.

Held, that no appeal from such an order lies to a Judge in Chambers, as appeals from the County Courts in ordinary cases are to a Divisional Court, and the appeal from the decision of a County Court Judge to a Judge of the High Court given by 55 V. c. 42, s. 187, s.-s. 3 (O.), "under this section," is from the decision of the County Court Judge upon the merits on the trial of the contested election, and not the quashing without a trial of the fiat upon which the proceedings were founded.

Quære, whether the County Court Judge had power to make such an order.

Regina ex rel. Grant v. Coleman, 7 A. R. 619, referred to.

W. M. Douglas, K.C., for the relator.

J. H. Rodd, for the respondent.

[THE MASTER IN CHAMBERS, 4TH NOVEMBER, 1902.]

PARRAMORE v. BOSTON MANUFACTURING CO.

Discovery—Examination of parties—Production of documents—Patent of invention—Agents.

In an action for damages for the infringement of a patent of invention the defendants pleaded among other defences that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced and after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent.

Held, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented

invention was manufactured in Canada under the patent; and the plaintiff, having refused upon his examination for discovery to answer questions relating to these matters, was ordered to attend for re-examination at his own expense.

The plaintiff was also ordered to make and file another affidavit on production, and to produce for inspection statements received by him from such agents.

G. H. Kilmer, for the defendants.

J. Bicknell, K.C., for the plaintiff.

W. N. Tilley, for the J. B. Kleinert Rubber Company.

QUEBEC

In the Superior Court.

[COURT OF REVIEW, 25TH FEBRUARY, 1902.]

CARTIER v. GENSER.

*Bankruptcy and insolvency—Insolvent estate—Creditor appointed inspector
—Exacting promissory notes—Defrauded creditors.*

A creditor of an insolvent estate was appointed one of the inspectors thereof. A compromise was proposed, but this inspector would only agree to the same upon the insolvent giving him promissory notes in return for his assent to the arrangement. An action was subsequently brought on these notes.

Held, that the notes were null and void, both because they were made in fraud of the other creditors, and also as being against public order; and that, therefore, no action could be maintained on them, either by the creditor himself or by a prête-nom.

Judgment of the Court below affirmed and action dismissed with costs.

Adam, Mathieu, and Mathieu, for the appellant.

Jacobs, Patterson, and Garneau, for the respondent.

[PAGNUELLO, J., 8RD OCTOBER, 1902.]

IMPERIAL LIFE INS. CO. v. CHARLEBOIS.

Life insurance—Contract made by minor—Plea of lesion.

Action on a promissory note for \$686.25 given in payment of the first premium on a policy of life insurance for \$25,000. The defendant pleaded that he was a minor when the contract was made; that it was disadvantageous to him, as it absorbed nearly all his annual revenue; and that as soon as his tutor had heard of it he had served a protest on the company on the ground that the contract was injurious to his pupil.

Held, that the defendant had established his plea, and that it was not his interest to have so large an insurance, especially as his health was not good, and the premium took up nearly all of his fixed income.

Action dismissed, but without costs, inasmuch as the plaintiffs had been led into error as to the defendant's age, health, and financial circumstances.

Peers Davidson, for the plaintiffs.

Beaudin, Cardinal, Loranger, and St. Germain, for the defendant.

[LANGELIER, J., 28RD SEPTEMBER, 1902.]

BLACKWOOD v. PERCIVAL.

Foreign judgment—Action thereon in two jurisdictions—Lis pendens.

The plaintiffs obtained judgment in Manitoba in a suit wherein the defendant appeared and pleaded. The plaintiffs then sued both in Ontario and in Quebec upon an exemplification of the judgment rendered in Manitoba. The defendant pleaded in the Quebec action that this was a case of *lis pendens*, inasmuch as there was a suit pending in Ontario between the same parties concerning the same thing. The plaintiffs inscribed in law against this plea.

Held, that there was no *lis pendens*, because the suit in Ontario was merely on an exemplification of a final judgment given in Manitoba, and that concurrent suits in two Provinces upon exemplifications of the same judgment did not give rise to *lis pendens*.

Inscription maintained.

Blair and Lavery, for the plaintiffs.

Jacobs, Patterson, and Garneau, for the defendant.

[FORTIN, J., 21ST OCTOBER, 1902.

MARIEN v. LUSSIER.*Medicine and surgery—Fees of physician—Action for—Pleading—Irrelevant allegations of declaration.*

The plaintiff, a practising physician, sued the defendant for \$3,000 for professional services. In his declaration he set up the fact that the case was notorious, and that the public had been daily kept aware of the defendant's condition, and of all details connected therewith, thus putting the plaintiff's professional reputation at stake. These facts were alleged as partly justifying the large amount of the fee claimed. The defendant inscribed in law against these allegations.

Held, that the allegations complained of could not be connected with the point at issue, which was the amount of the fee due to the plaintiff.

The inscription was, therefore, maintained, and the allegations complained of were struck out of the declaration.

Laurendeau and Bazin, for the plaintiff.

Lussier, for the defendant.

[DOHERTY, J., 21ST OCTOBER, 1902.

SMITH v. LANG.*Promissory note—Accommodation indorser—Waiver of notice of protest.*

Action on a promissory note against the defendant Quesnel as indorser. The defendant pleaded that he was only a guarantor on the note, and had received none of the proceeds thereof, and that, as he had received no notice of protest, he was discharged from all liability. The evidence shewed that when the note fell due Quesnel had gone to the plaintiff, offered a renewal note, and had asked for time in which to pay.

Held, that this action on the part of Quesnel was a waiver of protest under the Bills of Exchange Act.

Judgment for the plaintiff with costs.

Stephens and Hutchins, for the plaintiff.

Cresse and Descarries, for the defendants.

[MATHIEU, J., 22ND MAY, 1902.]

SMITH v. BEAUBIEN.

Foreign judgment—Action on—Pleading—Declaration—No statement of original cause of action—Exception.

An action was brought in the Province of Quebec upon a foreign judgment. The defendant made an exception to the form, upon the ground that the plaintiff had failed to indicate the causes of action in the suit in which judgment had been rendered.

Held, that the plaintiff bringing an action upon a foreign judgment is not bound to state the grounds of the original action, where it is shewn, by the certificate of the clerk of the court by which the judgment was rendered, that the claim sued on was personally served on the defendant, together with the writ of summons in the action in which the foreign judgment was rendered.

Exception overruled.

Claxton and *Kennedy*, for the plaintiff.

Bissailon and *Brossard*, for the defendant.

MANITOBA

In the King's Bench.

[RICHARDS, J., 4TH OCTOBER, 1902.]

LAW v. ACTON.

Will—Construction of—Mortmain Act—Bequests to church and school, also to "three oldest and poorest in municipality"—Abatement of legacies.

Suit for the construction of a will. Testator directed: "To my son William McMurray I give and bequeath the sum of two thousand dollars." Except the above named William McMurray, no person named William was mentioned in the will. A codicil was as follows: "This is a codicil to my last will and testament. I am sorry, my dear William, to make this alteration. I cut you off my will and leave you two hundred dollars. You know how you have used me to make me do this."

Held, that the codicil revoked the bequest in the will of \$2,000 to the testator's son William, and made a new bequest

to him of \$200. The codicil contained this clause: "I leave \$500 to Acton School; \$500 to Eden Presbyterian Church; \$500 to Winnipeg Hospital; and \$300 to the three oldest and poorest people in Rosedale Municipality."

Held, that the Mortmain Act, 9 Geo. II. c. 36, was in force in Manitoba, except as it might be affected by Provincial statutes.

So far as the bequest to the Acton school came out of land, or the proceeds of land, it was void. It remained to consider such bequest in so far as it was payable out of the proceeds of pure personalty.

The executors realized from the sale of the whole estate \$4,312.60, of which \$3,025 was received from the sale of the real estate and \$200 from the sale of the crop growing on the testator's land at the time of his death, which was for the purposes of the Mortmain Act to be considered as proceeds of realty. That left a balance of \$1,087.60, which was to be assumed to be derived from pure personalty. The "Acton school" was shewn to be "the school district of Acton, number 155." The bequest was valid to the extent of such part thereof as bore to the whole \$500 the proportion which the pure personalty bore to the whole estate; i.e., the proportion which \$1,087.60 bore to \$4,312.60. As the estate had not realized enough to pay the legacies in full, and they would have to be abated, the request to the school district must, for the purpose of such abatement, be taken at the amount for which it was above found to be valid, and then abated proportionately with the other legacies.

The bequest to the three oldest and poorest people in Rosedale municipality was a valid bequest: it was sufficiently certain to be carried out.

The Eden Presbyterian Church was shewn to be a duly organized and lawful congregation of "the Presbyterian Church in Canada," and to have been such when the codicil was made.

As the testator's death occurred more than six months after the making of the codicil, the provisions of s. 6 of c. 47 of 38 V. (Man.) took the bequest out of the operation of 9 Geo. II. c. 36, and the bequest was, therefore, a valid one.

The "Winnipeg Hospital" referred to in the codicil was admitted to be the Winnipeg General Hospital. Section 2 of c. 48 of 38 V. (Man.) took the bequest out of the operation of 9 Geo. II. c. 36, and made it a valid one.

The costs of the solicitors for the executors and for the Eden Presbyterian Church to be paid out of the estate, as between solicitor and client.

A. Haggart, for the plaintiffs.

Campbell and Crawford, for the Presbyterian Church.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 12TH JUNE, 1902.]

TROWBRIDGE v. McMILLAN,

Parties—Addition of—Litigation between agents—Principals added.

T. sued McM. as the drawer of a bill of exchange payable to T.'s order, with an alternative claim against McM. on a guaranty that the bill would be paid. T. was the manager of the P. C. line, of Seattle, which owned the steamer Mexico, and the defendant was the agent of the D. and W. H. N. Co., and these two principals had through T. and McM. entered into a charterparty providing that the steamer Mexico should carry certain freight, for which the D. and W. H. N. Co. agreed to pay. McM. alleged that he gave the bill of exchange, sued on along with the guaranty to T. as the balance of the freight moneys due under the charterparty, and the company set up a claim for demurrage, and advised McM. not to pay.

On an application made by McM. and the company, an order was made adding the company as a defendant, and giving leave to counterclaim against the P. C. line.

Held, on appeal, that the order was properly made, as the real parties in interest should be brought before the Court.

A. E. McPhillips, K.C., for the appellant.

Sir C. H. Tupper, K.C., and *F. Peters*, K.C., for the respondent.

[FULL COURT, 29TH JULY, 1902.]

FRY v. BOTSFORD.

MACQUILLAN v. FRY.

Mines and minerals—Adverse action—Certificate of improvements—Co-owner—Estoppel—Notice—Res judicata—Judgment in rem.

Appeal from a judgment of IRVING, J., on a point of law in which the question, "Does the decision of the adverse action of *Callahan v. Coplen*, 6 Brit. Col. L. R. 523, prevent

these actions being maintained?" was answered by him in the negative.

Held, that a judgment in an adverse action under s. 37 of the Mineral Act is not a judgment *in rem*.

One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements.

Per MARTIN, J.—That s. 37 does not apply to co-owners of the same claim, but to owners of conflicting claims.

Decision of IRVING, J., affirmed.

Bentley v. Botsford, 8 Brit. Col. L. R. 128, followed.

F. Peters, K.C., and *H. J. Duncan*, for the appellants.

Joseph Martin, K.C., for the respondents.

[HUNTER, C.J., 2ND JUNE, 1902.]

CREWE v. MOTTERSHAW.

Fire—Setting out—Adjoining owners—Escape of fire—Maintaining dangerous thing—Liability for—Negligence.

Action for damages. The plaintiff and defendant were adjoining land owners, and a fire, started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's lands.

Held, applying the principle of *Rylands v. Fletcher*, L. R. 3 H. L. 330, that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it.

Judgment for the plaintiff for \$300.

Costs on County Court scale only allowed, as the action should have been brought in a County Court.

J. H. Simpson, for the plaintiff.

F. McB. Young, for the defendant.

[HUNTER, C.J., 10TH JULY, 1902.]

HAYES v. THOMPSON.

Municipal corporation—By-law—Closing of saloons—Bar-rooms—Sunday closing—Powers of municipality—Liquor Traffic Regulation Act.

Appeal by way of case stated from a conviction by the police magistrate for Nanaimo, whereby the appellant was

convicted under a Sunday observance by-law, the offence being that of being found in the bar-room of the Crescent Hotel between 10 and 12 p.m. on Sunday, contrary to the provisions of the by-law. By the Liquor Traffic Regulation Act, liquor is prohibited from being sold between 11 p.m. on Saturday and 1 a.m. of the Monday following, and also during any other days or hours during which the place is to be kept closed by order of municipal by-law.

Held, setting aside the conviction, that a municipality has no power under s. 50, s.-ss. 109 and 110, of the Municipal Clauses Act, to pass a by-law closing any kind of licensed premises except saloons.

2. A municipality is not empowered, by s. 7 of the Liquor Traffic Regulation Act, to pass any closing by-law, the intention of the section being to prohibit the sale during, *inter alia*, such hours as may be prescribed by the municipality under the authority of some other statute.

3. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad.

L. P. Duff, K.C., and *F. McB. Young*, for the appellant.

C. H. Barker, for the respondent.

[DRAKE, J., 24TH MARCH, 1902.]

REX v. SING.

Justice of the peace—Convictions—Separate offences—Disposition of both cases after hearing evidence in both.

Two informations were preferred before a justice of the peace against the accused for distinct offences of selling liquor to Indians. At the conclusion of the first case, the magistrate reserved his decision, and proceeded with the second case, in which he convicted, and then dismissed the first. On an application to quash the conviction, the magistrate stated on affidavit that in convicting he was governed only by the evidence in the case in which the conviction was made.

Held, that the postponement by the magistrate of his decision in the first case until he had concluded the second, did not, under the circumstances, render the conviction in the second case bad in law.

Regina v. McBerny, 3 Can. Crim. Cas. 339, distinguished.

Harold Robertson, for the applicant.

H. A. Maclean, contra.

IN CHAMBERS.

[MARTIN, J., 10TH OCTOBER, 1902.]

WARD v. DOMINION STEAMBOAT LINE CO.

*Summary judgment—Motion for—Affidavit of plaintiff—Cross-examination on
—Discretion to refuse.*

On the return of a summons for judgment under Order XIV., an application was made on behalf of the defendants for leave to cross-examine the plaintiff on his affidavit filed in support of the summons. No affidavit of merits had been filed on behalf of the defendants.

Held, refusing the application, that it is only in exceptional cases that a defendant will be permitted to cross-examine the plaintiff on his affidavit, and then only after the defendant has filed an affidavit of merits.

J. H. Lawson, for the plaintiff.

Higgins, for the defendants.

Supreme Court of Canada.

BRITISH COLUMBIA]

[28TH OCTOBER, 1902.

PAULSON v. BEAMAN.

Appeal—Right of—Final judgment—Order of appellate Court dismissing appeal from refusal of trial Judge to nonsuit.

This action was brought under s. 37 of the Mineral Act of British Columbia, R. S. B. C. 1897 c. 135, as amended, to adverse the defendants' application for certificate of improvements for "Pearl" mineral claim, situate near Kaslo, B. C.

The trial was begun before MARTIN, J., but before the plaintiff closed his case, an adjournment was granted to permit him to put in proof of the measurement shewing the extent of the encroachment of the "Pearl" on the "Iron Chief" mineral claim owned by the plaintiff. During the course of the trial it appeared that the map or plan filed under s. 37 by the plaintiff was not made as a result of a survey, but from measurements taken by the plaintiff's brother. The defendants then urged a dismissal of the action, contending that the map or plan was of no effect, but the trial Judge ordered it to be filed as part of the evidence, and declined to deal with its effect at that stage of the action.

The defendants appealed from the trial Judge's refusal to dismiss the action, to the full bench of the Supreme Court of British Columbia, and there contended that the action should have been dismissed, and that a postponement should not have been granted, because the plaintiff had not filed with the Mining Recorder a map made as a result of a survey. With this view the majority of the Court agreed, and directed a judgment to be entered dismissing the action and allowing the appeal. From this judgment the plaintiff appealed to the Supreme Court of Canada, and thereupon the defendants moved to quash the appeal, on the ground that the same was not from a *final judgment*, as provided by s. 24 of the Supreme and Exchequer Courts Act, but one within the discretion of the Court, and affecting only a matter of procedure.

E. P. Davis, K.C., for the defendants, relied upon *Solaman v. Warner*, [1891] 1 Q. B. 734; *Re Riddel*, 20 Q. B. D. 318, 512; *Standard Discount Co. v. La Grange*, 3 C. P. D. 67; *Maritime Bank v. Stewart*, 20 S. C. R. 105; *Rural Municipality of Morris v. London and Canadian Loan Co.*, 19 S. C. R. 434.

S. S. Taylor, K.C., for the plaintiff, was not called upon.

THE COURT held that under the interpretation of the words "final judgment" in the Supreme and Exchequer Courts Act, the judgment appealed from dismissing the action was a final judgment; and the motion to quash was dismissed with costs.

Exchequer Court of Canada.

[BURBIDGE, J., 14TH JULY, 1902.]

LUXFER PRISM CO. v. WEBSTER.

Patent for invention—Prisms for deflecting light—Anticipation—Novelty.

A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses and shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements.

Semble, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass, it would fail for want of novelty.

C. Robinson, K.C., and *F. Britton Osler*, for the plaintiffs.
Oughtred, for the defendants.

[10TH NOVEMBER, 1902.]

CALGARY AND EDMONTON R. W. CO. v. THE KING.

Railway—Land subsidy in the North-West Territories—Mines and minerals—Reservation in grant—53 V. c. 4, s. 2—Dominion Lands Act.

By 53 V. c. 4. the suppliant railway company, among others, were authorized to receive a grant of Dominion lands

of 6,400 acres for each mile of their railway, when constructed. Under the provisions of s. 2, the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees respectively of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of the Dominion Lands Act, which provided that all patents for lands in Manitoba and the North-West Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with full power to work the same.

Orders in council authorizing the issue of patents for the lands in question to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in those orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889.

Held, that the regulation reserving mines and minerals applied to all grants of lands made under the provisions of 53 V. c. 54, and that the omission of reference to such regulations in the orders in council authorizing patents to be issued did not alter the position of the suppliant railway company under the law.

Semble, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands.

HARGRAVE v. THE KING.

Crown—Postmaster's salary—Claim for difference between amount authorized and that paid—Interest—Civil Service Act, R.S.C. c. 17, s. 6 and sched. B.—51 V. c. 12, s. 12—Extra allowances.

By the Civil Service Act, R. S. C. c. 17, sched. B, a city postmaster's salary, where the postage collections in his office amount to \$20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor in Council or in the Postmaster-General to make the salary more or less than the amount provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment

of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute.

Upon his petition to recover the difference between the said amounts:—

Held, that he was entitled to recover.

2. That the provisions in s. 6 of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by vote of Parliament for that purpose" was no bar to the suppliant's claim, even if it could be shewn that if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the Treasury who are intrusted with the safe keeping and payment of the public money, and not to the Courts of law.

Collins v. United States, 15 Ct. of Clms. 35, referred to.

3. The suppliant was not entitled to interest on his claim.

4. The provision in s. 12 of the Civil Service Amendment Act, 1888, to the effect that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy-head, officer, or employee in the civil service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration, and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back.

I. F. Hellmuth, K.C., and *D. W. Saunders*, for the suppliant.

C. Fitzpatrick, K.C., A.-G., and *Newcombe*, K.C., for the respondent.

[17TH NOVEMBER, 1902.]

CORPORATION OF PILOTS FOR THE HARBOUR OF
QUEBEC v. THE "GRANDEE."

Ship—Pilots dues—Liability of barge for same—R.S.G. c. 80, s. 55.—
"Every ship which navigates."

Held, affirming the judgment of the local Judge for the Quebec Admiralty District, that the expression "every ship

which navigates," found in s. 58 of the Pilotage Act, R. S. C. c. 80, means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means and which must be moved or propelled or navigated by another vessel.

T. C. Casgrain, K.C., for the appellants.

C. Pentland, K.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, C.J.]

[19TH SEPTEMBER, 1902.

SMITH v. HUNT.

Mortgage—Pretended sale under power—Fraud—Purchasers for value without notice—Knowledge of agent—Redemption—Acts of parties to fraud—Damage by.

On an appeal from the judgment of MEREDITH, C.J., 2 O. L. R. 134, 21 Occ. N. 438:—

Held, that the defendant D. was not personally liable, as he committed no wrong in taking the assignment of the mortgage, and in exercising the power of sale wrought no change in the plaintiffs' rights, as the property in the hands of H., the purchaser, who became trustee for R., was redeemable unaffected by the sale. But the defendant H. was personally liable, as he was possessed of the legal title and had the legal power and control, and it was his sale and his act that prejudiced the plaintiff.

Judgment below varied.

J. L. Murphy, for the appellants.

W. R. Riddell, K.C., and *J. H. Rodd*, for the respondents.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[GRAHAM, E. J., 3RD NOVEMBER, 1902.]

WILLIS v. BEHIE.

Evidence—Foreign commission—Examination of absent plaintiff.

Action of replevin. After the commencement of the action one of the plaintiffs left the jurisdiction. Application was made on behalf of the plaintiffs to examine the absent plaintiff under a commission, the plaintiffs' solicitor stating that the absent plaintiff was joined by mistake.

McInnes, for the plaintiffs.

J. A. Chisholm, for the defendant, contended that the name of the absent plaintiff should first be struck from the record; that delay had occurred; and that the absent plaintiff and the defendant would contradict each other on vital points in the case, and both should be examined on the trial.

GRAHAM, E. J.:—I think the plaintiffs ought to have leave to issue a commission. The delay is satisfactorily accounted for, and, even if Wells Behie is a real plaintiff, the law permits a commission to be issued to take the evidence of a party. The fact that it is on the part of a plaintiff makes no difference.

[GRAHAM, E. J., 4TH NOVEMBER, 1902.]

McDONALD v. ROBERTSON.

Penalty—Nova Scotia Towns Incorporation Act—Qui tam action—Right of informer to bring—Stay—Statute of Limitations—Interpretation Act.

This was a *qui tam* action for the recovery of the penalties prescribed by the Towns Incorporation Act, R. S. N. S. c. 71, in the case of a person who acts as mayor after becoming disqualified. Section 56, s. s. 3, of the Act prescribes the penalty, namely, \$20 for each time he so acts. Section 238 provides that "all actions and prosecutions for penalties for

breach of any of the provisions of this chapter . . . may, when not otherwise therein provided, be prosecuted by the town or any officer thereof, or any person who prosecutes therefor, and shall be begun by information laid before the stipendiary magistrate of the town." Section 238, s.-s. 2, gives the stipendiary magistrate jurisdiction to enforce such penalties, and s.-s. 3 makes the Summary Convictions Act applicable. Section 242 states that all penalties collected should form part of the revenue of the town.

The Summary Convictions Act, R. S. N. S. c. 161, s. 2, provides: "In every case in which a penalty or imprisonment is prescribed by any . . . statute of Nova Scotia . . . and it is not provided in such chapter in what manner and by what procedure such penalty . . . may be recovered . . . such penalty shall be enforced on summary conviction before two justices or a stipendiary magistrate, as if the same was expressly so declared in such statute."

The Interpretation Act, R. S. N. S. c. 1, s. 23, s.-s. 45, provides: "Where a pecuniary penalty or forfeiture is imposed for a contravention of any enactment, then if no other mode is prescribed for the recovery thereof, and the same cannot be recovered upon summary conviction, such penalty or forfeiture shall be recoverable with costs by civil action or procedure at the suit of the Crown only, or of a private party suing as well for the Crown as for himself, before a Court having jurisdiction in the amount of the penalty in cases of simple contract. If no other provision is made for the appropriation of the penalty of forfeiture, one-half shall belong to the Crown and the other half shall belong to the private plaintiff, if there is any, and if there is none, the whole shall belong to the Crown."

The plaintiff claimed the right to bring the action as a common informer under the above provisions of the Interpretation Act. The defendant took out a summons to stay the action.

J. J. Power, for the plaintiff.

E. M. McDonald, for the defendant.

GRAHAM, E.J.:—This action must be stayed. The penalty is not given to a person aggrieved. But for the provisions in the Interpretation Act, the Crown alone could sue thereunder: *Bradlaugh v. Clark*, 8 App. Cas. 354. But the Interpretation Act does not allow the action to be maintained. Another mode of enforcing the penalty is provided in the

Towns Incorporation Act, and if that does not apply, the penalty can be recovered under the Summary Convictions Act. The fact that the six months' limitation to a recovery by summary conviction has expired does not enable a *qui tam* action to be now maintained, if it could not be maintained in the first instance. The Statute of Limitations for a *qui tam* action requires it to be brought within one year after the breach: 31 Eliz. c. 5, s. 5; *Dwyer v. Best*, L. R. 1 Ex. 152. An application to stay the action is the proper mode of taking advantage of the irregularity. *Chitty's Arch.* p. 377. The action must be stayed with costs.

[TOWNSHEND, J., 12TH NOVEMBER, 1902]

RUGGLES v. M. AND V. B. R. W. CO.

Judgment—Defence arising after action brought—Confession—Judgment for costs without Judge's order—Disposal of remaining defences.

The defendant under Order 24, Rules 1 and 2, pleaded a defence arising after action brought, which was a good answer to the whole action. The plaintiff confessed this defence and signed judgment against the defendant for costs under Rule 3 of Order 24, which provides that the plaintiff may deliver a confession of such defence, and may thereafter sign judgment for his costs up to the time of pleading such defence, unless the Court or a Judge shall otherwise order. The defendant moved to set aside the judgment because (1) it was entered up by the prothonotary without a Judge's order, and (2) such judgment could not be entered while the other defences remained undisposed of.

T. R. Robertson, for the plaintiff.

Wade, K.C., for the defendant.

TOWNSHEND, J.:—The words of the Rule specifically enable the plaintiff to sign a judgment without further proceedings except taxing costs, unless the defendant obtain an order otherwise. The result of the authorities seems to be that the subsequent defence amounts to a waiver of the original defence pleaded. It so operates in the present case. It would be futile to go to trial on the remaining defence, as there is no question remaining to be tried, as in *Hoght v. Tottenham*, [1892] W. N. 88, where North, J., compelled the plaintiff to go to trial. *Bridgetown, etc., Co. v. Barbados, etc., Co.*, 38 Ch. D. 378, is distinguishable. The motion must be dismissed with costs.

MANITOBA

In the King's Bench.

[KILLAM, C.J., DUBUC, J., 30TH OCTOBER, 1902.]

In re LISGAR DOMINION ELECTION.

*Parliamentary elections—Bribery—Treating—Supplying refreshments—
Agency—Delegates to Convention.*

Petition complaining of the undue election of a member of the House of Commons of Canada for the electoral district of Lisgar. It was based solely upon allegations of corrupt practices, and charged, in general terms and in the language of the statute, the commission by the respondent personally and through agents and others on his behalf of nearly all the acts specified by the Dominion Elections Act, 1900, as constituting corrupt practices.

By the particulars subsequently furnished and at the trial no attempt was made to connect the respondent himself with the commission of any corrupt practice, but evidence was given for the purpose of shewing that agents of the respondent were guilty of such.

In the address of counsel for the petitioners, after the completion of the evidence, it was contended that 12 cases of bribery had been proved.

The trial Judges found that, although, in some cases, payments were admitted, they had been trifling, and the evidence of some of the witnesses was unreliable, and in others, although the transactions were suspicious, it was not satisfactorily established that the money was given as a bribe.

In Bureau's case the evidence was that he purchased a dress and gave it to the daughter of Labossière, a hotel keeper. Bureau was working in the respondent's interest and stayed at Labossière's hotel; the daughter gave up her room to Bureau and he said he wanted to make her a nice present.

Held, that it was impossible to infer with any certainty that the present was made for the purpose of affecting the father's vote.

Counsel for the petitioners also contended that eight cases of corrupt treating had been proved. The petition contained

allegations of treating under all of the sections 109, 110, and 111 of the Election Act. But it did not appear that the particulars really charged any offence under s. 109. There was no evidence of any act which appeared to come within the section.

In Jobin's case the treating was on polling day. He lived in a locality where there was no licensed tavern. He was accustomed, according to his own account, to keep considerable quantities of wine and spirits on hand and to supply them quite freely to others in the way of hospitality, or as a matter of business.

Held, that under the circumstances the Court would not infer the intent necessary to create an offence under either s. 110 or s. 111.

In the case of Ami and Foley the charges were of treating in bars. The evidence of Ami's treating was of a very general and vague character. He stayed for some time at Labossière's hotel and seemed to have treated considerably, even including, at times, all in the bar room. The circumstances of the different occasions, or who were present, were not shewn.

Held, impossible, upon such evidence, to find the corrupt intent proved.

In Foley's case the charge in the particulars was of treating all of the voters—a large number present in the bar of Tremblay's hotel on a particular evening—and that Foley then announced "that although he was not the Government candidate, he had their money to spend."

The evidence shewed that Foley was at Labossière's, not Tremblay's hotel, and gave an invitation to all in the house to drink, and that what he said was that "if he wasn't a candidate, he had money to spend."

Foley's name was one of those brought before the convention which nominated the respondent as a candidate in the Government interest.

The evidence of the part taken by Foley in the contest was very vague and seemed in no way to support the view that this treating was done in the respondent's interest or for the purpose of influencing electors.

In the case of Watson, the charge against him and others associated with him, was of furnishing food for a meal at the house of an elector, to him and other electors, on the occasion of a meeting the night before polling day.

It might be inferred that the refreshments were supplied with intent to influence the electors, and that, in that sense, it was done corruptly. The suggestion, after the votes had been polled, of a further "treat" for the night of polling day was not without importance. That suggestion fell through.

Held, that the case could not be brought within s. 111, for which it seems necessary that either the meat or drink, or the money or a ticket to procure them, should be actually supplied.

In Fiset's case it was charged in general terms in the particulars that Fiset travelled about in the constituency and canvassed a large number of voters in certain specified polling districts, and "corruptly treated them, to induce them to vote for the respondent." The evidence shewed that Fiset did go about canvassing and he was driven by Jean Moreau. It was sought by the petitioners to shew that in so going about Fiset treated various electors, but objection was made to the allowance of such evidence on the ground that the particulars did not give the details required by the order, and the Court refused to hear evidence of treating in that way, not more definitely specified, or to allow the examination of Moreau for the purpose of obtaining information only. About a week before polling day Fiset spent an evening at Moreau's house; he had with him whisky and gin and gave a drink to one Cardinal, telling him it was "election whisky." The meeting was not arranged, but the neighbours just happened to come in. It was not shewn that Cardinal had a vote. Cardinal's evidence was given without objection, and he was cross-examined upon it.

The Court held they were not prevented from considering the charge on account of its not being specified in the particulars, but the way in which the evidence was brought out was to be taken into consideration. If such meetings were frequent or intentionally brought about, the inference of the corrupt intent would be almost irresistible. As it was, it could not be taken as absolutely clear.

As to the nature of agency in the abstract, in election law there does not now seem to be any room for doubt. In election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction, or employment, or request, or it may be by recognition and adoption of the services of one assuming to act without prior authority or request. It may be directly shewn or it may be inferred from circumstances. It may proceed directly from the supposed principal, or it may be created indirectly through one or more authorized agents.

The fact that a person is a delegate to or member of the convention or body which selects a candidate does not of itself make such person an agent of the chosen candidate.

Canvassing or other work in the promotion of an election does not *per se* establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency.

The respondent was nominated at a meeting of delegates from different portions of the constituency. The respondent did not appear to have definitely requested the assistance of these delegates in the contest, but at a general public meeting, after the close of the convention, he expressed the hope "that all his friends would go to work with a good will;" the respondent further stated that he wished it understood that he expected the delegates to assist at the election.

Held, that these and other general remarks did not seem sufficient to constitute all supporters of the Government or all Liberals, or even all such in the constituency, agents of the candidate.

Accompanying a candidate in his canvass is not sufficient in itself to constitute agency.

On the whole the Court found that none of the charges were sufficiently proved, and directed that the petition should be dismissed.

C. P. Wilson and J. R. Haney, for the petitioners.

H. M. Howell, K.C., and J. D. Cameron, for the respondent.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 26TH JUNE, 1902.]

BOOKER v. WELLINGTON COLLIERY CO.

Master and servant—Injury to servant—Employer's liability—Operating colliery without statutory manholes—Allowing trip to run outside customary hours—Negligence—Railway—Excessive damages.

In the defendants' coal mine the haulage slope, which was necessarily used as a travelling road by the workmen, was not provided with manholes at intervals of not more than twenty yards, as required by the Coal Mines Regulation Act, and on account of this lack of sufficient manholes it was the

custom of the defendants not to run the trip during the time the workmen were going to and coming from work. The plaintiff while coming from work was run into and injured by the trip, which had been started off during a prohibited time. The trip was a train of cars, operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by the defendants' negligence in letting the trip down, and on the verdict judgment was entered for the plaintiff for \$1,424 and costs.

An appeal to the full Court was dismissed, the Court refusing to reverse the findings of fact or to interfere with the damages as excessive.

Held, also, that the place in question was a "railway" within the meaning of the Employers' Liability Act.

A. P. Luxton, for the appellants.

C. H. Barker, for the respondent.

[This decision has since been affirmed by the Supreme Court of Canada.]

[MARTIN, J., 8TH MAY, 1902.]

REX v. HOLMES.

Criminal law—Procedure—Grand jury—Indorsing names of witnesses on indictment—Abortion—Form of indictment.

Motion to quash an indictment at assize. Amongst the witnesses who gave evidence before the grand jury were two who had been summoned by the grand jury of its own motion, and whose names were not indorsed on the bill of indictment.

Held, that the provisions of s. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate the indictment.

An indictment under s. 273 of the Code charging accused "with unlawfully using on her own person . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient.

W. A. Macdonald, K.C., for the motion.

C. R. Hamilton, contra.

In the County Court.**IN CHAMBERS.**

• [MARTIN, J., 8RD NOVEMBER, 1902.]

ROBERTS v. FRASER.*County Court—Practice—Discovery—Oral examination.*

Summons on behalf of the defendant for an order for the oral examination of the plaintiff for discovery.

Held, discharging the summons, that a County Court Judge has no jurisdiction to grant an order for an oral examination for discovery, except in the case of a failure to answer interrogatories as provided in s. 126 of the County Courts Act.

Frank Higgins, for the summons.

G. E. Powell, contra.

THE CANADIAN LAW TIMES ANNUAL DIGEST

OF CANADIAN CASES REPORTED AND
NOTED DURING THE YEAR 1902,

DECIDED IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, IN
THE SUPREME AND EXCHEQUER COURTS OF CANADA,
AND IN THE COURTS OF ALL THE PROVINCES,

AND

A BRIEF SUPPLEMENTARY DIGEST OF CASES DECIDED BY THE
COURT OF APPEAL AND HIGH COURT OF JUSTICE FOR ONTARIO,
DURING THE YEAR 1902, AND REPORTED IN VOLUME I.
OF THE ONTARIO WEEKLY REPORTER,

TOGETHER WITH

A TABLE OF THE CASES DIGESTED
(*With References also to the Occasional Notes for 1902.*)

AND A TABLE OF THE CASES AFFIRMED, FOLLOWED, ETC., IN THE
CASES DIGESTED.

EDITED BY
EDWARD B. BROWN, B.A.,
Of Osgoode Hall, Barrister-at-Law.

•

TORONTO:
THE CARSWELL CO., LIMITED, 30 ADELAIDE STREET EAST,
1903.

Entered according to Act of the Parliament of Canada, in the year one-thousand nine hundred and three, by THE CARSWELL COMPANY, Limited, in the Office of the Minister of Agriculture.

List of Reports Containing the Cases Comprised in this Digest with the Mode of Citation.

COURTS.	REPORTS AND MODE OF CITATION.
Judicial Committee of Privy Council	[1902] A. C.
Supreme Court of Canada	31 S. C. R. (part), 32 S. C. R. (part).
Exchequer Court of Canada	7 Ex. C. R. (part).
Ontario—All the Courts	2 O. L. R. (part), 3 O. L. R., 4 O. L. R. (part).
Quebec—King's Bench	Q. R. 10 K. B. (part), Q. R. 11 K. B. (part).
Quebec—Superior Court	Q. R. 19 S. C. (part), Q. R. 20 S. C., Q. R. 21 S. C. (part).
Quebec—Practice	4 Q. P. R. (part), 5 Q. P. R. (part).
Nova Scotia—Supreme Court	34 N. S. Reps., 35 N. S. Reps. (part).
New Brunswick—Supreme Court	35 N. B. Reps. (part).
New Brunswick—Equity	2 N. B. Eq. Reps. (part).
Manitoba—King's Bench	14 Man. L. R. (part).
British Columbia—Supreme Court	8 Brit. Col. L. R. (part), 9 Brit. Col. L. R. (part).
North-West Territories—Supreme Court	1 Terr. L. R. (part), 4 Terr. L. R. (part), 5 Terr. L. R. (part).
Canadian Law Times Occasional Notes	22 Occ. N.

CONTENTS OF DIGEST NUMBER.

	COLUMN.
Index of Subjects.....	i
Table of English Cases	ix
Table of Cases Noted and Digested	i
Table of Cases Affirmed, etc..	xiv
Digest	1
Index-Digest Ontario Weekly Reporter	At end of volume.

TABLE OF THE NAMES OF THE CASES

IN THE OCCASIONAL NOTES, 1902, AND THE ANNUAL DIGEST, 1902.

The figures in italics refer to the pages of the OCCASIONAL NOTES, 1902; the figures in ordinary type refer to the columns of the ANNUAL DIGEST, 1902.

Cases marked with the asterisk have not been published in the regular Reports.

A.

Abbott v. Atlantic Refining Co., *411*, 393.
 Acorn v. Hill, 251.
 Adams v. Bank of Montreal, 53, 82.
 Adams v. Mulligan, 186, 190.
 Agricultural S. and L. Co. v. Alliance Assce. Co., 229.
 Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co., 229.
 Aiton v. McDonald, 37, 119.
 Algoma Central R. W. Co. v. The King, 85, 96.
 Allan v. Fortier, 257.
 Allan v. Rever, *294*, 173.
 Allen and Town of Napanee, *In re*, *412*, 314.
 American Stoker Co. v. General Engineering Co. of Ontario, 367.
 Anderson v. Hicks, 354.
 Anderson v. Mikado Gold Mining Co., *175*, 283.
 Arbec v. Lussier, 16, 319.
 Arcand v. Yon, 4.
 Archambault v. Archambault, 16, 504.
 Archbold, *In re*, 502.
 Archibald v. Lawlor, 264.
 Armitage, *Ex p.*, 199.
 Armstrong v. Canada Atlantic R. W. Co., *379*, 287.
 Armstrong v. Lancashire Fire Ins. Co., *146*, 509.
 Armstrong v. Provident Savings Life Assce. Socy., *13*, 230.
 Army and Navy Clothing Co. of Toronto, *In re*, *11*, 93.
 Ash v. Methodist Church, 3, 79.
 Ashworth v. Montreal and Atlantic R. W. Co., 123.
 Assessment Act, *In re*, *247*, 34.
 Atkinson v. Borland, 203.
 Attorney-General v. Lovitt, 417.
 *Attorney-General v. Power, *397*, 492.
 Attorney-General v. Scully, 275.
 Attorney-General v. Waverley Gold Mining Co., 298.
 Attorney-General for British Columbia v. Ludgate, 148.
 Attorney-General of Manitoba v. Manitoba License Holders' Assn., 97.
 Auger v. Montambault, 124.
 Auger v. Moreau, 4.
 Awde v. Chaurest, 361.
 Ayer v. Estabrooks, 328, 502.

B.

Bachand v. Lalumière, 65.
 Bagg v. Town of St. Louis, 39.
 Bagshaw v. Johnston, 33, 291.
 Bailey v. Gillies, 289, 108.
 Bailey v. Reinhardt, 474.
 Baker v. Gingras, 211.
 Balfour v. Toronto R. W. Co., *221*, 20.
 Balgonie Protestant Public School Trustees v. Canadian Pacific R. W. Co., 34.
 Bank of British North America v. Laporte, 43.
 Bank of British North America v. Robert Ward & Co. (Ltd), 462.
 Bank of Montreal v. Bent, 11.
 *Bank of Montreal v. Burns, *342*, 78.
 Bar of Montreal v. Duff, 133.
 Bank of Montreal v. Dunlop, *327*, 302.
 Bank of Montreal v. Hatch, 58, 188.
 Bank of Montreal v. Maritime Sulphide Fibre Co., 37, 91.
 Bank of Montreal's Claim, 22, 57.
 Bank of Toronto v. St. Lawrence Fire Ins. Co., 78.
 Barbe v. Barbe, 412.
 Barbers' Assn. of Province of Quebec v. Blanchard, 371.
 *Bartlett v. Nova Scotia Steel Co., *261*, 24.
 Bastien v. Desjardins, 378.
 Baston v. Toronto Fruit Vinegar Co., *232*, 106.
 Batzold v. Upper, *257*, 179.
 Bauld v. Fraser, 388.
 Baxter v. Jones, *372*, 391.
 Baxter v. Kennedy, 260.
 Beam v. Beatty, *58*, *381*, 220.
 Beaubien v. Lynch, 377.
 Beaubien v. Rioux, 116.
 Beaubien Produce and Milling Co. v. Lecuyer, 187.
 Beauchamp v. Beauchamp, 209, 383.
 Beauchamp v. Gourde, 95.
 Beauchamp v. Gourre, 508.
 Beauchemin v. Fournier, 41.
 Beaudin v. City of Montreal, 440.
 Beaudoin v. Dubrule, 27.
 Beaudoin v. Gaudry, 475.
 Beaudry v. Harrigan, 257.
 Beauharnois Dominion Election, *In re*, *6*, *193*, 348, 349.

- Beaulac v. Lupien, 381.
 Beaumont v. Lamonde, 19.
 Belanger v. Carboneau, 348.
 Belfrey v. Frank, 185.
 Bell v. Royal Bank of Canada, 460.
 Belling v. City of Hamilton, 110, 486.
 Berthiaume v. Kent, 103.
 Bertrand v. Anderson, 437.
 Bertrand v. Angers, 248.
 *Bertudato v. Fauquier, 34, 118.
 Bilodeau v. Benoit, 50.
 Birkbeck Loan Co. v. Johnston, 160, 469.
 *Birkett v. Brewster, 93, 291.
 Bisailon v. Curé, &c., of St. Valentin, 239.
 *Black v. Hughes, 220, 288.
 Blackwood v. Mussen, 2.
 Blackwood v. Percival, 268, 331, 417, 241, 396.
 Blanchard Estate, *In re*, 250.
 Blank Estate, *In re*, 193.
 Bleekir v. Chisholm, 297.
 Boggs v. Bennett Lake and Klondike Navigation Co., 167.
 Boisclair v. Proteau, 133.
 Boisseau v. Canadian Pacific R. W. Co., 353, 286.
 Bolduc, *In re*, 254.
 Bolduc v. Larose, 360.
 Bongard, *In re*, 197.
 Bonhomme and Burnett, *In re*, 50.
 Booker v. Wellington Colliery Co., 436, 286.
 Booth v. Booth, 131, 291.
 Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal, 275, 456.
 Bouchard v. Bastien, 272.
 Boucher v. Montour, 219.
 Boucher v. Morrison, 265, 370.
 Bourassa v. Confederation Life Assn., 120.
 Bourget v. Lefebvre, 383.
 Boyd v. McKay, 286, 351, 352.
 Boyle v. Victoria Yukon Trading Co., 377, 242, 513.
 Boys' Home v. Lewis, 238.
 Bradburn and Turner, *In re*, 142, 476.
 Brampton Gas Co., *In re*, 370, 90.
 Brantford Electric and Operating Co. v. Brantford Starch Works, 13, 158.
 Briggs v. Newswander, 277, 100.
 British Columbia Board of Trade Building Assn. v. Tupper, 127.
 *British Columbia Provincial Loan Assn. v. Charnock, 155, 305.
 British Columbia Stock Exchange, Limited, v. Irving, 204.
 *British Columbia Timber and Trading Co. v. Leberry, 273, 288.
 Bromwell v. O'Farrell, 377, 509.
 Bromillard v. Shawl, 40.
 Brown v. City of Hamilton, 324, 313.
 Brown v. Craft, 287.
 Brown v. London Street R. W. Co., 78, 336.
 Brown v. Moore, 196, 105.
 Brown v. Wiseman, 423.
 Browne v. Gault, 390.
 Bruneau v. Banque Jacques-Cartier, 363.
 Brunet v. Bergeron, 117.
 Brunet v. Berthiaume, 476.
 Brunet v. Marien, 193.
 Bryce v. Township of Brooke, 254, 255, 13, 412.
 Bryce v. Wilks, 56.
 Burland v. City of Montreal, 318.
 Burland v. Earle, 87.
 Burrard Dominion Election, *In re*, 10, 346.
 Byer v. Grove, 28, 165.
- C.
- Cabana v. Latour, 363.
 Calder v. Hallett, 424.
 Calder v. Law Society of British Columbia, 258.
 Calgary and Edmonton R. W. Co. v. The King, 426, 408.
 Came v. Consolidated Car Heating Co., 16, 369.
 Cameron, *In re*, 493.
 Campean v. Ottawa Fire Ins. Co., 125.
 Canadian Asbestos Co. v. Glasgow and Montreal Asbestos Co., 17.
 Canadian Bank of Commerce v. Rolston, 232, 184.
 Canadian Bank of Commerce v. Town of Toronto Junction, 97, 324.
 Canadian Breweries (Limited) v. Allard, 181.
 Canadian Camera and Optical Co., *In re*, 13, 90.
 Canadian Congregational Missionary Society v. Larivière, 43.
 Canadian Fire Ins. Co. v. Robinson, 8, 227.
 Canadian General Electric Co. v. Ship-ton, 474.
 Canadian Mining and Investment Co. v. Wheeler, 123, 246.
 Canadian Mutual Loan Co. v. Burns, 303.
 Canadian Pacific R. W. Co. and City of Toronto, *In re*, 235, 252.
 Canadian Pacific R. W. Co. and Macleod Public School District, *In re*, 38.
 Canadian Pacific R. W. Co. and Town of Macleod, *In re*, 33.
 Canadian Pacific R. W. Co. and Village of Verdun, *In re*, 39.
 Canadian Pacific R. W. Co. v. City of Montreal, 315.
 Canadian Pacific R. W. Co. v. Roy, 16, 406.
 *Capstick v. Hendry, 35, 49.
 Cardinal v. Brodeur, 373.
 Carleton Place Methodist Church Trustees v. Keyes, 50, 80.
 Carleton Place Voters' Lists, *In re*, 108, 353.
 Carr v. O'Rourke, 207, 194.
 Carriere v. City of Montreal, 147.
 Carscallen v. Madole, 363, 352.
 Carswell v. Langley, 97, 50.
 Carte v. Dennis, 110, 178, 180.
 Carter v. McLean, 265.
 *Cartier v. Genser, 476, 55, 56.
 Cartwright School Trustees and Town-ship of Cartwright, *In re*, 288, 13, 425.

- Cavanagh v. McIlmoyle, 266.
 Centaur Cycle Co. v. Hill, 253, 386, 14, 15.
 Centre Bruce Provincial Election, *In re*, 286, 345.
 Centre Star Mining Co. v. British Columbia Southern R. W. Co., 483.
 Centre Star Mining Co. v. Rossland Miners' Union, 166.
 Chalmers v. Fysh, 10.
 Chalmers v. Shoe Wire Grip Co., 117.
 Chapelle v. The King, 296.
 Chapleau v. Town of St. Louis, 382.
 Chapman, *In re*, 259, 499.
 Charbonneau v. Alarie, 95.
 Charette v. Leveillé, 242.
 Charpentier v. Quebec Bank, 256.
 Chateauguay and Northern R. W. Co. v. Trenholme, 404.
 Chatham Banner Co., *In re*, 22, 57.
 Chaussé v. Olivier, 321.
 Cheval v. Sénécal, 378.
 Chevalier v. Ross, 96, 385.
 Chong v. McMorran, 357.
 Choquette v. Leclaire, 66.
 *Chicogna v. McHeather, 309, 45.
 Citizens Light and Power Co. v. Town of St. Louis, 314.
 Clark v. Hamilton, 61, 120.
 Clark v. Wilder, 51.
 Claverie v. Gory, 178.
 Clayoquot Fishing and Trading Co., *In re*, 50.
 Cleary v. Boscowitz, 41, 278, 295, 297.
 Clergue v. McKay, 64, 148, 162, 169, 170.
 Clergue v. Murray, 354, 392.
 Clermont v. Charest, 238.
 Clifford v. Beauport Brewery Co., 373.
 Coaticook, Town of, v. People's Telephone Co., 18, 313, 443.
 Codville v. Fraser, 123, 54.
 Cogswell v. Grant, 262.
 Coit v. Dowling, 100.
 Collom v. Manley, 278, 297.
 Columbia and Western R. W. Co., *In re*, 408.
 Commercial Bank of Windsor v. Morrison, 196, 64.
 Commercial Bank of Windsor v. Smith, 63.
 Common School Fund and Lands, *In re*, 25.
 Confederation Life Assn. v. Brown, 396.
 *Conn v. Fitzgerald, 345, 260.
 Connolly v. Baie des Chaleurs R. W. Co., 355.
 Connolly v. Montreal Park and Island R. W. Co., 157.
 Connolly v. Stanbridge, 18, 133.
 Conrad v. Alberta Mining Co., 511.
 Consolidated Car Heating Co. v. Came, 183.
 Cooke v. Wilson, 168, 166.
 Copland v. Canadian Pacific R. W. Co., 459.
 Cornwall v. Halifax Banking Co., 360, 223.
 Côté v. Cantin, 181, 256.
 Counsell v. Livingston, 360, 66.
 Cournoyer v. St. Martin, 272.
 Courteau v. Skelly, 214, 215.
 Covert v. Pettijohn, 308, 483.
 Cox v. Nova Scotia Telephone Co., 488.
 Cox v. Schack, 188, 420.
 *Coyne v. Ryan, 12, 171.
 Crawford, *Re*, 493.
 Crédit Foncier Franco-Canadien v. Dufresne, 208, 210.
 Crevier v. Cloutier, 431.
 Crevier v. Evans, 77, 383.
 Crewe v. Mottershaw, 422, 200.
 *Crockett v. Academy of Music, 301, 85.
 Crosby v. Ball, 324, 231.
 Crosskill v. Sarnia Ranching Co., 36.
 Crown Corundum and Mica Co. v. Logan, 159, 4.
 Crow's Nest Pass Coal Co. v. Bell, 407, 160.
 Currie v. Cunin, 215.
 *Cummings v. Ryan, 150, 366.
 Cushen v. City of Hamilton, 282, 371.
 Cusson v. Vaillancourt, 507.
- D.
- Dagenais v. Caron, 350.
 Dahmé v. Supreme Court of the Order of Foresters, 233.
 Daigneault v. Emerson, 247.
 Dallas v. Town of St. Louis, 194, 324.
 Dallin v. Weaver, 112.
 Daly v. Robertson, 485.
 Dansereau v. Bradshaw, 45.
 Davidson v. Francis, 328, 101.
 Davidson v. Manitoba and North-West Land Corp., 305, 393.
 Davidson v. Stuart, 266, 156, 337.
 Davis v. Crown Point Mining Co. of Ontario, 52, 291.
 Davis v. Hord, 285, 292, 14, 124.
 De Bury v. De Bury, 184, 217.
 Décary v. Bro dit Pominville, 56.
 Dechène v. Dussault, 505.
 *De Forest, *In re*, 400, 473.
 De Kerouack v. Gauthier, 213.
 Delage v. Delisle, 335.
 Delisle v. McCrea, 122.
 Delpit v. Côté, 277.
 De Martigny v. Bienvenu, 160.
 Demamez, *In re*, 49.
 Demers v. Lemieux, 367.
 Deneen v. McLeod, 215.
 Descormiers v. Hyland, 186.
 De Sieyes v. Painchaud, 44.
 Desjardins v. Bastien, 304.
 Desjardins v. Lamoureux, 355.
 Desjardins v. Masson, 191.
 Desmarteau v. Viau, 51.
 Destroismaisons v. Dominion Ice Co., 383.
 Devlin v. Charlebois, 43.
 Diamond Glass Co. v. Okell Morris Co., 190, 115.
 Dickson v. The "Comrade," 436.
 Dill v. Wheatley, 62.
 Dillon v. Atlantic and Lake Superior R. W. Co., 189, 190.
 Dion v. Fafard, 161.
 Dixon v. Dauphinee, 11, 70.

Dixon v. Mackay, 374, 191, 201, 246.
 Dodge v. Smith, 52, 176.
 Doherty v. Millers and Manufacturers
 Ins. Co., 295, 228.
 Doidge v. Royal Templars of Temperance,
 321, 232.
 Dominion Burglary Guarantee Co. v.
 Wood, 151, 3.
 Dominion Cartridge Co. v. McArthur, 5,
 282.
 Dominion Coal Co. v. The "Lake On-
 tario," 435.
 Dominion Cotton Mills Co. v. General
 Engineering Co. of Ontario, 367.
 Donnelly, *In re*, 10, 250.
 Donnelly v. Rafter, 373.
 Donohue v. Donohue, 193, 210.
 Doolittle v. Electrical Maintenance and
 Construction Co., *In re*, 136, 130.
 Dorval, Village of, v. Legault, 414.
 Doull v. Keefe, 185.
 Dover v. Denne, 204, 466.
 Dowler v. Union Assurance Society, 36.
 Drew v. The King, 144.
 Drouin v. Laurier, 377.
 Drouin v. Morrisette, 79, 478.
 Drysdale v. Union S. S. Co., 74, 434.
 Duclos v. Beaumier, 41.
 Dufresne v. Fortin, 331.
 Dufresne v. Superior, 48.
 Duhaime v. Parish of St. Francois du
 Lac, 269.
 Dulmage v. White, 260, 479.
 Duncombe, *In re*, 167, 499.
 Dunfy v. Kelly, 209.
 Dunn v. Prescott Elevator Co., 257, 47.
 Dunsmuir, *In re*, 39.
 Dunsmuir v. Colonist Printing and Pub-
 lishing Co., 86.
 Dupuis v. Beaudry, 187.
 Dupuis v. Dupuis, 17, 108, 379.
 Dupuis v. McTavish, 216.
 Durocher v. Degré, 278.
 Duyon v. Le Blanc, 465.

E.

Ecclesiastiques du Séminaire des Missions
 Etrangères v. Kieffer, 481.
 Edmonton By-law, *In re*, 310, 362.
 Edmonton, Town of, v. Brown, 10, 485.
 Elizabethtown, Township of, v. Township
 of Augusta, 191, 316.
 Elliott v. Fraser, 374.
 Elliott v. Hamilton, 412, 49.
 England v. England, 217.
 Equitable Savings, Loan, and Building
 Assn., *In re*, 386, 14.
 Esquimalt and Nanaimo R. W. Co. v.
 New Vancouver Coal Co., 387.
 Ethier v. Legault, 192, 22, 349.
 Evans, *In re*, 164, 494.
 Evans v. Chaput, 190.
 Evans v. Jaffray, 117, 133, 169.
 Excelsior Life Ins. Co. v. Employers' Lia-
 bility Assce. Corp., 94, 26.

F.

Fairclough v. Smith, 289.
 Fairfield v. Ross, 413, 5.
 Fallis v. Gartshore-Thompson Pipe
 Foundry Co., 283, 337.
 Farand v. Emond, 187, 188, 341.
 Faulkner, *In re*, 94, 26.
 Faulkner v. Faulkner, 270.
 Fawcett v. Canadian Pacific R. W. Co.,
 39, 244, 9, 285.
 Federation Brand Salmon Canning Co.
 v. Short, 367.
 Feigenbaum v. Jackson, 173.
 Ferguson v. Grand Trunk R. W. Co., 132,
 286.
 Filiatrault v. Corporation of Coteau
 Landing, 311.
 Filiatrault v. Feeny, 180.
 Findlay v. Canadian Pacific R. W. Co.,
 405.
 Findlay v. Ottawa Furnace and Foundry
 Co., 200, 454.
 Finnie v. City of Montreal, 356, 20, 388.
 Fisher v. Bradshaw, 281, 69.
 Flannaghan v. Healy, 105.
 Florida Mining Co., *In re*, 244, 273, 92, 94.
 *Fooks v. Cox, 44, 242.
 Ford v. Hodgson, 177, 452.
 Ford v. Metropolitan R. W. Co., 227, 447.
 Ford v. Phillips, 257.
 Foreman v. Seely, 67, 438.
 Forfar v. Sage, 474.
 Fournier v. Lamoureux, 281.
 Fowle v. Ocean Accident and Guarantee
 Corporation, 289, 224.
 Fox v. Morris, 384.
 Francoeur v. Paradis, 195.
 *Frankel v. Grand Trunk R. W. Co., 176,
 229, 22, 401.
 Franklin v. City of Montreal, 369.
 Fraser v. Murray, 68.
 Fraser v. Price, 18.
 Fréchette v. Martin, 437.
 Fréchette v. Prevost, 30.
 Freeman v. Stewart, 442.
 Friel v. Stinton, 461.
 Fry v. Botsford, 378, 421, 123, 124, 294.

G.

Gagné v. Victoriaville Society of St. John
 Baptist, 131.
 Gagnon v. Dunbar, 264.
 Galerneau v. Bertrand, 221.
 Gallagher v. City of Moncton, 169, 411.
 Gallagher v. McQueen, 414.
 Gallagher v. Wilson, 4.
 Garand v. Malo, 189.
 Garand v. Roussin, 184.
 Garbacht v. Silverman, 113.
 Gardner, *In re*, 119, 497.
 Gareau v. Montreal Street R. W. Co., 4,
 340.
 Garneau v. Gaudet, 378, 398.
 Gaudeau v. Tetu, 187, 212.
 Gaul v. Township of Ellice, 157, 274.
 Gauthier v. Barcelo, 245.
 Gauthier v. Drouin, 63.

- Geddes and Cochrane, *In re*, 54, 254.
 Gegg v. Bassett, 114, 454.
 Gélinas v. St. Maurice Lumber Co., 205.
 Geoffrion v. Montreal Park and Island R. W. Co., 486.
 Germain v. Dussault, 42.
 Giard v. Lachance, 413.
 Gignac v. People's Telephone Co., 418.
 Giguère v. Jacob, 198.
 Gilbert Blasting and Dredging Co. v. The King, 82, 152.
 Gildner v. Busse, 137, 162.
 Gillett v. Lumsden, 297, 455.
 Gilman v. Fenwick, 459.
 Gingras v. Finley, 117.
 Girard v. Letellier, 244.
 Girard v. Metropolitan Life Ins. Co., 233.
 Girard v. Vincent, 214.
 Girouard v. Canadian Pacific R. W. Co., 403.
 Giroux v. Bergevin, 346.
 Glenn v. Rudd, 113, 109.
 Globe Savings and Loan Co. v. Employers' Liability Asso. Corp., 397.
 Gloucester, Township of, v. Canada Atlantic R. W. Co., 63, 284, 490.
 Godbout v. McPeak, 217, 382.
 Goldberg v. Giffin, 44.
 Gordon v. Pinder, 419.
 Gosselin v. Bellefleur, 17, 160.
 Gough, *In re*, 112, 467.
 Grand Forks and Kettle River R. W. Co. v. Vancouver, Victoria, and Eastern R. W. and Navigation Co., 128, 221.
 Grange v. Sauvé, 265.
 Grant v. Acadia Coal Co., 261, 359, 284, 465.
 Grant v. Dupont, 27.
 Gravel v. Durocher, 132.
 Gravel v. Lafontaine, 355.
 Graves v. Gorrie, 172, 110.
 *Gray v. Guernsey, 402, 104.
 Great North-West Telegraph Co. v. Dalby, 354.
 Green, *Es p.*, 97.
 Grenier v. Jacques Cartier Pulp and Paper Co., 122.
 Grier v. David, 17, 384.
 Griffin v. Toronto R. W. Co., 368.
 Grimmer v. County of Gloucester, 276, 325.
 Grosbois v. Bienville, 131.
 Guay v. Guay, 265.
 Guay v. St. Jerome and St. Monica School Commissioners, 116.
 Guertin v. Molleur, 120, 397.
 Guillot v. Garant, 380.
 Guimond v. Blanchard, 264.
 Guimond v. Gravel, 51.
 Gunn v. Harper, 208, 225, 244.
- H.
- Haddad v. Marcotte, 507.
 Haggerty v. Lenora Mount Sicker Copper Mining Co., 106, 8, 104.
 Hall v. Alexander, 178, 175.
 Hall v. Fenton, 168.
 Hall v. Hatch, 58, 188.
 Hall v. Kenton, 47.
 Halton Provincial Election, *In re*, 362, 350.
 Hambly v. Albright, 201, 368.
 Hamel v. Parish of St. Jean Deschaillons, 313.
 Hamelin v. Bannerman, 7, 159.
 Hamelin v. Perrault, 40.
 Hanson v. Village of Grand'mère, 310.
 Hargrave v. The King, 427, 154.
 Hargrave v. Royal Templars of Temperance, 1, 20.
 Harris v. Dunsmuir, 341, 402.
 Harris v. Dustin, 421.
 Harris v. Harris, 73, 42.
 Hart v. City of Halifax, 326.
 Hart v. Parsons, 434.
 Hawkins v. Batzold, *In re*, 14, 398.
 Hawley v. Wright, 198, 335.
 Hayes v. Thompson, 422, 310.
 *Haynen v. Murdle, 152, 271.
 Hébert v. Michaud, 215.
 Heffernan v. Sheridan, 306.
 Hennessey v. Farquhar, 275.
 Henning v. Maclean, 405, 494.
 Hertel v. Foley, 355.
 Hetu v. Poirier, 48.
 Hevé v. Royal Electric Co., 358, 336.
 Higgins v. Clish, 425.
 Higgins v. Stephens, 195, 21.
 Hill Estate, *In re*, 503.
 Hill v. Hill, 107, 11, 210.
 Hill v. Howley, 187.
 Hislop v. Joss, 144, 303.
 Hochelaga, County of, v. Laplaine, 318.
 *Hodgins v. O'Hara, 29, 133, 87.
 Hoffstrom v. Stanley, 337, 289.
 Hogaboom v. The King, 88, 153.
 Hogle v. Rockwell, 399.
 Hogue v. Ogilvie, 44.
 Holland, *In re*, 164, 417.
 Holmes v. Town of Goderich, 222, 104.
 Holness v. Niebergall, 287.
 Hood v. Tyson, 113.
 *Hoover's Claim, 21, 90.
 Hopkin v. Hamilton Electric Light and Cataract Power Co., 284, 339.
 Hospital for Sick Children v. Chute, 173, 501.
 Houle v. Paquet, 508.
 Hughes v. Chambers, 333, 78, 426.
 *Hull v. Allen, 138, 179.
 Hull Electric Co. v. Ottawa Electric Co., 97, 313.
 Hulme v. Chant, 216, 273.
 *Hume v. Hume, 147, 376.
 Hunter v. Boyd, 50, 194.
 Huot v. Bienville, 211.
 Huot v. Quebec R. W. Light, and Power Co., 404.
 Hutchinson v. Conway, 27.
 Hutton v. Justin, 23, 467.
 Hyde v. Lefavre, 226.
 Hyland v. Canadian Development Co., 170, 181.
- I.
- Imperial Bank v. Hull, 58.
 *Imperial Life Ins. Co. v. Charlebois, 417, 234.

Insurance Co. of North America v. Borden, 359.
 Iredale v. McIntyre, 330, 410.
 *Ireland, *In re*, 151, 429.

J.

Jackson v. Grand Trunk R. W. Co., 12, 249, 406, 463.
 Jacques-Cartier Bank v. Lalande, 61.
 James v. Grand Trunk R. W. Co., 2, 404.
 Jeannotte v. Pariseau, 365.
 Jelly, *In re*, 64, 476.
 Jobin v. Rainville, 384.
 Johnson v. Moore, 426.
 Johnston, *In re*, 24, 441.
 Jones v. Bissonnette, *In re*, 53, 512.
 *Jones v. Galbraith, 76, 356.
 Jones Stackers Co. v. Green, 264, 107.
 Judgments Acts, *In re*, 113.
 Jutras v. Mercure, 450.

K.

Kaine v. Matthews, 377.
 Kaulbach v. Archbold, 9, 504.
 Kaulbach v. Mader, 192.
 Kavanagh v. Norwich Union Fire Ins. Co., 83.
 Kedy v. Davison, 26.
 Keerson, *Ex p.*, 276.
 Keith v. Ottawa and New York R. W. Co., 114, 403.
 *Kelly, *In re*, 262, 196.
 Kemp v. Chown, 89, 369.
 Kent v. Community of Sisters of Charity of Providence, 92.
 Kerr, *In re*, 37.
 Kettle River Mines, Limited v. Bleasdel, 103, 9.
 Kidd v. Harris, 25, 131, 12, 278.
 Kidd v. McKinnon, 30.
 Kidder v. Campbell, 500.
 King and Law Society of British Columbia, *In re*, 154, 258.
 King v. Law, 107, 102.
 King v. Municipality of Matsqui, 42, 34.
 Kingston, City of, and Kingston Light, Heat, and Power Co., *In re*, 181, 329.
 *Kinsman v. Onderdonk, 262, 44.

L.

Labelle v. Leonard, 347.
 Lachance v. Casault, 459.
 Lafontaine v. Choquette, 381.
 Lafontaine v. Lafontaine, 115.
 Lafrance v. Parent, 117.
 Laishley v. Goold Bicycle Co., 372, 279.
 Laliberté v. Gingras, 198.
 Lalonge v. Corporation of St. Vincent de Paul, 119.
 Lamalice v. Electric Printing Co., 341, 371.
 Lambe v. Thompson S. S. Line, 508.
 Lamont v. Canadian Pacific R. W. Co., 407.
 Lamontaigne v. Town of Macleod, 39.
 Lang and Smith, *In re*, 212, 409.
 Langevin v. Grand Trunk R. W. Co., 513.

Langley v. Law Society of Upper Canada, 99, 358.
 Langley v. Van Allen, 222, 53.
 Lantaigne v. Kelling, 341.
 Laporte v. Duplessis, 181.
 Lareau v. Martineau, 439.
 Larivière v. Town of Richmond, 78, 305.
 Larochelle v. Lafleur, 7.
 Larocque v. City of Montreal, 185, 336.
 Latour v. Yasinooski, 432.
 Lauterman v. Vineberg, 3.
 Law v. Acton, 419, 496.
 Lawr v. Parker, 294.
 Leach and City of Toronto, *In re*, 406, 34.
 Leblanc v. Robitaille, 78, 149.
 Leckie v. Stuart, 107.
 Lee v. Canadian Mutual L. and I. Co., 60, 301.
 Lefebvre v. Castonguay, 95.
 Lefebvre v. Lefebvre, 161.
 Legacé v. Olivier, 323.
 Legal and Financial Exchange v. Cameron, 65.
 Legrand v. Legrand, 448.
 Leishman v. Garland, 109, 15.
 Leith v. Hall, 44.
 Le Jeune v. Sparrow, 395.
 Lemay v. Labelle, 170.
 Lemoine v. La Caisse Générale, 382.
 Lennox Provincial Election, *In re*, 363, 407, 345, 352.
 Leonard v. Martel, 321.
 Leroi Mining Co. v. Rossland Miners' Union, No. 38, Western Federation of Miners, 456.
 Leroux v. Cholette, 40.
 Leroux v. De Beaujeu, 238.
 Leroy v. Smith, 72, 102.
 Lessard v. Meunier, 125.
 Leveillé v. Kauntz, 122, 338.
 Levy v. Lamarche, 331.
 Lewis v. Barré, 336, 422.
 Lewis v. Dalby, 112, 120.
 L'Huissier v. Brosseau, 457.
 Lincoln Provincial Election, *In re*, 362, 346.
 Lipschitz v. Rittner, 99.
 Lisgar Dominion Election, *In re*, 331, 343, 344, 345.
 Littlejohn v. Soper, 45, 253.
 Liverpool, Town of, v. Liverpool &c. R. W. Co., 325.
 Livingstone v. Colpitts, 177, 419.
 Lloyd v. Walker, 206, 31.
 Lougheed and City of Calgary, *In re*, 37.
 Louise, Municipality of, v. Canadian Pacific R. W. Co., 124, 123.
 Lovell (R. J.) Co. v. Coles, 165, 511.
 Loy v. Poirier, 193, 349.
 Lung v. Lung, 9.
 Luxfer Prism Co. v. Webster, 426, 307.
 Lydon v. Moore, 513.

M.

Macaulay v. Victoria Yukon Trading Co., 154, 377, 513.
 Macdonell v. City of Toronto, 294, 328.

- MacDonnell v. Robertson, 391, 433.
 Mackay v. Colonial Investment and Loan Co., 389, 511.
 Mackenzie v. Cunningham, 43, 209.
 Mackintosh, *In re*, 74, 426.
 MacLaren v. Villeneuve, 292.
 MacLaughlin v. Lake Erie and Detroit River R. W. Co., 202, 370.
 Maclean v. Meloche, 195.
 Mackod Improvement Co. v. Town of Macleod, 33.
 Macnutt v. Shaffner, 392.
 MacQuillan v. Fry, 421, 294.
 MacAlpine and Lake Erie and Detroit River R. W. Co., *In re*, 98, 26.
 McAulay v. McLennan, 60.
 McBean v. Wyllie, 270, 340.
 McCarthy v. Laviolette, 384.
 McCarthy v. Town of Regina, 430.
 McCleave v. City of Moncton, 199, 323.
 McClure v. Township of Brooke, 254, 255, 13, 412.
 McCormick Harvesting Machine Co. v. Warnica, 158, 129.
 McCowan v. Armstrong, 55, 263.
 McCowan v. McKay, 100, 423.
 McCune v. Botsford, 340, 115.
 McCurry v. Reid, 133.
 *McDermott v. Hickling, 59, 299.
 McDonald Estate, *In re*, 416.
 McDonald v. Lowe, 380.
 McDonald v. McDonald, 206.
 *McDonald v. Robertson, 430, 373.
 McDougall v. McLean, 11, 67, 182.
 McGarr v. Town of Prescott, 281, 487.
 McGee v. The King, 87, 148.
 McGeorge v. Ross, 279.
 McGillivray v. Williams, 373, 270.
 McGowan v. Governor, &c., Hudson's Bay, 36.
 McGuinness v. McGuinness, 54, 184.
 McGuire v. Miller, 9, 243.
 McIntyre, *In re*, McIntyre v. London and Western Trusts Co., 90, 470.
 McIntyre v. Town of Lindsay, 292, 488.
 McKay v. Boyd, 287, 350.
 McKay v. Talbot, *In re*, 115, 130.
 McKay v. Victoria Yukon Trading Co., 169, 9.
 McKelvey v. Le Roi Mining Co., 42, 246, 127, 283.
 *McKenzie v. MacLaughlin, 92, 162.
 McKinnon v. Jessop, 362, 346.
 McKinnon v. Pabst Brewing Co., 39, 103.
 MacLaughlin v. Recorder's Court of the City of Montreal, 98.
 MacLaughlin Carriage Co. v. Fader, 29.
 MacLaughlin Carriage Co. v. Oland, 395.
 McLeod v. Ins. Co. of North America, 237.
 McLeod v. Montreal Street R. W. Co., 382, 463.
 McLeod v. Municipality of Kings, 96, 327.
 McMillan, *In re*, 495.
 McNally v. Préfontaine, 359.
 McNaught v. VanNorman, 341, 295.
 McNeil v. Victoria School Trustees, 429.
 McNevin v. Canadian Railway Accident Ins. Co., 223, 22, 223.
 McNicol, *Ex p.*, 221.
 McQuade v. The King, 87, 153.
 Madill v. Township of Caledon, 175, 488.
 Magann v. Grand Trunk R. W. Co., 115, 126.
 Mahaffy v. Bridgland, 322, 352.
 Main v. McInnis, 41.
 Maison St. Joseph du Sault au Récollet v. Montreal Park and Island R. W. Co., 472.
 Maisonneuve, Town of, v. Chartier, 179.
 Mallory's Case, 162, 87.
 Manchester v. Hills, 69.
 Manitoba Farmers' Hedge and Wire Fence Co. v. Stovel Co., 186, 161.
 Manitoba Farmers' Mutual Hail Ins. Co. v. Fisher, 303, 229.
 Manley v. O'Brien, 74, 426.
 Mannheim Ins. Co. v. Atlantic and Lake Superior R. W. Co., 236.
 Manseau v. Bruyère, 43.
 Marcotte v. Fortin, 388.
 Marcotte v. Turcot, 89.
 *Marien v. Lussier, 418, 293.
 Markham, *In re*, Village of, and Town of Aurora, 205, 354, 23, 308.
 Marsolais v. Grenier, 19.
 Martel v. Paquet, 239.
 Martin and Merritt, *In re*, 116, 475.
 Martin v. County of Arthabaska, 327, 329.
 Mason v. Lindsay, 371, 420.
 Mattice v. Montreal Street R. W. Co., 446.
 Mayer v. Vaughan, 273, 458.
 Mead v. Fyen, 431.
 Mecredy v. Quann, 8.
 *Meehan v. Berry, 237, 265.
 Mellon v. King's County, 324.
 Meloche v. Davidson, 490.
 Merchants Bank v. Sussex, 387, 30.
 Merchants Bank of Halifax v. Houston, 339, 125.
 Merchants' Life Assn. of Toronto, *In re*, 19, 21, 65, 90, 235.
 Mercier v. Gosselin, 193.
 Mercier v. Plamondon, 144, 247.
 *Merritt v. Copper Crown Mining Co., 239, 83, 84.
 Messenger v. Town of Bridgetown, 487.
 Meyers v. Ritson, 431.
 Michaud v. Clement, 43.
 Middleton v. Scott, 28, 369, 12, 301.
 Mignerone v. Yon, 19, 190, 246.
 Milburn v. Wilson, 84.
 Miller v. Grand Trunk R. W. Co., 353, 285, 406.
 Miller v. Green, 160.
 Milligan v. Jamieson, 409, 163.
 Mitchell v. Meldon, 122.
 Mitton, *Ex p.*, 73.
 Molsons Bank v. Beaudry, 59.
 Monarque v. Banque Jacques-Cartier, 7, 478.
 Monro v. Toronto R. W. Co., 231, 221.
 Montambault v. Brien, 444.
 Montambault v. Niquette, 190.
 Montreal and Ottawa R. W. Co. v. City of Ottawa, 224, 402.

Montreal, City of, v. Hatton, 311.
 Montreal, City of, v. City of Ste. Cune-
 gonde, 251, 317.
 Montreal, City of, v. Montreal Street R.
 W. Co., 20.
 Montreal, City of, v. Montreal Street R.
 W. Co., 445.
 Montreal Cold Storage and Freezing Co.,
In re, 89, 91, 94, 242.
 Montreal Gas Co. v. Cadieux, 101.
 Moore v. J. D. Moore Co., 283, 280.
 Morang v. Rose, 168, 358.
 Moreau v. Gélinas, 117.
 Morin v. Jetté, 24.
 Morinville v. Baril, 190.
 Morison v. Municipality of Kings, 96,
 327.
 Morphy v. Colwell, 111, 55.
 Morneau v. Verret, 132.
 Morrison v. Grand Trunk R. W. Co., 149,
 162, 166.
 Morrow v. Peterborough Water Co., 326,
 92.
 Mount v. Farrell, 365.
 Mowat v. Municipality of North Van-
 couver, 308.
 Mowat v. Provident Savings Life Assce.
 Socy., 221, 234.
 Mullin's Claim, 89, 91.
 Munsen v. The "Comrade," 436.
 Murphy v. Star Exploring and Mining
 Co., 104, 294.
 Murray, *In re*, 373, 442.
 Murray v. Smith, 241, 472.
 Muskoka Provincial Election, *In re*, 322,
 352.
 Mutchmor v. Waterloo Mutual Fire Ins.
 Co., 406, 226.
 Mutual Life Assce. Co. of Canada v.
 Giruère, 276, 234.
 Myers v. Mercier, 431.
 Myers v. Sault Ste. Marie Pulp and Paper
 Co., 203, 282.

N.

National Trust Co. v. Hughes, 101, 231.
 Neely v. Peter, 297, 482.
 Neil v. American Express Co., 74.
 Neilson v. Quebec Bridge Co., 402.
 Nelson Coke and Gas Co. v. Pellatt, 382,
 88.
 Nelson, Corporation du Canton de, v.
 County of Mégantic, 319.
 Nesbit v. Galna, 150, 119.
 Neven v. People's Telephone Co., 355.
 New Rockland, Corporation of, v. Tor-
 rance, 322.
 New Westminster Provincial Election, *In*
re, 43, 347.
 New York and Ottawa Co. v. Collins Bay
 Rafting and Forwarding Co., 250, 104.
 *Newborn, *In re*, 120, 498.
 Newsome v. Mutual Reserve Fund Life
 Assn., 115, 465.
 Newton v. Bergman, 46.
 Nichol v. Pooley, 127, 123.
 Nightingale v. Union Colliery Co., 461.
 Nixon v. Barber, 362, 350.

Noel v. Corporation of Pilots for Harbour
 of Quebec, 41.
 North American Life Assce. Co. v.
 Brophy, 250, 236.
 North Grey Provincial Election, *In re*,
 286, 287, 350, 351, 352.
 North-West Cattle Co., *In re*, 94.
 Northern Counties Investment Trust,
 Limited, and City of Vancouver, *In*
re, 127, 318.
 Northern Elevator Co. v. McLennan, 302,
 444.
 Nottawasaga, *In re* Township of, and
 County of Simcoe, 48, 172, 32.

O.

O'Driscoll and Wright, *In re*, 352.
 Ogilvie v. Ogilvie, 491.
 O'Hearn v. Town of Port Arthur, 255,
 446.
 Okell and Morris Fruit Preserving Co.,
In re, 93.
 Okell v. Dickson, 77.
 Oland v. McNeil, 197, 467, 480.
 Ontario Bank v. Young, 64.
 Ontario Mining Co. v. Seybold, 96.
 Oppenheimer v. Sperling, 376, 362.
 Orland v. McNeil, 197, 469.
 *Ottawa Electric Co. v. Consumers Elec-
 tric Co., 140, 315.
 Ottawa Electric Co. v. St. Jacques, 77,
 107.
 Ottawa Gas Co. v. City of Ottawa, 302,
 114.
 Ouimet v. Ouimet, 342.

P.

Pabst Brewing Co. v. Ekers, 455.
 *Padget v. Padget, 137, 24.
 Pagé v. Beauchamp, 216.
 Pagnac v. Clavierie, 178.
 Palliser v. Duff, 381.
 Paradis v. Labbé, 125.
 Parent v. Cook, 31, 110, 300.
 Parent v. Quebec North Shore Turnpike
 Trustees, 46, 454.
 Parizeau v. Thémens, 331.
 Parramore v. Boston Manufacturing Co.,
 415, 167.
 Patterson v. Turner, 163, 88.
 *Pattison v. Township of Wainfleet, 303,
 486.
 *Paulson v. Beaman, 425, 23, 294.
 "Pawnee" The, 129, 436.
 Pearce v. Archibald, 213.
 Pease v. Town of Moosomin, 178, 328.
 Pelletier v. Michaud, 171, 364, 413.
 Peloquin v. Brazeau, 447.
 Pennington v. Morley, 183, 290.
 People's Building and Loan Assn. v.
 Stanley, 254, 300, 371, 410, 12, 183,
 464.
 People's Bank of Halifax v. Labreque,
 374.
 Perkins v. Brais, 270.
 Perrault v. Liverpool and London and
 Globe Ins. Co., 508.

Perrin v. Tate, 43.
 Perron v. Marquis, 187.
 Perry v. Carscallen, 407, 345.
 Perry v. Simard, 174.
 Peters v. Worrall, 198, 2.
 Pettigrew v. Baillargé, 276.
 Pettit, *In re*, 300, 172.
 Phaneuf v. McKnight, 30.
 Pharand v. Emond, 186.
 Phillips v. Hanna, *In re*, 209, 129.
 Phillips v. Laviolette, 161.
 Phillips v. Malone, 32, 159, 510.
 Pike v. Copley, 218, 514.
 Pilots for the Harbour of Quebec, Corporation of, v. The "Grandee," 428, 437.
 Pinonnault v. County of Laprairie, 320.
 Pither v. Manly, 63.
 Platt v. Buck, 374, 169.
 Poirier v. Cusson, 372.
 Poirier v. Loy, 347.
 Pontiac Pacific Junction R. W. Co. v. Sisters of Charity at Ottawa, 404.
 Poulin v. St. Germain, 254.
 Pouliot v. Michaud, 114.
 Powell v. Hiltgen, 276.
 Power v. Foster, 478.
 Powers v. Curtis, 296.
 Preston v. Nugent, 438.
 Prevost v. Village of Ahunstic, 379.
 Price v. Delisle, 149.
 Price v. Fraser, 47, 459.
 Price v. Talon, 195, 281.
 Prince Albert, *Re Town of*, 249.
 Prince Edward Provincial Election, *In re*, 285, 350.
 Protain v. Prevost, 214.
 Providence, Community of Sisters of Charity of, v. Bastien, 92.
 Provident Chemical Works v. Canada Chemical Mfg. Co., 381, 455.
 Provincial Bank of Canada v. Lacerte, 384.
 Provincial Trusts Co. v. Gamon, 64, 470.
 Publishers' Syndicate, *In re*, 162, 87.
 Putterbaugh v. Gold Medal Mfg. Co., 122, 404.

Q.

Quebec Central R. W. Co. v. Dionne, 178.
 Quebec, Province of, v. Province of Ontario and Dominion of Canada, 25.
 Quintal v. Bénard, 292.
 Quirk v. Dudley, 388, 222.

R.

Rae v. Gifford, 43, 347.
 Rammelmeyer v. Curtis, 296.
 Rankin v. Sterling, 230, 475.
 Raymond v. Faulkner, 40, 412.
 Reeves v. McCulloch, 106.
 Regina v. Armour, 149.
 Regina v. Bowers, 112.
 Regina v. Brown, 142.
 Regina v. Cahill, 73.
 Regina v. Davidson, 76, 267.
 Regina v. Forsythe, 138.

Regina v. Houson, 219.
 Regina v. Joseph, 147.
 Regina v. McClung, 146.
 Regina v. McKay, 137.
 *Regina v. Mellon, 343, 219.
 Regina v. Mennel, 141.
 Regina v. Nimmons, 489.
 Regina v. Vantassel, 72.
 Regina v. Walker, 145.
 Reid v. McCurry, 241.
 Reliance Savings and Loan Co. v. Curry, 305.
 "Reliance," The, v. Conwell, 77, 435.
 Renaud v. Lamothe, 357, 505.
 Rennie v. Quebec Bank, 171, 79.
 Rex v. Adams, 148.
 Rex v. Algoma Central R. W. Co., 249, 415.
 Rex v. Bennett, 290, 112.
 Rex v. Brennan, 416.
 Rex v. Brooks, 105, 141.
 Rex v. Campbell, 127.
 Rex v. Carrière, 187, 146.
 Rex v. Clark, 90, 137.
 Rex v. Clements, 268.
 Rex v. Cole, 132, 143.
 Rex v. Conrod, 268.
 Rex v. D'Aoust, 228, 136.
 Rex v. George, 137.
 Rex v. Giovanetti, 73.
 Rex v. Hanrahan, 228, 140.
 Rex v. Harris, 83, 151.
 Rex v. Holmes, 437, 145.
 Rex v. Hurst, 68, 139.
 Rex v. Jack, 147.
 Rex v. James, 369, 138.
 Rex v. Johnson, 125, 141.
 Rex v. Jordan, 219, 146.
 Rex v. Keeping, 140.
 Rex v. Kneeland, 145.
 Rex v. Lavoie, 138.
 Rex v. Likely, 191, 150.
 Rex v. Long, 136.
 Rex v. McGregor, 290, 311.
 Rex v. McKinnon, 161, 147.
 Rex v. McLeod, 267.
 Rex v. Meehan, *In re*, 133, 179, 131, 139.
 Rex v. Neuberger, 146.
 Rex v. Nichol, 75, 112.
 Rex v. O'Hearn, 73.
 Rex v. Portugais, 17.
 Rex v. Rice, 220, 355, 19, 143.
 Rex v. Riendeau, 144.
 *Rex v. Robertson, 240, 322.
 Rex v. St. Pierre, 233, 76, 313.
 Rex v. Scully, 360, 275.
 Rex v. Sedger, 84, 151.
 Rex v. Sing, 423, 247.
 Rex v. Trevanne, 385, 135.
 Rex v. Wagner, 138.
 Rex v. White, 136.
 Rex v. Wipper, 72.
 Rex v. Young, 84, 211, 139, 150.
 *Rex ex rel. Davis v. Campbell, 118, 322.
 Rex ex rel. Ivison v. Irwin, 299, 333.
 Rex ex rel. McFarlane v. Coulter, 414, 16, 332.
 Rex ex rel. Roberts v. Ponsford, 146, 333.
 *Rex ex rel. Ross v. Taylor, 183, 332.

- Rex ex rel. Tolmie v. Campbell, 236, 330.
 Richards v. Bank of British North America, 57.
 Richelieu Dominion Election, *In re*, 193, 22.
 Richer v. Michaud, 188, 189.
 Ridgeway v. Collier, 372.
 Riopelle and Kent, *In re*, 52.
 Ritchie v. Vermillion Mining Co., 382, 82.
 Ritz and Village of New Hamburg, *In re*, 410, 309.
 Ritz v. Schmidt, 79, 443.
 Rivers, *In re*, 410.
 Roach v. Duggan, 131, 133.
 Roach v. Ripley, 158.
 Robert v. Commissioners of Schools of St. Hermengilde, 427.
 Roberts v. Fraser, 438, 127.
 Roberts v. Hartley, 185, 203.
 Roberts v. The "Pawnee," 436.
 *Robertson, *In re*, 211, 193.
 Robertson v. Bossuyt, 438.
 Robertson v. Cobban Mfg. Co., 121.
 Robinson v. Mann, 2, 68.
 Rochez v. Champagne, 361.
 Roe v. Hood, 2.
 *Rood v. Thompson, 36, 400.
 Rose v. Croden, 135, 386.
 Ross v. Elliott, 374.
 Ross v. The King, 86, 416.
 Ross v. Western Loan and Trust Co., 67.
 Rothchild v. Canadian Pacific R. W. Co., 118.
 Rousseau v. Corporation of Blandford, 328.
 Rutherford v. Macy, 382.
 Rowe v. Hyde, 51.
 Roy v. Davis, 380.
 Roy v. Dickson, 460.
 Roy v. Supreme Council Catholic Benevolent Legion, 235.
 Royal Bank of Canada v. Harris, 117, 178.
 Ruffles, *Re*, 75.
 *Ruggles v. M. and V. B. R. W. Co., 432, 245.
 Runciman v. Star Line S. S. Co., 157.
 Russell v. Murray, 255.

 S.
 Sabourin v. Montreal City and District Savings Bank, 211.
 Sage v. Shore Line R. W. Co., 38, 400.
 St. Aubin v. Lamarche, 381.
 St. Denis v. Goulet, 43.
 *St. John, City of, v. Wilson, 209, 309.
 St. Joseph de Chambly, Parish of, v. Arbec, 320.
 St. Raymond, Corporation de, v. Prior, 484.
 St. Sulpice Seminaire v. Masson, 479.
 Salter and Township of Beckwith, *In re*, 182, 312.
 Saunders v. The "Comrade," 436.
 Savaria v. Paquette, 82.
 Sawers v. City of Toronto, 25, 380, 32.
 Saxe v. Kent, 52.
 Scadding, *In re*, 409, 500.
 Schiller v. Canada North-West Coal and Lumber Syndicate, 386.
 Schwartz v. Winkler, 401, 54, 361.
 Schwob v. Farnham, 4, 374.
 Scott v. Membership, 122, 356.
 Secor v. Gray, 27, 192.
 Senecal v. Chappell, 185.
 Sessenwein v. Schwartz, 448.
 Shallcross v. Alaska S. S. Co., 509.
 Shank v. Bourassa, 211.
 Sharp v. Woodstock School Trustees, 114.
 Sicotte v. Martin, 174.
 Simpson v. Johnston, 38, 466.
 Sinclair v. Preston, 9, 238.
 Skelly v. Thibault, 438.
 Skillings v. Royal Ins. Co., 258, 224.
 Skinner v. Farquharson, 197, 504.
 Slater Shoe Co. v. Trudeau, 121.
 Slocan Municipal Election, *In re*, 332.
 Smith and Larivière, *In re*, 52.
 *Smith v. Beaubien, 419, 241.
 Smith v. Canadian Pacific R. W. Co., 405.
 Smith v. Hunt, 429, 305.
 *Smith v. Lang, 418, 62.
 Snure and Davis, *In re*, 234, 255.
 Snyder, *In re*, 299, 232.
 Sorignet v. Henry, 338.
 Soucy v. Electric Printing Co., 80, 512.
 Soucy v. Industrial Printing Co., 358.
 Southwold Public School Sections, *In re*, 62, 429.
 Sparling v. Houlihan, 306, 472.
 Spence v. Arnold, 103.
 Spring-Rice v. Town of Regina, 33.
 Stack v. T. Eaton Co., 322, 201.
 Standard Drain Pipe Co. v. Robertson, 378.
 Standard Life Assce. Co. v. Trudeau, 231.
 Standard Trading Co. v. Seybold, 414, 122.
 Star Mining and Milling Co. v. Byron N. White Co., 104, 116, 238.
 Starr, *In re*, Starr v. Starr, 216.
 Stephens v. Higgins, 40.
 Stewart v. Clarke, 286, 345.
 Stewart v. Freeman, 211, 399, 376, 442.
 Stocker v. Canadian Pacific R. W. Co., 170.
 Styles v. City of Victoria, 489.
 Succession Duty Act, *In re*, 416.
 Sutton v. Village of Port Carling, 139, 450.
 Sweeney v. Lovell, 444.
 Sword v. Tedder, 471.
 Synod of Diocese of Montreal v. Kelly, 257.

 T.
 Talbot v. Guilmartin, 214.
 Tanaka v. Russell, 128, 28.
 Tanguay v. Grand Trunk R. W. Co., 403.
 Tapley v. Irving, 447.
 Tassé v. Beaubien, 134.
 Tate v. Hennessey, 181.

Taylor v. Delaney, 136, 15.
 Taylor v. Drake, 220, 462.
 Taylor v. Grand Trunk R. W. Co., 361, 407.

Taylor v. Macfarlane, 325, 269.
 Taylor v. Robertson, 80, 439.
 Temple v. Western Assee. Co., 226.
 Theoret v. Boileau, 330.
 Therien v. Hainault, 292.
 Theroux v. Carrier, 272.
 Theriault v. Parish of St. Alexandre, 320.

Therrien v. Hénault, 292.
 Thibault and Gardner, *In re*, 53.
 Thibault v. Poulin, 170.
 Thompson v. Thompson, 180.
 Thomson v. Stone, *In re*, 327, 412, 129.
 Thorne v. Parsons, 379, 499.
 Thureson, *In re*, McKenzie v. Thureson, 51, 304.

Tobey Furniture Co. v. Macmaster, 419.
 Tobin v. Gannon, 163.
 *Toronto, City of, *In re* Assessment, 390, 33.

Toronto, City of v. Bell Telephone Co. of Canada, 142, 98.

Toronto Electric Light Co. Assessment, *In re*, 206, 38.

*Toronto General Trusts Corp'n. v. Newborn, 120, 498.

Toronto General Trusts Corporation v. White, 178, 255.

Toronto Junction Public School Board v. County of York, 145, 428.

Toronto Public School Board and City of Toronto, *In re*, 15, 279, 428.

Tougan v. Canadian Pacific R. W. Co., 121.

Tougher, *In re*, 98, 131.

Toussignant, County of, v. County of Nicolet, 355, 21.

Town v. Archer, 258, 293.

Trahan v. Morin, 7.

Travers v. Casey, 210, 495.

Travers v. Roman Catholic Bishop of St. John, 495.

Tremblay, *Ex p.*, 207.

Trenholm, *Ex p.*, 73.

Trenholme v. Provost, 195.

Troude v. Meldrum, 209, 257.

Trowbridge v. McMillan, 421, 358.

Truro, Town of, v. Archibald, 316.

Tucker v. The King, 201, 154.

Tuckett-Lawry v. Lamoureux, 174, 491.

Turgeon v. Shannon, 46, 212.

Turner, *In re*, Turner v. Turner, 389, 497.

Turiff v. McDonald, 440.

Two Mountains Dominion Election, *In re*, 5, 192, 22, 349.

U.

Union Bank v. Code, 45, 85.

Union Bank v. Elliott, 331, 59.

Union Bank v. Morris, 45, 85.

Union Bank of Canada v. Rideau Lumber Co., 114, 457.

Union Bank of Canada v. Town of Macleod, 310, 35.

Union Bank of Halifax v. Wurzburg & Co. (Ltd.), 402, 514.

Union S. S. Co. v. Drysdale, 278, 434.

V.

Vallée and Richelieu R. W. Co. v. Menard, 17.

Vallée v. Prescott, 355.

Vanasse v. Bruneau, 22.

Vancouver Agency v. Quigley, 514.

Vancouver Land and Securities Co. v. McKinnell, 387.

Vanier v. Kent, 432.

Vernons' Claims, 19, 65, 235.

Victoria, City of, v. Bowes, 218, 35.

Victoria-Montreal Fire Ins. Co., *In re*, 93.

Victoria-Montreal Fire Ins. Co. v. O'Neil, 85.

Victoria Mutual Fire Ins. Co. v. Derome, 89.

Vidal v. Latulippe, 209.

Ville-Marie Bank v. Kent, 59, 477.

Ville-Marie Bank v. Vannier, 52.

Villeneuve v. Canadian Pacific R. W. Co., 405.

Villeneuve v. Matte, 56.

Vipond v. Kilburn, 383, 384.

Vitale v. Canadian Pacific R. W. Co., 379.

Vivian and Rural Municipality of White-water, *In re*, 338, 312.

W.

Wade v. Uren, 479.

Wake v. Canadian Pacific Lumber Co., 153, 289.

Wallace v. Harrington, 302, 441.

Wallace v. Languedoc, 328, 334.

Walsh v. Brooke, 252.

Walsh v. Walper, 49, 188, 268.

War Eagle Mining Co. v. British Columbia Southern R. W. Co., 247, 482, 483.

Ward v. Benson, 117, 362.

Ward v. Dominion Steamboat Line Co., 424, 243.

Ward v. Jasmin, 167.

Ward v. Johnston, 106.

Ward v. Merchants Bank of Halifax, 377.

Warrington v. Palmer, 126, 199, 9, 284.

Water Clauses Consolidation Act, *In re*, 247, 482, 483.

Waterland v. City of Greenwood, 245, 463.

Watts, *In re*, 130, 166, 196, 197.

*Webb v. New York Life Ins. Co., 179, 235.

Weddell v. The King, 85, 152.

Wehrfritz v. Russell, 217, 28.

West v. Lachine Rapids Hydraulic and Land Co., 383.

Western Assee. Co. v. Pharand, 228.

Wheeler v. Town of Cornwall, 260, 361.

Whitby, Town of, v. Grand Trunk R. W. Co., 173, 409.

White, Patrick, *In re*, 449.

Whitla v. Manitoba Assee. Co., 72, 266, 225.

Whitla v. Royal Ins. Co., 69, 266, 225.
***Wiedeman v. Guittard**, 129, 12, 65.
Wilcock v. City of Montreal, 147.
Wilder v. Wilder, 121.
Wilder v. Wolf, 293, 45.
Wilkins, *Ex p.*, 474.
Wilkins v. Eadie, 365.
Wilkins v. Major, 159.
Williams (A. R.) Co.'s Claim, 18, 90.
Williams, *In re*, 323, 468.
Williams v. Currie, 285, 350.
Williams v. Faulkner, 40, 412.
***Willis v. Behie**, 430, 182.
***Wilson v. Botsford-Jenks Co.**, 95, 280.
Wilson v. Canadian Development Co., 271, 75.
Wilson v. Giroux, 417.
Wilson v. Hotchkiss, 3, 84.
Wilson v. Robertson, 300.
Wilson v. Shaver, 11, 422.
Wilson v. Windsor Foundry Co., 424.
Wineman v. The "Hiawatha", 436.
Winters v. McKinistry, 213, 306.

Wistar v. Dunham, 48, 121.
Wolf v. Weir, 76.
Woolf v. Allen, 104.
Worrall v. Peters, 64.
Wright v. Shattuck, 182, 422.

Y.

Yale Hotel Co. v. Vancouver, Victoria, and Eastern R. W. and Navigation Co., 128, 221.
Yates, *In re*, 413, 493.
Yorkshire Guarantee and Securities Corp'n. v. Fulbrook, 461.
Young, *In re, 31, 496.
Young v. Denike, 27, 218, 501.
Young v. Township of Stanstead, 487.
Yuill v. White, 312, 253.

Z.

Zwicker v. Morash, 451.

TABLE OF CASES

AFFIRMED, REVERSED, OVERRULED, FOLLOWED, APPROVED,
APPLIED, CONSIDERED, SPECIALLY REFERRED TO,
ETC., BY OR IN THE CASES DIGESTED.

A.	COLUMN.	COLUMN.	
Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co., 21 Occ. N. 124, 32 O. R. 369, Reversed in <i>S. C.</i> , 21 Occ. N. 582, 3 O. L. R. 127.....	229	Atkinson v. Newcastle, 2 Ex. D. 441, followed in <i>McBean v. Wyllie</i> , 22 Occ. N. 270, 14 Man. L. R. 135.....	340
Ainsworth v. Wilding, [1900] 2 Ch. 315, followed in <i>Clergue v. McKay</i> , 22 Occ. N. 148, 162, 3 O. L. R. 478.....	169	Attorney-General v. Scully, 21 Occ. N. 432, 2 O. L. R. 315, affirmed in <i>S. C.</i> , 22 Occ. N. 360, 4 O. L. R. 394.....	275
Allen v. Allen, [1894] P. 246, followed in <i>Carte v. Dennis</i> , 21 Occ. N. 267, 5 Terr. L. R. 30.....	178	Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348, followed in <i>Attorney-General of Manitoba v. Manitoba License Holders Association</i> , [1902] A. C. 73.....	96
Allen v. Furness, 20 A. R. 34, followed in <i>Taylor v. Macfarlane</i> , 22 Occ. N. 325, 4 O. L. R. 239...	269	Attorneys, <i>In re</i> , 26 C. P. 496, followed in <i>In re Johnston</i> , 21 Occ. N. 561, 3 O. L. R. 1.....	441
Anderson v. Goodsall, 7 Brit. Col. L. R. 404, followed in <i>British Columbia Timber and Trading Co. v. Leberry</i> , 22 Occ. N. 273.....	288		
Anderson Tire Co. of Toronto v. American Dunlop Tire Co., 5 Ex. C. R. 100, referred to in <i>Hambly v. Albright</i> , 22 Occ. N. 201, 7 Ex. C. R. 363.....	368	B.	
Apollinaris Co. v. Wilson, 31 Ch. D. 632, followed in <i>In re Lang and Smith</i> , 22 Occ. N. 212.....	409	Bacon's Will, <i>Re</i> , 31 Ch. D. 460, considered in <i>Bank of Montreal v. Burns</i> , 22 Occ. N. 342.....	78
Appleby v. Meyers, L. R. 2 C. P. 660, followed in <i>King v. Low</i> , 22 Occ. N. 107, 3 O. L. R. 234.....	102	Bailey v. Reinhardt, Q. R. 17 S. C. 387, affirmed in <i>S. C.</i> , Q. R. 20 S. C. 225.....	474
Argles v. McMath, 26 O. R. at p. 248, followed in <i>Stack v. T. Eaton Co.</i> , 22 Occ. N. 322, 4 O. L. R. 335.....	201	Bain v. Brand, 1 App. Cas. 762, followed in <i>Stack v. T. Eaton Co.</i> , 22 Occ. N. 322, 4 O. L. R. 335...	201
Armstrong v. Canada Atlantic R. W. Co., 21 Occ. N. 497, 2 O. L. R. 219, reversed in <i>S. C.</i> , 22 Occ. N. 379, 4 O. L. R. 560.....	287	Bank of Montreal v. Black, 9 Man. L. R. 439, followed in <i>Schwartz v. Winkler</i> , 22 Occ. N. 401, 14 Man. L. R. 197.....	361
Armstrong v. Johnson, 32 O. R. 15, followed in <i>Codville v. Fraser</i> , 22 Occ. N. 123, 14 Man. L. R. 12...	54	Bank of Toronto v. St. Lawrence Fire Ins. Co., Q. R. 19 S. C. 434, affirmed in <i>S. C.</i> , Q. R. 21 S. C. 251.....	78
Asbestos and Asbestic Co. v. Durand, 30 S. C. R. 285, discussed and approved in <i>Dominion Cartridge Co. v. McArthur</i> , 22 Occ. N. 5, 31 S. C. R. 392.....	282	Barry v. The Queen, 2 Ex. C. R. 333, referred to in <i>McQuade v. The King</i> , 22 Occ. N. 87, 7 Ex. C. R. 318.....	153
Ash v. Methodist Church, 21 Occ. N. 21, 27 A. R. 602, affirmed in <i>S. C.</i> , 22 Occ. N. 3, 31 S. C. R. 497....	79	Bartlett v. Pickersgill, 4 East 577, discussed in <i>Hull v. Allen</i> , 22 Occ. N. 138.....	179
Assessment Act, <i>In re</i> 9 Brit. Col. L. R. 60, reversed in <i>S. C.</i> , 9 Brit. Col. L. R. 209.....	34	Beam v. Beatty, 22 Occ. N. 58, 3 O. L. R. 345, reversed in <i>S. C.</i> , 22 Occ. N. 381, 4 O. L. R. 554....	220
		Beauchamp v. City of Montreal, M. L. R. 7 S. C. 382, followed in <i>L'Huissier v. Brosseau</i> , Q. R. 20 S. C. 170.....	457

	COLUMN.
Bell Telephone Co. Assessment, <i>In re</i> , 25 A. R. 351, applied in <i>In re Toronto Electric Light Co. Assessment</i> , 22 Occ. N. 206, 3 O. L. R. 620	38
Bell Telephone Co. v. City of Quebec, 20 S. C. R. 230, followed in <i>County of Toussignant v. County of Nicolet</i> , 22 Occ. N. 355, 32 S. C. R. 353	21
Bentley v. Botsford, 8 Brit. Col. L. R. 128, followed in <i>Fry v. Botsford</i> , 22 Occ. N. 421, 9 Brit. Col. L. R. 234	294
Berkeley's Trusts, <i>Re</i> , 8 P. R. 193, followed in <i>In re Williams</i> , 22 Occ. N. 323, 4 O. L. R. 501....	468
Birch v. Cropper, 14 App. Cas. 525, followed in <i>Morrow v. Peterborough Water Co.</i> , 22 Occ. N. 326, 4 O. L. R. 324	92
Blair v. Chew, 21 Occ. N. 404, followed in <i>Neely v. Peter</i> , 22 Occ. N. 297, 4 O. L. R. 293	482
Boisseau v. Canadian Pacific R. W. Co., Q. R. 11 K. R. 394, affirmed in S. C., 22 Occ. N. 358, 32 S. C. R. 424	286
Boosey v. Davidson, 13 Q. B. 257, considered in <i>Carte v. Dennis</i> , 21 Occ. N. 68, 267, 5 Terr. L. R. 30	110
Boss v. Litton, 5 C. & P. 407, explained and distinguished in <i>Belling v. City of Hamilton</i> , 22 Occ. N. 110, 3 O. L. R. 313	486
Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. D. 339, followed in <i>Davidson v. Manitoba and North-West Land Corporation</i> , 22 Occ. N. 305	393
Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal, 21 Occ. N. 517, 7 Ex. C. R. 187, reversed in S. C., 22 Occ. N. 275, 32 S. C. R. 315	456
Bouchard v. Bastien, Q. R. 16 S. C. 565, affirmed in S. C., Q. R. 19 S. C. 507	272
Bradlaugh v. Clark, 8 App. Cas. 354, followed in <i>McDonald v. Robertson</i> , 22 Occ. N. 430.....	372
Bridges v. Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75, referred to in <i>Haynen v. Mundle</i> , 22 Occ. N. 152	271
Bridgetown, &c., Co. v. Barbados, &c., Co., 38 Ch. D. 378, distinguished in <i>Ruggles v. M. and V. B. R. W. Co.</i> , 22 Occ. N. 432	245
Bridgeman v. Green, 2 Ves. Sr. 627, followed in <i>Atkinson v. Borland</i> , 14 Man. L. R. 205	203
Briggs v. Newswander, 8 Brit. Col. L. R. 402, reversed in S. C., 22 Occ. N. 277, 32 S. C. R. 405..	100

	COLUMN.
Brigham v. Banque Jacques-Cartier, 30 S. C. R. 429, followed in <i>Cartier v. Genser</i> , Q. R. 21 S. C. 139.	54
British Columbia Towing, &c., Co. v. Sewell, 9 S. C. R. 527, followed in <i>Davidson v. Stuart</i> , 14 Man. L. R. 74	357
Brown v. London Street R. W. Co., 21 Occ. N. 369, 2 O. L. R. 53, reversed in S. C., 22 Occ. N. 78, 31 S. C. R. 642.....	336
Burrard Dominion Election, <i>In re</i> , 21 Occ. N. 252, 8 Brit. Col. L. R. 65, affirmed in S. C., 22 Occ. N. 10, 31 S. C. R. 459.....	346
Busfield, <i>In re</i> , Whaley v. Busfield, 32 Ch. D. 123, followed in <i>Pennington v. Morley</i> , 22 Occ. N. 183, 3 O. L. R. 514	290

C.

Caledonian R. W. Co. v. Walker's Trustees, 7 App. Cas. 259, referred to in <i>McQuade v. The King</i> , 22 Occ. N. 87, 7 Ex. C. R. 318..	153
Came v. Consolidated Car Heating Co., Q. R. 18 S. C. 44, reversed in S. C., Q. R. 11 K. B. 103.....	369
Campbell v. Fleming, 1 A. & E. 40, distinguished in <i>Murray v. Smith</i> , 22 Occ. N. 241, 14 Man. L. R. 125	472
Campeau v. Ottawa Fire Ins. Co., Q. R. 20 S. C. 239, 4 Q. P. R. 197, followed in <i>Magann v. Grand Trunk R. W. Co.</i> , Q. R. 21 S. C. 72, 4 Q. P. R. 348	126
Canadian Pacific R. W. Co. v. Roy, 20 Occ. N. 441, Q. R. 9 Q. B. 351, reversed in S. C., [1902] A. C. 220	406
Cape Breton Co., <i>In re</i> , 26 Ch. D. 221, 29 Ch. D. 795, approved in <i>Burland v. Earle</i> , [1902] A. C. 83	87
Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, distinguished in <i>Baston v. Toronto Fruit Vinegar Co.</i> , 22 Occ. N. 232, 4 O. L. R. 20	106
Casselman v. Ottawa, Arnprior, and Parry Sound R. W. Co., 18 P. R. 261, followed in <i>Morrison v. Grand Trunk R. W. Co.</i> , 22 Occ. N. 149, 162, 4 O. L. R. 43.....	166
Catling v. King, 64 L. J. Ch. 384, considered in <i>Bank of Montreal v. Burns</i> , 22 Occ. N. 342	78
Chesterfield's Trusts, <i>In re</i> , 24 Ch. D. 643, applied in <i>In re Cameron</i> , 21 Occ. N. 593, 2 O. L. R. 756....	485
Cleary v. Boscowitz, 8 Brit. Col. L. R. 225, affirmed in S. C., 22 Occ. N. 278, 32 S. C. R. 417	297
Clements v. Flight, 16 M. & W. 48, followed in <i>Gray v. Guernsey</i> , 22 Occ. N. 402	164

COLUMN.

Collen v. Wright, 8 E. & B. 647, followed in Coit v. Dowling, 4 Terr. L. R. 464	100
Collins v. United States, 15 Ct. of Clms. 35, referred to in Hargrave v. The King, 22 Occ. N. 427	154
Collom v. Manley, 8 Brit. Col. L. R. 153, reversed in S. C., 22 Occ. N. 278, 32 S. C. R. 371	297
Collom v. Manley, 22 Occ. N. 278, 32 S. C. R. 371, followed in Cleary v. Boscowitz, 22 Occ. N. 278, 32 S. C. R. 417	297
Comber v. Leyland, [1898] A. C. 524, referred to in Phillips v. Malone, 22 Occ. N. 32, 3 O. L. R. 47....	510
Commercial Union Assee. Co. v. Temple, 29 S. C. R. 206, followed in Whitla v. Royal Ins. Co., 22 Occ. N. 69, 72, 266, 14 Man. L. R. 90	225
And in Temple v. Western Assee. Co., 35 N. B. Reps. 171.....	226
Confederation Life Ass'n v. Labatt, 18 P. R. 266, followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245	358
Connecticut Mutual, &c., Co. v. Moore, 6 App. Cas. 644, followed in Davidson v. Stuart, 14 Man. L. R. 74	337
Conrad v. Alberta Mining Co., 20 Occ. N. 108, 4 Terr. L. R. 322, affirmed in S. C., 21 Occ. N. 102, 4 Terr. L. R. 412	511
Cooke v. Millar, 3 Rev. Leg. 446, 4 Rev. Leg. 260, referred to in Schwob v. Farnham, 22 Occ. N. 4, 31 S. C. R. 471	374
Cooper v. Jarman, L. R. 3 Eq. 98, distinguished in <i>In re</i> Murray, 22 Occ. N. 373, 4 O. L. R. 418.....	442
Coplen v. Callaghan, 30 S. C. R. 555, followed in Cleary v. Boscowitz, 22 Occ. N. 278, 32 S. C. R. 417..	297
Counsell v. Livingston, 21 Occ. N. 563, 2 O. L. R. 582, affirmed in S. C., 22 Occ. N. 360, 4 O. L. R. 340	66
Cowan's Trust, <i>In re</i> , 14 Ch. D. 638, not followed in Carswell v. Langley, 22 Occ. N. 97, 3 O. L. R. 261	50
Coyne v. Ryan, 21 Occ. N. 498, affirmed in S. C., 22 Occ. N. 12..	171
Cradock v. Piper, 1 Macn. & G. 664, commented on in <i>In re</i> Williams, 22 Occ. N. 323, 4 O. L. R. 501..	468
And distinguished in Turriff v. McDonald, 21 Occ. N. 545, 13 Man. L. R. 577	440
Croft v. King, [1893] 1 Q. B. 419, followed in <i>In re</i> Jones v. Bissonnette, 22 Occ. N. 53, 2 O. L. R. 54	512

COLUMN.

Croockewitt v. Fletcher, 1 H. & N. 893, followed in Manitoba Farmers' Mutual Hail Ins. Co. v. Fisher, 22 Occ. N. 303, 14 Man. L. R. 157	229
Cunard v. Symon-Kaye Syndicate, 27 N. S. Reps. 340, distinguished in Union Bank of Halifax v. Wurzburg & Co. (Ltd.), 22 Occ. N. 402, 9 Brit. Col. L. R. 160....	514
Currier v. Friedrich, 22 Gr. 243, followed in Fairclough v. Smith, 21 Occ. N. 447, 13 Man. L. R. 509..	280
Cutter v. Powell, 6 T. R. 320, followed in Manitoba Farmers' Mutual Hail Ins. Co. v. Fisher, 22 Occ. N. 303, 14 Man. L. R. 157..	220
D.	
Dallas v. Town of St. Louis, Q. R. 11 K. B. 117, affirmed in S. C., 22 Occ. N. 194, 32 S. C. R. 120..	324
Damer v. Busby, 5 P. R. at p. 389, followed in Merchants Bank v. Sussex, 22 Occ. N. 387, 4 O. L. R. 524	30
Danger v. London Street R. W. Co., 30 O. R. 493, applied in O'Hearn v. Town of Port Arthur, 22 Occ. N. 255, 4 O. L. R. 209	446
Davidson v. Hill, [1901] 2 K. B. 617, followed in Merritt v. Copper Crown Mining Co., 22 Occ. N. 239	83
Dawson v. London Street R. W. Co., 18 P. R. 223, followed in Morrison v. Grand Trunk R. W. Co., 22 Occ. N. 149, 162, 4 O. L. R. 43	166
Day, <i>In re</i> , [1898] 2 Ch. 510, distinguished in <i>In re</i> Murray, 22 Occ. N. 373, 4 O. L. R. 418.....	442
Delorme v. Cusson, 28 S. C. R. 66, followed in Parent v. Quebec North Shore Turnpike Trustees, 22 Occ. N. 46, 31 S. C. R. 556..	454
Dennick v. Railroad Co., 103 U. S. 11, approved in Merritt v. Copper Crown Mining Co., 22 Occ. N. 239	83
Dicks v. Yates, 18 Ch. D. 76, followed in Carte v. Dennis, 21 Occ. N. 68, 5 Terr. L. R. 30	110
Diocesan Synod of Nova Scotia v. O'Brien, Ritch. Eq. Dec. 352, followed in Power v. Foster, 34 N. S. Reps. 479	478
Doe d. Bennett v. Turner, 7 M. & W. 226, distinguished in McCowan v. Armstrong, 22 Occ. N. 55, 3 O. L. R. 100	263
Doe d. Hunt v. Moore, 14 East 601, referred to in <i>In re</i> Young, 22 Occ. N. 31.....	496
Dominion Bank v. Heffernan, 11 P. R. 504, distinguished in <i>In re</i> Thomson v. Stone, 22 Occ. N. 327, 412, 4 O. L. R. 333, 585.....	129

COLUMN.

Dominion Cotton Mills Co. v. General Engineering Co. of Ontario, 31 S. C. R. 75, reversed in S. C., [1902] A. C. 570	367
Douglas v. Samson, 1 N. B. Eq. 137, followed in Capstick v. Hendry, 22 Occ. N. 35	48
Drifil v. McFall, 41 U. C. R. 313, followed in Union Bank v. Elliott, 22 Occ. N. 331, 14 Man. L. R. 187	58
Drysdale v. Dugas, 26 S. C. R. 20, followed in Gareau v. Montreal Street R. W. Co., 22 Occ. N. 4, 31 S. C. R. 463	340
Drysdale v. Union S. S. Co., 22 Occ. N. 74, 8 Brit. Col. L. R. 228, reversed in S. C., 22 Occ. N. 278, 32 S. C. R. 379	434
Dubois v. Village of Ste. Rose, 21 S. C. R. 65, followed in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353	21
Duck v. Bates, 13 Q. B. D. 846, followed in Carte v. Dennis, 21 Occ. N. 68, 267, 5 Terr. L. R. 30	110
Ducondu v. Dupuy, 9 App. Cas. 150, followed in Drouin v. Morrisette, 22 Occ. N. 79, 31 S. C. R. 563 ..	478
Duhaime v. Parish of St. Francois du Lac, Q. R. 19 S. C. 162, affirmed in S. C., Q. R. 21 S. C. 89	260
Dyment v. Thompson, 9 O. R. 566, 12 A. R. 658, 13 S. C. R. 303, commented on in Lewis v. Barré, 22 Occ. N. 336, 14 Man. L. R. 32	422

E.

Eade v. Winser, 47 L. J. C. P. 584, followed in Harris v. Harris, 22 Occ. N. 73, 8 Brit. Col. L. R. 307	42
Earle v. Burland, 21 Occ. N. 16, 27 A. R. 540, varied in Burland v. Earle, [1902] A. C. 83	87
Ecroyd v. Coulthard, [1897] 2 Ch. 554, followed in Gunn v. Harper, 22 Occ. N. 208, 225, 3 O. L. R. 693	244
Eldon v. Haig, 1 Chit. 11, followed in Rex <i>ex rel.</i> Roberts v. Ponsford, 22 Occ. N. 146, 3 O. L. R. 410	333
Elizabethtown, Township of, v. Township of Augusta, 21 Occ. N. 375, 2 O. L. R. 4, affirmed in S. C., 22 Occ. N. 191, 32 S. C. R. 295	316
Emery v. Webster, 9 Ex. 242, followed in Chevalier v. Ross, 22 Occ. N. 96, 3 O. L. R. 219	385
Esquimalt and Nanaimo R. W. Co. v. New Vancouver Coal Co., 6 Brit. Col. L. R. 306, reversed in S. C., 9 Brit. Col. L. R. 162	387

COLUMN.

Evans v. Jaffray, 1 O. L. R. 614, followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245	358
Evans v. Skelton, M. L. R. 3 Q. B. 325, 16 S. C. R. 637, followed in Ford v. Phillips, Q. R. 21 S. C. 1 ..	256
Excelsior Life Ins. Co. v. Employers' Liability Assurance Corpn., <i>In re</i> Faulkner, 21 Occ. N. 532, 2 O. L. R. 301, affirmed in S. C., 22 Occ. N. 94, 3 O. L. R. 93	25

F.

Fair v. McCrow, 31 U. C. R. 599, followed in Municipality of Louise v. Canadian Pacific R. W. Co., 22 Occ. N. 124, 14 Man. L. R. 124 ..	128
Falck v. Williams, [1900] A. C. 176, followed in Colt v. Dowling, 4 Terr. L. R. 464	100
Fane v. Fane, L. R. 20 Eq. 698, followed in McCowan v. Armstrong, 22 Occ. N. 55, 3 O. L. R. 100	263
Farwell v. The Queen, 22 S. C. R. 558, referred to in Hogaboom v. The King, 22 Occ. N. 88, 7 Ex. C. R. 292	133
Federation Brand Salmon Canning Co. v. Short, 7 Brit. Col. L. R. 197, affirmed in S. C., 31 S. C. R. 378	367
Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, followed in Township of Gloucester v. Canada Atlantic R. W. Co., 22 Occ. N. 63, 284, 3 O. L. R. 85, 4 O. L. R. 262 ..	490
Field v. Hart, 22 A. R. 449, followed in Roberts v. Hartley, 22 Occ. N. 185	266
Fisher v. Bradshaw, 21 Occ. N. 378, 2 O. L. R. 128, affirmed in S. C., 22 Occ. N. 281, 4 O. L. R. 162 ..	68
Fisher v. Fisher, 28 S. C. R. 494, followed in Hargrove v. Royal Temp-lars of Temperance, 22 Occ. N. 1, 31 S. C. R. 385	20
Fitzjohn v. MacKinder, 9 C. B. N. S. 505, followed in Powell v. Hiltgen, 5 Terr. L. R. 16	216
Forrest v. Laycock, 18 Gr. 611, followed in <i>In re</i> Thomson v. Stone, 22 Occ. N. 327, 412, 4 O. L. R. 333, 585	129
Foster v. McKinnon, L. R. 4 C. P. 704, followed in Jones Stacker Co. v. Green, 22 Occ. N. 264, 14 Man. L. R. 61	107
Fournier v. Lamoureux, Q. R. 21 S. C. 32, reversed in S. C., Q. R. 21 S. C. 99	281
Freeth v. Burr, L. R. 9 C. P. 206, followed in McCowan v. McKay, 22 Occ. N. 100, 13 Man. L. R. 390 ..	423

G.

COLUMN.

Galloway v. Corporation of London, L. R. 4 Eq. 90, not followed in Ottawa Gas Co. v. City of Ot- tawa, 22 Occ. N. 408, 4 O. L. R. 656	114
Gardner v. Irwin, 4 Ex. D. 49, fol- lowed in <i>Clergue v. McKay</i> , 22 Occ. N. 148, 162, 3 O. L. R. 478.	169
Geddes and Garde, <i>In re</i> , 22 Occ. N. 455, 32 O. R. 262, approved in <i>In re Geddes and Cochrane</i> , 22 Occ. N. 54, 3 O. L. R. 75.....	254
Geddis v. Proprietors of Bann Reser- voir, 3 App. Cas. 430, followed in Canadian Pacific R. W. Co. v. Roy, [1902] A. C. 220	406
Gibbons v. Darvill, 12 P. R. 478, distinguished in <i>Schwartz v.</i> <i>Winkler</i> , 22 Occ. N. 401, 14 Man. L. R. 197	361
Gillard v. Milligan, 28 O. R. 645, followed in <i>Elliott v. Hamilton</i> , 22 Occ. N. 412, 4 O. L. R. 585..	49
Granby, Village of, v. Menard, 21 Occ. N. 7, 31 S. C. R. 14, fol- lowed in <i>The "Reliance" v. Con-</i> <i>well</i> , 22 Occ. N. 77, 31 S. C. R. 653	435
Grant v. Acadia Coal Co., 34 N. S. Reps. 319, reversed in <i>S. C.</i> , 22 Occ. N. 359, 32 S. C. R. 427 ..	284
Grant v. Dupont, 8 Brit. Col. L. R. 7, affirmed in <i>S. C.</i> , 8 Brit. Col. L. R. 223	27
Grant v. West, 23 A. R. 533, fol- lowed in <i>Carswell v. Langley</i> , 22 Occ. N. 97, 3 O. L. R. 261.....	50
Graves v. Gorrie, 20 Occ. N. 456, 32 O. R. 266, 21 Occ. N. 232, 1 O. L. R. 309, affirmed in <i>S. C.</i> , 22 Occ. N. 172, 3 O. L. R. 607	110
Greene v. Mappin, M. L. R. 5 Q. B. 108, followed in <i>Leroux v. Beau-</i> <i>jeu</i> , Q. R. 20 S. C. 235, 4 Q. P. R. 35	238
Guertin v. Mollieur, Q. R. 19 S. C. 571, affirmed in <i>S. C.</i> , Q. R. 21 S. C. 261.....	120
Gunn v. Adams, 8 C. L. J. 211, fol- lowed in <i>Capstick v. Hendry</i> , 22 Occ. N. 35	49

H.

Haggert v. Town of Brampton, 28 S. C. R. 174, followed in <i>Stack v.</i> <i>T. Eaton Co.</i> , 22 Occ. N. 322, 4 O. L. R. 335	201
Haliburton v. DeWolfe, 1 N. S. D. 12, followed in <i>Capstick v. Hen-</i> <i>dry</i> , 22 Occ. N. 35	48
Hammersmith R. W. Co. v. Brand, L. R. 4 H. L. 215, followed in Canadian Pacific R. W. Co. v. Roy, [1902] A. C. 220	406

COLUMN.

Hanbury v. Chambers, 10 Man. L. R. 167, followed in <i>Hughes v.</i> <i>Chambers</i> , 22 Occ. N. 333, 14 Man. L. R. 163	426
Harbin v. Masterman, [1896] 1 Ch. 351, followed in <i>In re McIntyre</i> , 22 Occ. N. 90, 3 O. L. R. 212....	470
Hart v. Parsons, Q. R. 10 K. B. 555, reversed in <i>S. C.</i> , 20 Occ. N. 372, 30 S. C. R. 473	434
Hawley v. Wright, 34 N. S. Reps. 363, affirmed in <i>S. C.</i> , 22 Occ. N. 198, 32 S. C. R. 40	335
Heard v. Pilley, L. R. 4 Ch. 548, dis- cussed in <i>Hull v. Allen</i> , 22 Occ. N. 138	179
Helby v. Matthews, [1895] A. C. 471, distinguished and applied in <i>Mason v. Lindsay</i> , 22 Occ. N. 371, 4 O. L. R. 365	420
Henderson v. Bank of Hamilton, 23 S. C. R. 716, distinguished in <i>Mackay v. Colonial Investment</i> and <i>Loan Co.</i> , 22 Occ. N. 389, 4 O. L. R. 571.....	511
Henderson v. Merthyr Tydfil Urban District Council, [1900] 1 Q. B. 434, not followed in <i>Ottawa Gas</i> <i>Co. v. City of Ottawa</i> , 22 Occ. N. 408, 4 O. L. R. 656.....	114
Henderson v. The Queen, 6 Ex. C. R. 47, distinguished in <i>Ross v. The</i> <i>King</i> , 22 Occ. N. 86, 7 Ex. C. R. 287	416
Henning v. Maclean, 21 Occ. N. 434, 2 O. L. R. 169, affirmed in <i>S. C.</i> , 22 Occ. N. 405, 4 O. L. R. 666..	494
Hévé v. Royal Electric Co., 21 Occ. N. 442, Q. R. 11 K. B. 436, affirmed in <i>S. C.</i> , 22 Occ. N. 358, 32 S. C. R. 462	336
Hicks v. Ross, [1891] 3 Ch. 499, re- ferred to in <i>In re McIntyre</i> , 22 Occ. N. 90, 3 O. L. R. 212	470
Higgins v. Central Co., 155 Mass. 176, approved in <i>Merritt v. Cop-</i> <i>per Crown Mining Co.</i> , 22 Occ. N. 239	83
Hobson v. Gorringer, [1897] 1 Ch. 182, followed in <i>Stack v. T. Eaton</i> <i>Co.</i> , 22 Occ. N. 322, 4 O. L. R. 335	201
Hodgins v. McNeil, 9 Gr. 305, ap- proved in <i>Kidd v. Harris</i> , 22 Occ. N. 25, 3 O. L. R. 60	278
Hodgkinson, <i>In re</i> , [1895] W. N. 85, followed in <i>McCune v. Botsford</i> , 22 Occ. N. 340, 9 Brit. Col. L. R. 129	115
Hoght v. Tottenham, [1892] W. N. 88, referred to in <i>Ruggles v. M.</i> and <i>V. B. R. W. Co.</i> , 22 Occ. N. 432	245
Holland v. Hodgson, L. R. 7 C. P. 328, followed in <i>Stack v. T. Eaton</i> <i>Co.</i> , 22 Occ. N. 322, 4 O. L. R. 335	201

	COLUMN.
Hopkin v. Hamilton Electric Light and Cataract Power Co., 21 Occ. N. 440, 2 O. L. R. 240, affirmed in <i>S. C.</i> , 22 Occ. N. 284, 4 O. L. R. 238	339
Howell v. Metropolitan District R. W. Co., 51 L. J. Ch. 158, referred to in <i>Cicogna v. McHeather</i> , 22 Occ. N. 309	45
Hughes v. Hughes, 6 A. R. 373, 380, followed in <i>Fairfield v. Ross</i> , 22 Occ. N. 413, 4 O. L. R. 524	5
Hull Electric Co. v. Ottawa Electric Co., Q. R. 10 Q. B. 34, followed in <i>S. C.</i> , [1902] A. C. 237	313
Humble v. Hunter, 12 Q. B. 310, distinguished in <i>Abbott v. Atlantic Refining Co.</i> , 22 Occ. N. 411, 4 O. L. R. 701	393
Hunt v. Harlow, 1 Old. 709, followed in <i>McLaughlin Carriage Co. v. Fader</i> , 34 N. S. Reps. 534	29
Huson and South Norwich, <i>In re</i> , 19 A. R. 343, followed in <i>In re Salter and Township of Beckwith</i> , 22 Occ. N. 182, 4 O. L. R. 51	312

J.

Jackson v. Grand Trunk R. W. Co., 22 Occ. N. 12, 2 O. L. R. 689, affirmed in <i>S. C.</i> , 22 Occ. N. 249, 32 S. C. R. 245	463
James v. Grand Trunk R. W. Co., 20 Occ. N. 278, 31 O. R. 672, 21 Occ. N. 110, 1 O. L. R. 127, reversed in <i>S. C.</i> , 22 Occ. N. 2, 31 S. C. R. 420	404
James v. Smith, [1891] 1 Ch. at p. 357, discussed in <i>Hull v. Allen</i> , 22 Occ. N. 138	79
Jarvis v. Great Western R. W. Co., S. C. P. 280, followed in <i>Ottawa Gas Co. v. City of Ottawa</i> , 22 Occ. N. 408, 4 O. L. R. 656	114
Jenkins v. Jackson, [1891] 1 Ch. 89, referred to in <i>Davis v. Hord</i> , 22 Occ. N. 285, 4 O. L. R. 466 ..	14
Jones v. Just, L. R. 3 Q. B. 202, followed in <i>Higgins v. Clish</i> , 34 N. S. Reps. 135	425

K.

Kelly v. Ottawa R. W. Co., 3 A. R. 616, considered in <i>Findlay v. Canadian Pacific R. W. Co.</i> , 21 Occ. N. 461, 5 Terr. L. R. 143 ..	405
Kelly v. Solari, 9 M. & W. 54, followed in <i>McDermott v. Hickling</i> , 22 Occ. N. 59	290
Kettlewell v. Watson, 21 Ch. D. 686, referred to in <i>Commercial Bank of Windsor v. Morrison</i> , 22 Occ. N. 196, 32 S. C. R. 98	64

	COLUMN.
Knight v. Grand Trunk R. W. Co., 13 P. R. 386, overruled in <i>Morrison v. Grand Trunk R. W. Co.</i> , 22 Occ. N. 149, 162, 4 O. L. R. 43	166
Kreutziger v. Brox, 32 O. R. 418, not followed in <i>McCormick Harvesting Machine Co. v. Warnica</i> , 22 Occ. N. 158, 3 O. L. R. 427 ..	129

L.

Laine v. The Queen, 5 Ex. C. R. 128, distinguished in <i>Ross v. The King</i> , 22 Occ. N. 86, 7 Ex. C. R. 287 ..	415,
Langley v. Van Allen, 20 Occ. N. 437, 32 O. R. 216, 21 Occ. N. 551, 3 O. L. R. 5, affirmed in <i>S. C.</i> , 22 Occ. N. 222, 32 S. C. R. 174 ..	53
Lawr v. Parker, 7 Brit. Col. L. R. 418, affirmed in <i>S. C.</i> , 8 Brit. Col. L. R. 223	294
Lawson v. McGeoch, 20 A. R. 464, followed in <i>Codville v. Fraser</i> , 22 Occ. N. 123, 14 Man. L. R. 12 ..	54
Lee v. Abdy, 17 Q. B. D. 309, followed in <i>National Trust Co. v. Hughes</i> , 22 Occ. N. 101, 14 Man. L. R. 41	230
Leitch v. Grand Trunk R. W. Co., 12 P. R. 541, 671, 13 P. R. 309, followed in <i>Morrison v. Grand Trunk R. W. Co.</i> , 22 Occ. N. 149, 162, 4 O. L. R. 43	166
Liquor Act of Manitoba, <i>In re</i> , 21 Occ. N. 212, 13 Man. L. R. 239, reversed in <i>Attorney-General of Manitoba v. Manitoba License Holders' Assn.</i> , [1902] A. C. 73 ..	97
Littlejohn v. Soper, 21 Occ. N. 111, 1 O. L. R. 172, reversed in <i>S. C.</i> , 22 Occ. N. 45, 31 S. C. R. 572 ..	252
Livingstone v. Western Ins. Co., 16 Gr. 9, followed in <i>Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co.</i> , 21 Occ. N. 582, 3 O. L. R. 127	229
Lucas v. De la Cour, 1 M. & S. 249, distinguished in <i>Abbott v. Atlantic Refining Co.</i> , 22 Occ. N. 411, 4 O. L. R. 701	398
Lucas v. Williams, [1892] 2 Q. B. 117, considered in <i>Carte v. Dennis</i> , 21 Occ. N. 68, 267, 5 Terr. L. R. 30	110

M.

Macarthur v. Leckie, 9 Man. L. R. 110, followed in <i>Sword v. Tedder</i> , 21 Occ. N. 546, 13 Man. L. R. 572	471
Macaulay v. Victoria Yukon Trading Co., 22 Occ. N. 154, 9 Brit. Col. L. R. 27, reversed in <i>S. C.</i> , 22 Occ. N. 377, 9 Brit. Col. L. R. 136	513

	COLUMN.
Macdonald v. Corrigan, 9 Man. L. R. 284, followed in Conn v. Fitzgerald, 22 Occ. N. 345	260
MacLaughlin v. Lake Erie and Detroit River R. W. Co., 21 Occ. N. 466, 2 O. L. R. 190, reversed in S. C., 22 Occ. N. 202, 3 O. L. R. 706	370
McCleave, <i>Ex p.</i> , 35 N. B. Reps. 100, distinguished in Gaul v. Township of Ellice, 22 Occ. N. 157, 3 O. L. R. 438	274
McDermott v. Hickling, 22 Occ. N. 59, reversed in S. C., 1 O. W. R. 768	209
McDougall v. McMillan, 25 C. P. 75, 92, followed in Sawers v. City of Toronto, 22 Occ. N. 25, 380, 2 O. L. R. 717, 4 O. L. R. 624	32
McDowell v. Ulster Bank, 60 Alb. L. J. 346, distinguished in Haynen v. Mundie, 22 Occ. N. 152	271
McIntyre, <i>In re</i> , 21 Occ. N. 350, varied in S. C., 22 Occ. N. 90, 3 O. L. R. 212	470
McKay v. Township of Hinchinbrooke, 24 S. C. R. 55, referred to in County of Tonssignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353	21
McNevin v. Canadian Railway Accident Ins. Co., 21 Occ. N. 76, 553, 32 O. R. 284, 2 O. L. R. 521, affirmed in S. C., 22 Occ. N. 223, 32 S. C. R. 194	223
McNorsley v. Mayor, &c., of St. John, 6 S. C. R. 531, distinguished in Gaul v. Township of Ellice, 22 Occ. N. 157, 3 O. L. R. 438	274
McWhirter v. Corbett, 4 C. P. 203, followed in MacDonnell v. Robertson, 1 Terr. L. R. 438	433
McWillie v. North Shore R. W. Co., 17 S. C. R. 571, considered in Findlay v. Canadian Pacific R. W. Co., 21 Occ. N. 461, 5 Terr. L. R. 143	405
Mace and Frontenac, <i>In re</i> , 42 U. C. R. at p. 76, followed in <i>In re</i> Salter and Township of Beckwith, 22 Occ. N. 182, 4 O. L. R. 51	312
Mail Printing Co. v. Clarkson, 25 A. R. 1, followed in Carawell v. Langley, 22 Occ. N. 97, 3 O. L. R. 261	50
Mann v. Ward, 8 Times L. R. 690, not followed in Myers v. Sault Ste. Marie Pulp and Paper Co., 22 Occ. N. 203, 3 O. L. R. 600	282
Mannheim Ins. Co. v. Atlantic and Lake Superior R. W. Co., Q. R. 15 S. C. 469, 476, in part affirmed and in part reversed in S. C., Q. R. 21 S. C. 200	2
Manning v. Robinson, 29 O. R. 483, followed in <i>In re</i> Holland, 22 Occ. N. 164, 3 O. L. R. 406	416

	COLUMN.
Maple Leaf Dairy Co., <i>Re</i> , 2 O. L. R. 590, followed in <i>In re</i> Okall and Morris Fruit Preserving Co., 9 Brit. Col. L. R. 153	93
Marriott v. Hampton, 2 Sm. L. C., 10th ed., p. 431, followed in McDermott v. Hickling, 22 Occ. N. 59	299
Martin v. County of Arthabaska, Q. R. 20 S. C. 329, reversed in S. C., Q. R. 21 S. C. 119	327
Martley v. Carson, 20 S. C. R. 634, applied in Covert v. Pettijohn, 22 Occ. N. 308, 9 Brit. Col. L. R. 118	483
Mason v. Bertram, 18 O. R. 1, followed in Davidson v. Stuart, 22 Occ. N. 266, 14 Man. L. R. 74	156
Matthews (George) Co. v. Bouchard, 28 S. C. R. 580, followed in Dominion Cartridge Co. v. McArthur, 22 Occ. N. 5, 31 S. C. R. 392	282
Mayer v. Vaughan, Q. R. 20 S. C. 549, affirmed in S. C., Q. R. 11 K. B. 340	458
Medland, <i>In re</i> , Eland v. Medland, 41 Ch. D. at p. 492, followed in <i>In re</i> McIntyre, 22 Occ. N. 90, 3 O. L. R. 212	470
Meighen v. Buell, 24 Gr. 503, followed in Turriff v. McDonald, 21 Occ. N. 545, 13 Man. L. R. 577	440
Meloche v. Davidson, Q. R. 20 S. C. 26, affirmed in S. C., Q. R. 11 K. B. 302	400
Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 434, followed in McCowan v. McKay, 22 Occ. N. 100, 13 Man. L. R. 590	423
Messenger v. Town of Bridgetown, 33 N. S. Reps. 291, affirmed in S. C., 31 S. C. R. 379	487
Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, referred to in McQuade v. The King, 22 Occ. N. 87, 7 Ex. C. R. 318	153
Metropolitan R. W. Co. v. Wright, 11 App. Cas. 152, followed in Dominion Cartridge Co. v. McArthur, 22 Occ. N. 5, 31 S. C. R. 392	282
Middleton v. Scott, 22 Occ. N. 28, 3 O. L. R. 26, varied in S. C., 22 Occ. N. 369, 4 O. L. R. 459	301
Mitchell v. City of London Assee. Co., 15 A. R. 262, followed in Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co., 21 Occ. N. 582, 3 O. L. R. 127	220
Molsons Bank v. Halter, 18 S. C. R. 88, followed in Morphy v. Colwell, 22 Occ. N. 111, 3 O. L. R. 314	55

	COLUMN.
Monson v. Tussaud, [1894] 1 Q. B. 671, referred to in Quirk v. Dudley, 22 Occ. N. 388, 4 O. L. R. 532	222
Montreal and Ottawa R. W. Co. v. City of Ottawa, 2 O. L. R. 336, affirmed in S. C., 22 Occ. N. 224, 4 O. L. R. 56	402
Montreal, City of, v. Montreal Street R. W. Co., Q. R. 19 S. C. 504, affirmed in S. C., Q. R. 11 K. B. 458	445
Montreal Gas Co. v. Cadieux, Q. R. 11 K. B. 93, reversed in S. C., 28 S. C. R. 382, but restored in S. C., [1890] A. C. 589	101
Morley, <i>In re</i> , [1895] 2 Ch. 738, applied in <i>In re</i> Cameron, 21 Occ. N. 593, 2 O. L. R. 756	493
Moseley v. Victoria Rubber Co., 55 L. T. N. S. 452, followed in Clergue v. McKay, 22 Occ. N. 64, 3 O. L. R. 63	170
Mowat v. Provident Savings Life Assurance Society, 21 Occ. N. 17, 27 A. R. 675, reversed in S. C., 22 Occ. N. 221, 32 S. C. R. 147	234
Moxon v. Payne, L. R. 8 Ch. 881, followed in Atkinson v. Borland, 14 Man. L. R. 205	203
Murphy, <i>In re</i> , 26 O. R. 163, 23 A. R. 386, followed in <i>In re</i> Watts, 22 Occ. N. 166, 3 O. L. R. 368	197
Murray v. Jenkins, 28 S. C. R. 565, followed in Jones Stackar Co. v. Green, 22 Occ. N. 264, 14 Man. L. R. 61	107
Murray Canal, <i>Re</i> , 6 O. R. 685, approved in Kidd v. Harris, 22 Occ. N. 25, 3 O. L. R. 60	278
N.	
Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 417, distinguished in Nelson Coke and Gas Co. v. Pellatt, 22 Occ. N. 382, 4 O. L. R. 481	88
Nelson Coke and Gas Co. v. Pellatt, 21 Occ. N. 500, 2 O. L. R. 390, reversed in S. C., 22 Occ. N. 382, 4 O. L. R. 481	88
New Prance and Garrard's Trustee v. Hunting, [1897] 2 Q. B. 19, followed in Codville v. Fraser, 22 Occ. N. 123, 14 Man. L. R. 12	54
New Westminster Provincial Election, <i>In re</i> , 22 Occ. N. 43, 8 Brit. Col. L. R. 273, affirmed in S. C., 9 Brit. Col. L. R. 192	347
Newell v. Bradford, 37 L. J. C. P. 1, considered in Bank of Montreal v. Burns, 22 Occ. N. 342	78
Noble v. Blanchard, 7 Brit. Col. L. R. 62, not followed in Murphy v. Star Exploring and Mining Co., 22 Occ. N. 104, 8 Brit. Col. L. R. 421	294

	COLUMN.
North American Life Assce. Co. v. Brophy, 21 Occ. N. 357, 2 O. L. R. 559, in part affirmed and in part reversed in S. C., 22 Occ. N. 250, 32 S. C. R. 261	236
Nottawasaga, <i>In re</i> Township of, and County of Simcoe, 22 Occ. N. 48, 3 O. L. R. 169, reversed in S. C., 22 Occ. N. 172, 4 O. L. R. 1	32
O.	
Odell v. City of Ottawa, 12 P. R. 446, followed in Morrison v. Grand Trunk R. W. Co., 22 Occ. N. 149, 162, 4 O. L. R. 43	166
Oldfield v. Barbour, 12 P. R. 554, followed in Fairclough v. Smith, 21 Occ. N. 447, 13 Man. L. R. 509	289
Oliver v. Hunting, 44 Ch. D. 205, referred to in Calder v. Hallett, 5 Terr. L. R. 1	424
Omnium Securities Co. v. Canada Fire and Marine Ins. Co., 1 O. R. 494, observed upon in Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co., 21 Occ. N. 582, 3 O. L. R. 127	229
Ontario Mining Co. v. Seybold, 20 Occ. N. 110, 31 O. R. 386, 21 Occ. N. 23, 32 O. R. 301, affirmed in S. C., 32 S. C. R. 1	96
O'Shea v. Wood, [1891] P. 286, followed in Clergue v. McKay, 22 Occ. N. 148, 162, 3 O. L. R. 478	169
Osler v. Mutter, 19 A. R. 94, followed in Roberts v. Hartley, 22 Occ. N. 185	203
Ottawa Electric Co. v. St. Jacques, 21 Occ. N. 105, 1 O. L. R. 73, reversed in S. C., 22 Occ. N. 77, 31 S. C. R. 636	107
Owen v. Van Uster, 10 C. R. 318, followed in McDougall v. McLean, 1 Terr. L. R. 450	66

P.

Panama, &c., Co. v. India Rubber &c., Co., L. R. 10 Ch. 515, followed in Murray v. Smith, 22 Occ. N. 241, 14 Man. L. R. 125	472
Parry, <i>In re</i> , 42 Ch. D. 570, followed in <i>In re</i> McIntyre, 22 Occ. N. 90, 3 O. L. R. 212	470
Partlo v. Todd, 14 A. R. 444, followed in Gillett v. Lumsden, 22 Occ. N. 297, 4 O. L. R. 300	455
And referred to in Provident Chemical Works v. Canada Chemical Co., 22 Occ. N. 381, 4 O. L. R. 545	455
Paul v. Joel, 3 H. & N. 455, followed in Counsell v. Livingston, 22 Occ. N. 360, 4 O. L. R. 340	66

	COLUMN.
Pearce v. Gardner, [1897] 1 Q. B. 688, considered in Bank of Montreal v. Burns, 22 Occ. N. 342...	78
Pender v. Taddei, [1898] 1 Q. B. 798, followed in Hume v. Hume, 22 Occ. N. 147	376
People's Loan and Deposit Co. v. Grant, 18 S. C. R. 262, distinguished in Middleton v. Scott, 22 Occ. N. 369, 4 O. L. R. 459.....	300
Perera v. Perera, [1891] A. C. 354, followed in Kaulbach v. Archbold, 22 Occ. N. 9, 31 S. C. R. 387....	504
Petrie v. Machan, 28 O. R. 642, followed in McCormick Harvesting Machine Co. v. Warnica, 22 Occ. N. 158, 3 O. L. R. 427	129
Phillips v. Malone, 22 Occ. N. 32, 3 O. L. R. 47, affirmed in S. C., 22 Occ. N. 159, 3 O. L. R. 492.....	510
Phipps v. Ackers, 8 Cl. & Fin. 583, referred to in re Young, 22 Occ. N. 31	496
Portman v. Patterson, 21 U. C. R. 237, followed in Municipality of Louise v. Canadian Pacific R. W. Co., 22 Occ. N. 124, 14 Man. L. R. 124	128
Provident Chemical Works v. Canada Chemical Co., 21 Occ. N. 467, 2 O. L. R. 182, followed in Gillett v. Lumsden, 22 Occ. N. 297, 4 O. L. R. 300	455
And reversed in S. C., 22 Occ. N. 381, 4 O. L. R. 545	455
Pym v. Campbell, 6 E. & B. 370, followed in Commercial Bank of Windsor v. Morrison, 22 Occ. N. 196, 32 S. C. R. 98	63

Q.

Quigley v. Waterloo Mfg. Co., 1 O. L. R. 606, distinguished in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245...	358
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R.

Randall v. Lithgow, 53 L. J. Q. B. 513, referred to in Cicognia v. McHeather, 22 Occ. N. 309	45
Rathburn v. Hayford, 87 Mass. 406, followed in Fairclough v. Smith, 21 Occ. N. 447, 13 Man. L. R. 509	280
Reburn v. Parish of St. Anne, 15 S. C. R. 92, overruled in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353...	21
Regina v. Flavelle, 14 Q. B. D. 364, followed in Cooke v. Wilson, 22 Occ. N. 168, 3 O. L. R. 299.....	166
Regina v. Fox, 18 P. R. 343, distinguished in Rose v. Croden, 22 Occ. N. 135, 3 O. L. R. 383.....	386

	COLUMN.
Regina v. Grenier, 30 S. C. R. 42, followed in Ferguson v. Grand Trunk R. W. Co., Q. R. 20 S. C. 54	286
Regina v. McBerny, 3 Can. Crim. Cas. 339, distinguished in Rex v. Sing, 22 Occ. N. 423, 9 Brit. Col. L. R. 254	247
Regina v. McDonald, 26 N. S. Reps. 94, distinguished in Regina v. Vantassel, 34 N. S. Reps. 70....	72
Regina v. McGregor, 19 C. P. 69, distinguished in Sutton v. Village of Port Carling, 22 Occ. N. 139, 3 O. L. R. 445.....	450
Regina ex rel. Grant v. Coleman, 7 A. R. 619, referred to in Rex ex rel. McFarlane v. Coulter, 22 Occ. N. 414, 4 O. L. R. 520.....	332
Regina ex rel. Mangan v. Fleming, 14 P. R. 458, referred to in Rex ex rel. Ivison v. Irwin, 22 Occ. N. 299, 4 O. L. R. 192	333
Renaud v. Lamothe, 21 Occ. N. 392, affirmed in S. C., 22 Occ. N. 357, 32 S. C. R. 357	505
Rennie v. Quebec Bank, 21 Occ. N. 183, 1 O. L. R. 303, affirmed in S. C., 22 Occ. N. 171, 3 O. L. R. 541	79
Rex v. Algoma Central R. W. Co., 22 Occ. N. 85, 7 Ex. C. R. 238, reversed in S. C., 22 Occ. N. 240, 32 S. C. R. 277	415
Rex v. Riendeau, Q. R. 9 Q. B. 147, affirmed in part and reversed in part in S. C., Q. R. 10 K. B. 584.	144
Rex v. Scully, 21 Occ. N. 432, 2 O. L. R. 315, affirmed in S. C., 22 Occ. N. 360, 4 O. L. R. 394.....	275
Rice v. Ditmars, 21 N. S. Reps. 140, followed in Russell v. Murray, 34 N. S. Reps. 548	255
Richards v. Bank of British North America, 21 Occ. N. 576, 8 Brit. Col. L. R. 143, affirmed in S. C., 8 Brit. Col. L. R. 209	57
Richards v. Bank of Nova Scotia, 26 S. C. R. 381, referred to in Commercial Bank of Windsor v. Morrison, 22 Occ. N. 196, 32 S. C. R. 98	64
Ritchie v. Vermillion Mining Co., 21 Occ. N. 291, 1 O. L. R. 654, affirmed in S. C., 22 Occ. N. 382, 4 O. L. R. 588	82
Ritz v. Schmidt, 21 Occ. N. 396, 13 Man. L. R. 419, reversed in S. C., 22 Occ. N. 79, 31 S. C. R. 602....	443
Robinson v. Mann, 21 Occ. N. 375, 2 O. L. R. 63, varied in S. C., 22 Occ. N. 2, 31 S. C. R. 484	68
Rocheffoucauld v. Boustead, [1897] 1 Ch. 196, discussed in Hull v. Allen, 22 Occ. N. 138	170

	COLUMN.
Russell v. Smith, 12 Q. B. 217, followed in <i>Carte v. Dennis</i> , 21 Occ. N. 68, 267, 5 Terr. L. R. 30	110
Rylands v. Fletcher, L. R. 3 H. L. 330, applied in <i>Crewe v. Mottershaw</i> , 22 Occ. N. 422, 9 Brit. Col. L. R. 246	200
S.	
St. André Avelin, Corporation de, v. Corporation de Ripon, Q. R. 4 Q. B. 167, followed in <i>Corporation du Canton de Nelson v. County of Mégantic</i> , Q. R. 20 S. C. 334	319
St. Sulpice Seminaire v. Masson, Q. R. 17 S. C. 573, reversed in <i>S. C.</i> , Q. R. 10 K. B. 570	479
Salamon v. Salamon, [1897] A. C. 22, followed in <i>Littlejohn v. Soper</i> , 22 Occ. N. 45, 31 S. C. R. 572	252
Saltmarsh v. Hardy, 42 L. J. Ch. 422, distinguished in <i>Carte v. Dennis</i> , 21 Occ. N. 267, 5 Terr. L. R. 30	178
Santanderino v. Vanvert, 23 S. C. R. 145, followed in <i>The "Reliance" v. Conwell</i> , 22 Occ. N. 77, 31 S. C. R. 653	435
"Saracen," <i>The</i> , 6 Moo. P. C. 50, followed in <i>Munsen v. The "Comrade"</i> , 7 Ex. C. R. 331	436
Saults v. Eaket, 11 Man. L. R. 597, distinguished in <i>Jones Stacker Co. v. Green</i> , 22 Occ. N. 264, 14 Man. L. R. 61	107
Scott and County of Peterborough, <i>In re</i> , 26 U. C. R. 36, followed in <i>Sutton v. Village of Port Carling</i> , 22 Occ. N. 139, 3 O. L. R. 445	450
Seroka v. Kattenburg, 17 Q. B. D. 177, followed in <i>Mackenzie v. Cunningham</i> , 22 Occ. N. 43, 8 Brit. Col. L. R. 206	209
Sharp v. Jackson, [1890] A. C. 419, followed in <i>Codville v. Fraser</i> , 22 Occ. N. 123, 14 Man. L. R. 12	54
Sherbrooke, City of, v. McManamy, 18 S. C. R. 594, followed in <i>County of Toussignant v. County of Nicolet</i> , 22 Occ. N. 355, 32 S. C. R. 343	21
Sherras v. De Rutzen, [1895] 1 Q. B. 918, followed in <i>Regina v. Mellon</i> , 22 Occ. N. 343	219
Sinclair v. Preston, 21 Occ. N. 97, 12 Man. L. R. 228, affirmed in <i>S. C.</i> , 22 Occ. N. 9, 31 S. C. R. 408	238
Singleton v. Ellison, [1895] 1 Q. B. 607, followed in <i>Rex v. Young</i> , 22 Occ. N. 211, 14 Man. L. R. 58	139
Skinner v. Farquharson, 33 N. S. Repts. 261, reversed in <i>S. C.</i> , 22 Occ. N. 197, 32 S. C. R. 58	504

	COLUMN.
Smiles v. Belford, 25 Gr. 590, 1 A. R. 436, followed in <i>Carte v. Dennis</i> , 21 Occ. N. 68, 267, 5 Terr. L. R. 30	110
Smith v. Canadian Pacific R. W. Co., 34 N. S. Repts. 22, reversed in <i>S. C.</i> , 21 Occ. N. 427, 31 S. C. R. 367	405
Smith v. Hughes, L. R. 6 Q. B. 597, followed in <i>Jones Stacker Co. v. Green</i> , 22 Occ. N. 264, 14 Man. L. R. 61	107
Smith v. Hunt, 21 Occ. N. 438, 2 O. L. R. 134, varied in <i>S. C.</i> , 22 Occ. N. 429, 4 O. L. R. 653	305
Smith v. Spears, 22 O. R. 286, dissented from in <i>Winters v. McKinstry</i> , 22 Occ. N. 213	306
Smurthwaite v. Hannay, [1894] A. C. 494, distinguished in <i>Langley v. Law Society of Upper Canada</i> , 22 Occ. N. 99, 3 O. L. R. 245	358
South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44, referred to in <i>Haynen v. Mundie</i> , 22 Occ. N. 152	271
Sparrow v. Hill, 7 Q. B. D. 362, 8 Q. B. D. 479, followed in <i>Davis v. Hord</i> , 22 Occ. N. 285, 292, 4 O. L. R. 466	124
Standard Life Asse. Co. v. Trudeau, Q. R. 9 Q. B. 499, affirmed in <i>S. C.</i> , 31 S. C. R. 376	231
Stephens v. McArthur, 19 S. C. R. 440, followed in <i>Schwartz v. Winkler</i> , 21 Occ. N. 574, 13 Man. L. R. 493	54
And in <i>Codville v. Fraser</i> , 22 Occ. N. 123, 14 Man. L. R. 12	54
And in <i>Morphy v. Colwell</i> , 22 Occ. N. 111, 3 O. L. R. 314	55
Stevenson v. City of Kingston, 31 C. P. 333, followed in <i>Ottawa Gas Co. v. City of Ottawa</i> , 22 Occ. N. 408, 4 O. L. R. 656	114
Stevenson v. Traynor, 12 O. R. 804, followed in <i>Hislop v. Joss</i> , 22 Occ. N. 144, 3 O. L. R. 281	303
Steward v. England, [1895] 2 Ch. 820, followed in <i>Cogswell v. Grant</i> , 21 Occ. N. 351, 34 N. S. Repts. 340	262
Stoughton v. Leigh, 1 Taunt. 402, followed in <i>Allan v. Rever</i> , 22 Occ. N. 294, 4 O. L. R. 309	173
Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, <i>In re</i> , 21 Occ. N. 503, 2 O. L. R. 585, overruled in <i>Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation</i> , <i>In re Faulkner</i> , 22 Occ. N. 94, 3 O. L. R. 93	26
Summers v. Commercial Union Asse. Co., 6 S. C. R. 19, followed in <i>Canadian Fire Ins. Co. v. Robinson</i> , 22 Occ. N. 8, 31 S. C. R. 488	227

COLUMN.

Summers v. Cook, 28 Gr. 179, followed in Ford v. Hodgson, 22 Occ. N. 177, 3 O. L. R. 526	452
Sutton v. Sutton, 22 Ch. D. 511, followed in Cogswell v. Grant, 21 Occ. N. 351, 34 N. S. Reps. 340.	262
Sykes v. North Eastern R. W. Co., 44 L. J. C. P. 191, followed in Davidson v. Stuart, 22 Occ. N. 266, 14 Man. L. R. 74	156

T.

Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426, followed in Le Roi Mining Co. v. Rossland Miners' Union, 8 Brit. Col. L. R. 370	456
Tate v. Natural Gas and Oil Co., 18 P. R. 82, followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245	358
Taylor v. Robertson, 21 Occ. N. 270, 4 Terr. L. R. 474, reversed in S. C., 22 Occ. N. 80, 31 S. C. R. 615	439
Tennant v. Trenchard, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661, followed in Hutton v. Justin, 22 Occ. N. 23, 2 O. L. R. 713	467
Thompson v. London County Council, [1899] 1 Q. B. 840, distinguished in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245	358
Tilson v. Warwick Gas Light Co., 4 B. & C. 962, followed in Rex v. Robertson, 22 Occ. N. 240	322
Toomey v. Tracey, 4 O. R. 708, distinguished in <i>In re Scadding</i> , 22 Occ. N. 409, 4 O. L. R. 632	500
Toronto, City of, v. Lorsch, 24 O. R. 227, followed in Township of Gloucester v. Canada Atlantic R. W. Co., 22 Occ. N. 63, 284, 3 O. L. R. 85, 4 O. L. R. 262	490
Toronto General Trusts Co. v. Sewell, 17 O. R. 442, followed in National Trust Co. v. Hughes, 22 Occ. N. 101, 14 Man. L. R. 41....	230
Toronto Public School Board and City of Toronto, <i>In re</i> , 22 Occ. N. 15, 2 O. L. R. 727, affirmed in S. C., 22 Occ. N. 279, 4 O. L. R. 468	428
Toronto R. W. Co. v. The Queen, [1896] A. C. 551, referred to in Ross v. The King, 22 Occ. N. 86, 7 Ex. C. R. 287	415
Townsend v. Crowdy, 8 C. B. N. S. 493, followed in McDermott v. Hickling, 22 Occ. N. 59	299
Truro, Town of, v. Archibald, 33 N. S. Reps. 401, affirmed in S. C., 31 S. C. R. 380	316

COLUMN.

Tuckett-Lawry v. Lamoureux, 21 Occ. N. 187, 1 O. L. R. 364, affirmed in S. C., 22 Occ. N. 174, 3 O. L. R. 577	491
Turner v. Hellard, 30 Ch. D. 390, considered in Bank of Montreal v. Burns, 22 Occ. N. 342	78
Turner v. London and South Western R. W. Co., L. R. 17 Eq. 561, followed in Gunn v. Harper, 22 Occ. N. 208, 225, 3 O. L. R. 693	244

U.

Union Bank v. Code, 20 Occ. N. 300, 27 A. R. 396, affirmed in S. C., 22 Occ. N. 45, 31 S. C. R. 594	85
Union Bank v. Morris, 20 Occ. N. 300, 27 A. R. 396, affirmed in S. C., 22 Occ. N. 45, 31 S. C. R. 594	85

V.

Valpy v. Gibson, 4 C. B. 837, referred to in Calder v. Hallett, 5 Terr. L. R. 1	424
Verchères, County of, v. Village of Varennes, 19 S. C. R. 365, followed in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353	21

W.

Walter v. Rooke, 50 L. J. Q. B. 470, referred to in Cicogna v. McHeather, 22 Occ. N. 309	45
Warner v. Wilmington, 25 L. J. Ch. 662, considered in Bank of Montreal v. Burns, 22 Occ. N. 342....	78
Warmington v. Palmer, 22 Occ. N. 126, 8 Brit. Col. L. R. 344, reversed, and S. C., 7 Brit. Col. L. R. 414, restored in S. C., 22 Occ. N. 199, 32 S. C. R. 126	284
Warwick v. County of Simcoe, 36 C. L. J. 461, approved in Canadian Bank of Commerce v. Town of Toronto Junction, 22 Occ. N. 97, 3 O. L. R. 309	324
Watson v. Russell, 3 B. & S. 34, followed in Ontario Bank v. Young, 21 Occ. N. 565, 2 O. L. R. 761....	64
Webb v. Stenton, 11 Q. B. D. 518, followed in Carswell v. Langley, 22 Occ. N. 97, 3 O. L. R. 261....	50
Webster v. City of Sherbrooke, 24 S. C. R. 52, 268, referred to in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353	21

	COLUMN.
Weise v. Wardell, L. R. 19 Eq. 171, followed in Schwartz v. Winkler, 22 Occ. N. 401, 14 Man. L. R. 197	361
Western Assce. Co. v. Temple, 31 S. C. R. 373, followed in Whitla v. Royal Ins. Co., 22 Occ. N. 69, 72, 266, 14 Man. L. R. 90	225
West Huron, <i>In re</i> , 2 Ont. Elec. Cas. 58, corrected in <i>In re</i> Halton Elec- tion, 22 Occ. N. 362, 4 O. L. R. 345	350
Whitmore v. Turquand, 3 D. F. & J. 107, followed in Capstick v. Hen- dry, 22 Occ. N. 35	48
Wilkie v. Jellett, 2 N. W. T. Reps., part 1, p. 125, 26 S. C. R. 282, applied in <i>In re</i> Kerr, 5 Terr. L. R. 297	37
Wilson v. Hotchkiss, 21 Occ. N. 493, 2 O. L. R. 261, affirmed in <i>S. C.</i> , 22 Occ. N. 3, and <i>S. C.</i> , sub nom. Milburn v. Wilson, 31 S. C. R. 481	84
Wilson v. Shaver, 21 Occ. N. 141, 1 O. L. R. 107, affirmed in <i>S. C.</i> , 22 Occ. N. 11, 3 O. L. R. 110	422
Wilson v. Windsor Foundry Co., 33 N. S. Reps. 21, affirmed in <i>S. C.</i> , 31 S. C. R. 381	424

	COLUMN.
Withers v. Reynolds, 2 B. & Bd. 882, followed in McCowan v. McKay, 22 Occ. N. 100, 13 Man. L. R. 590	423

X.

Xenos v. Wickham, L. R. 2 H. L. 296, followed in Nelson Coke and Gas Co. v. Pellatt, 22 Occ. N. 382, 4 O. L. R. 481	88
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Y.

Young v. Accident Ins. Co. of N. A., M. L. R. 5 S. C. 222, approved in Magann v. Grand Trunk R. W. Co., Q. R. 21 S. C. 72, 4 Q. P. R. 348	115
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Z.

Zimmer v. Grand Trunk R. W. Co., 19 A. R. 693, considered in Find- lay v. Canadian Pacific R. W. Co., 21 Occ. N. 461, 5 Terr. L. R. 143	405
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THE CANADIAN LAW TIMES.

ANNUAL DIGEST, 1902.

ABANDONMENT.

See APPEAL, I. 4, IV. 11—ASSESSMENT AND TAXES, I. 2—COSTS, VIII. 1—INSURANCE, II. 2, V. 2—MINES AND MINERALS, 8—PARLIAMENTARY ELECTIONS, III. 9—TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN, 3—WAY, III. 3.

ABATEMENT.

See WILL, II. 4.

ABORTION.

See CRIMINAL LAW, IV. 1.

ABORTIVE SALE.

See TRUSTS AND TRUSTEES, 4.

ACCIDENT INSURANCE.

See INSURANCE, I.

ACCORD AND SATISFACTION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 6.

ACCOUNT.

1. *Action for—Agent's returns—Compromise—Subsequent discovery of error—Rectification—Prejudice.*—P. was agent to manage the wharf property of W. and receive the rents and profits thereof, being paid by commission. When his agency

terminated W. was unable to obtain an account from him, and brought an action therefor, which was compromised by P. paying \$375, giving \$125 cash and a note for the balance, and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that on one of the accounts assigned to him \$100 had been paid, and demanded credit on his note for that sum. This W. refused, and in an action on the note P. asserted that the error avoided the compromise, and that the note was without consideration, or in the alternative that the note should be rectified:—*Held*, that, as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing a greater liability on the part of P., W. was entitled to recover the full amount of the note. *Peters v. Worral*, 22 Occ. N. 198, 32 S. C. R. 52.

2. *Contestation—Maladministration—Exception to form—Demurrer.*—The party seeking an account may, in his contestation of the account rendered, urge all acts of maladministration committed by the accounting party; and objections to that mode of proceeding should be made by an exception to the form, and not by demurrer. *Blackwood v. Mussen*, 4 Q. P. R. 432.

3. *Pleading—Incidental demand—Omissions from principal demand.*—Omissions made by the plaintiff in framing an action *en reddition de compte* may, notwithstanding Arts. 516 and 522, C. P., be the subject of an incidental demand. *Roe v. Hood*, 4 Q. P. R. 333.

See APPEAL, X. 6—ARBITRATION AND AWARD, 1—BANKS AND BANKING, 2, 4—EXECUTORS AND ADMINISTRATORS, 1, 5,

8, 11—JUDGMENT, IV. 1—MISTAKE—PARTITION, 4—PARTNERSHIP, 1, 4—REFEREES AND REFERENCES, 1—WAY, I. 1.

ACQUIESCENCE.

See CONSTITUTIONAL LAW, 3.

ACT OF PARLIAMENT.

See STATUTES.

ACTION.

1. **Discontinuance—Counterclaim—Cause of action—Jurisdiction.**—Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue. *Dominion Burglary Guarantee Co. v. Wood*, 22 Occ. N. 151, 3 O. L. R. 365.

2. **Discontinuance—Practice as to—Return of writ—Motion to dismiss.**—The provisions of Art. 276, C. P., as to desistment, are not limitative, and the form prescribed by the Article is not obligatory.—2. A plaintiff who desists from his demand before return of the writ, is not obliged to return his action upon the day fixed in order to be in a position to state that he has desisted.—3. A motion for dismissal made after desistment is of no effect. *Lauterman v. Vineberg*, 5 Q. P. R. 127.

See SOLICITOR, 4.

3. **Dismissal for default of doing an act—Necessity for further order.**—Upon an appeal from an order of the Master in Chambers upon a motion to dismiss the action for default of an undertaking:—*Held*, per MEREDITH, C.J., that where an order is made for the doing of an act, or, in the alternative that the action should be dismissed, and default is made in the doing of the act, the order operates to put an end to the action, and no further order is necessary, and, the action being dead, the Court has no power to relieve from the consequences of such default. On appeal, a Divisional Court, being of opinion that under the

circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default. *Crown Corundum and Mica Co. v. Logan*, 22 Occ. N. 159, 3 O. L. R. 434.

4. **Dismissal for not going to trial—Joinder of issue served but not filed.**—An application for a judgment, as in case of nonsuit, was refused where it appeared that the plaintiff had not filed a joinder of issue, though one had been served. *Gallagher v. Wilson*, 21 Occ. N. 54, 35 N. B. Reps. 238.

5. **Dismissal for want of prosecution—Party in default—Costs.**—Where continuance of a suit is not effected by the party bound to continue the same, the opposite party, to be entitled to costs, is obliged to put him in default before taking action to compel him to do so by a demand in accordance with Art. 273, C. C. P. But the service of process in such action is of itself a sufficient putting in default, and the party defendant, in answer thereto, should confess judgment without costs, instead of pleading and asking for a dismissal of the action with costs. *Arcand v. Yon*, Q. R. 21 S. C. 48.

See COSTS, VII. 11 — PARTICULARS, 4 — REFEREES AND REFERENCES, 1—TRIAL, IV. 1—WRIT OF SUMMONS, II. 3, 14.

6. **Local venue—Real action—Situation of chattels in question.**—The plaintiffs had begun an action accompanied by a *saisie conservatoire*, claiming \$700 as the price of wood seized, and demanding, as a subsidiary matter, that they should also be paid the price of the wood upon the sale of it to be made by the Court:—*Held*, that such action was not a real action, within the meaning of Art. 100, C. C. P., and could not be begun in the place in which the thing seized was situated. *Auger v. Moreau*, Q. R. 20 S. C. 285.

See ASSESSMENT AND TAXES, IV. 4—COSTS, I. 1—LIMITATION OF ACTIONS—PARTIES, III. 4—PEREMPTION—PLEADING—SOLICITOR, 4, 5—SUMMARY PROCEDURE—TRUSTS AND TRUSTEES, 8—WILL, I. 1.

ADEMPTION.

See WILL, I. 2.

ADJOURNMENT.

See CANADA TEMPERANCE ACT, 2.

ADMINISTRATION.

See COURTS, VII.—SEQUESTRATION, 2—
VENDOR AND PURCHASER, 15—WILL.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS,

ADMINISTRATOR AD LITEM.

Action by heir-at-law to set aside transfer—*Locus standi*.]—The only living issue and heir-at-law of an intestate brought this action to set aside, on the ground of undue influence, a transfer of property made by the intestate to the defendant; and now applied for an order under Rule 194 or 195, appointing him administrator or administrator ad litem of the deceased:—*Held*, that the order could not be made under Rule 194, for the reasons given in *Hughes v. Hughes*, 6 A. R. 373, 380, nor under Rule 195, which was not applicable to a case of a plaintiff who without right or title has commenced an action, and then seeks to legalize his illegal act by an order of the Court. *Fairfield v. Ross*, 22 Occ. N. 413, 4 O. L. R. 534.

See EXECUTORS AND ADMINISTRATORS,
10—JUDGMENT, IV. 2.

ADMISSIONS.

See COMPANY, II. 2—LIMITATION OF ACTIONS, II. 6—MASTER AND SERVANT, II. 1.

ADVANCEMENT.

See WILL, II. 14.

ADVERSE ACTION.

See MINES AND MINERALS.

ADVERTISEMENT.

See EXECUTION, II. 2—VENDOR AND PURCHASER, 15.

ADVOCATE.

See BANKRUPTCY AND INSOLVENCY, III. 1—COMPANY, II. 1—COURTS, IX. 4—PARTICULARS, 1—PEREMPTION, 4, 5.

AFFIDAVITS.

See ARREST, I. 1, IV. 1—ATTACHMENT OF DEBTS, II. 2, 3, 8—BANKRUPTCY AND INSOLVENCY, I. 3—CONSERVATORY ATTACHMENT—COSTS, VII. 1, 2—DISCOVERY, III.—EVIDENCE, I. 1, IV. 1—EXECUTION, II. 4, III. 1—HUSBAND AND WIFE, VIII. 2—JUDGMENT, II. 1, III. 1, 2—LIQUOR LICENSE ACT, I. 1, 3, IV. 1—MINES AND MINERALS, 2, 4—MUNICIPAL ELECTIONS, 7, 10—OPPOSITION, 1—PARLIAMENTARY ELECTIONS, III. 1, 12—PARTIES, I. 1.

AGENCY.

See PARLIAMENTARY ELECTIONS, I.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AIDING AND ABETTING.

See CRIMINAL LAW, IV. 10.

ALIEN.

See BANKRUPTCY AND INSOLVENCY, I. 5.

ALIMENTARY ALLOWANCES.

Action to compel provision of maintenance—*Necessities* — *Relatives* — *Concurrent obligations* — *Parties* — *Infants* — *Tutrix*.]—An action for maintenance may be brought, although the claimant, at the date of its institution, is in possession of a sum of money sufficient to supply his or her wants for a short time to come, e.g., in this case, sufficient for about twelve months. It is not necessary that the claimant should wait until the money in hand is totally exhausted before instituting an action to have his right to maintenance determined. 2. The obligation of relatives by blood and relatives by alliance to furnish a maintenance is concurrent, and not successive. The father-in-law may, therefore, be condemned to contribute his proportion of the maintenance of a daughter-in-law, even where it appears that the father is equally

able to furnish maintenance. (See Q. R. 19 S. C. 358.) 3. The mother is entitled to sue for aliment on behalf of her children, without being named tutrix to them. *Laroche v. Lafleur*, Q. R. 20 S. C. 184.

See ATTACHMENT OF DEBTS, I. 1—HUSBAND AND WIFE, VI. 2, 3, 8—FATHER AND CHILD—SUCCESSION, 1.

ALIMONY.

See APPEAL, IV. 1—HUSBAND AND WIFE, II.

ALLEGIANCE.

See OATHS.

AMENDMENT.

Ordinary action—*Appearance*—[*Change to summary action.*]—A plaintiff cannot, after the appearance of the defendant, by simple amendment change an ordinary action into a summary action; and such an amendment will be struck out upon motion. *Trahan v. Morin*, 4 Q. P. R. 378.

See APPEAL, IX. 1—BAILIFF, 2—BANKS AND BANKING, 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—COSTS, VII. 4—DEFAMATION, II. 7—EXECUTION, III. 1, 2—INTERDICT—JUDGMENT, IV. 2—LIMITATION OF ACTIONS, II. 3—MUNICIPAL ELECTIONS, 5, 9—OPPOSITION, 1—PARLIAMENTARY ELECTIONS, III. 2, 4, V. 2—PLEADING—RAILWAY, VI. 6—REAL PROPERTY ACT, MANITOBA, 2—SUMMARY PROCEDURE—TRIAL, I. 1, IV. 1—VENUE, 2—WRIT OF SUMMONS, I., II. 1, III. 3.

ANIMALS.

See RAILWAY, V.

ANNUITY.

See BANKRUPTCY AND INSOLVENCY, I. 9—TRUSTS AND TRUSTEES, 9—WILL, I. 2, II. 8.

APPEAL.

- I. BRITISH COLUMBIA—APPEAL TO SUPREME COURT IN BANC.
- II. NORTH-WEST TERRITORIES—APPEAL TO SUPREME COURT IN BANC.
- III. NOVA SCOTIA—APPEAL TO SUPREME COURT IN BANC.
- IV. ONTARIO—APPEAL TO COURT OF APPEAL.
- V. ONTARIO—APPEAL TO HIGH COURT.
- VI. PRIVY COUNCIL.
- VII. QUEBEC—APPEAL TO CIRCUIT COURT.
- VIII. QUEBEC—APPEAL TO COURT OF KING'S BENCH.
- IX. QUEBEC—APPEAL TO SUPERIOR COURT IN REVIEW.
- X. SUPREME COURT OF CANADA.

See ARREST, II. — ASSESSMENT AND TAXES, II., IV. 4, VII. 1—ATTACHMENT OF DEBTS, II. 3, 6—CERTIORARI, 1—CHURCH 1—COMPANY, V. 11, 14—COSTS, I. 1, III. 1, V. 1, VIII. 1, 5—CRIMINAL LAW, V. 1, 2, 3—EXECUTION, VI. 4—INJUNCTION, 1—INSURANCE, IV. 5—LAND TITLES ACT, N. W. T., 3—LIQUOR LICENSE ACT, I. 1, 2, 3—MASTER AND SERVANT, III. 1—MUNICIPAL CORPORATIONS, VII. 4—NUISANCE, 2—PARLIAMENTARY ELECTIONS, III. 13, IV. 1—PARTIES, IV. 5—PRINCIPAL AND SURETY, 6—RAILWAY, IV. 1, 2—SHIP, II. 2—TRIAL, I. 1, IV. 1—VENDOR AND PURCHASER, 17—WILL, III. 2.

- I. BRITISH COLUMBIA—APPEAL TO SUPREME COURT IN BANC.

1. Appeal book—Paging.—The pages of appeal books should be numbered at the top of the pages. *Haggerty v. Lenora Mount Sicker Copper Mining Co.*, 22 Occ. N. 106, 9 Brit. Col. L. R. 6.

2. Entry of appeal—Extension of time—Application—Forum.—An appeal was not entered in time for the sittings of the full Court for which the notice of appeal had been given, and an application was made to extend the time and for leave to enter the appeal for next sittings:—*Held*, that when the full Court is sitting, such an application is properly made to it. *Meccredy v. Quann*, 9 Brit. Col. L. R. 117.

3. Notice of appeal—Extension of time for—Waiver—Security for costs.—The Court has no jurisdiction to extend the time limited by s. 76 of the Supreme Court Act of British Columbia, as amended by Acts of 1890 c. 20, for

giving notice of appeal. A respondent by applying for security for the costs of appeal does not waive his right to object that the appeal was not brought in time. *Lung v. Lung*, 8 Brit. Col. L. R. 423.

4. Notice of appeal—Grounds not argued—Abandonment—Misdirection—Particulars.]—Points not argued, although included in the notice of appeal, will be considered as abandoned. Grounds of appeal should be so particularized that the opposite party will know beforehand what he has to meet, and when "misdirection" is alleged, particulars should be stated. *Warmington v. Palmer*, 22 Occ. N. 126, 8 Brit. Col. L. R. 344.

5. Preliminary objection—Notice of.]—Notice of a preliminary objection to an appeal to the full Court must be served at least one clear day before the time set for the beginning of the sittings. *McGuire v. Miller*, 9 Brit. Col. L. R. 1.

6. Refusal to entertain—Interlocutory order—Action decided pending appeal—Costs.]—This was an appeal from an interlocutory order, and, pending the appeal, the action had been tried and decided. The full Court ordered that the appeal be struck out of the list, refusing to accede to the request of the appellant's counsel, who wanted the appeal to go on to decide the question of costs. *Fauccett v. Canadian Pacific R. W. Co.*, 22 Occ. N. 39, 8 Brit. Col. L. R. 219.

7. Reversing findings of facts—Trial without jury—Commission evidence—Company—Contract—Ultra vires.]—In an action in the Yukon for damages for breach of contract, tried without a jury, the evidence for the defence being evidence taken on commission, the Judge held that the contract sued on was made with the defendant company and not with one Munn as alleged by the defence, and gave judgment for the plaintiffs:—*Held*, reversing the finding and allowing the appeal, that the Judge had failed to appreciate the commission evidence. *Per DRAKE, J.*, that the question of *ultra vires*, not having been revised in the Court below, was not open on appeal. *McKay v. Victoria Yukon Trading Co.*, 22 Occ. N. 169, 9 Brit. Col. L. R. 37.

8. Security for costs—Stay of proceedings.]—An order for security for costs for an appeal to the full Court should provide for a stay of proceedings until security is given. *Kettle River Mines, Limited v. Bleasdel*, 22 Occ. N. 103, 8 Brit. Col. L. R. 350.

II. NORTH-WEST TERRITORIES—APPEAL TO SUPREME COURT IN BANC.

1. Ground not taken below—Notice of appeal.]—On appeal to the Court *in banc*, counsel for the defendants (appellants) having sought to raise for the first time the point that, although there had been a dedication of the land in question as a highway, such dedication was made and accepted subject to such obstructions as existed upon it at the time of dedication, the Court considering that the point was not covered by any of the grounds stated in the appellants' notice of appeal:—*Held*, that the appellants were not at liberty to raise the point at this stage. *Town of Edmonton v. Brown*, 1 Terr. L. R. 454.

2. Leave to appeal—Powers of Court in banc—New trial—Neglect to give evidence.]—The Judicature Ordinance, R. O. 1888 c. 58, s. 435, provides that "no appeal shall lie from the judgment or order of the Court presided over by a single Judge or of a Judge of the Court to the Court *in banc*, without the special leave of the Judge or Court whose judgment or order is in question, unless the title to real estate or some interest therein is affected, or unless the matter in controversy on the appeal in matters of contract exceeds the sum of \$500 and in matters of tort exceeds the sum of \$200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary, or other duty or fee, or a like demand of a general or public nature affecting future rights:—"*Held*, that, where a trial Judge had not granted leave to appeal in a case in which, by virtue of this section, leave to appeal was necessary, the Court *in banc* had no jurisdiction to entertain an appeal, or to give leave to appeal, even, *semble*, had it appeared that the Judge had said that the applicant might apply to the Court *in banc* for leave. *Semble*, where a party fails in his case by reason of his neglecting to give necessary evidence, of which at the time of the trial he had knowledge, he should be allowed a new trial to permit him to supply the evidence, only under special circumstances. *Chalmers v. Fysh*, 1 Terr. L. R. 434.

3. Notice of appeal—Time.]—See *In re Donnelly*, 5 Terr. L. R. 270.

4. Right of appeal—Amount in controversy.]—The plaintiff sued for \$617.85, and defendants with their defence, while denying liability, brought into Court \$367 as being sufficient to satisfy the plaintiff's claim; the trial Judge found the plaintiff entitled to \$543.22, and applied the \$367

in Court, leaving, with an adjustment of interest, a balance due to the plaintiff of \$182.43:—*Held*, that the amount in controversy exceeded \$200, and the defendant was entitled to appeal without special leave. *McDougall v. McLean*, 1 Terr. L. R. 436.

III. NOVA SCOTIA—APPEAL TO SUPREME COURT IN BANC.

1. Right of appeal—Order in Chambers—Discretion of Judge—Refusal to allow cross-examination.—On an application at Chambers to set aside, as false, frivolous, and vexatious, the pleas pleaded by the defendant to an action brought against him as the acceptor of a bill of exchange, discounted by the plaintiffs, the defendant applied for leave to cross-examine the manager of the plaintiffs on the affidavit upon which the motion was founded:—*Held*, that the matter was one within the discretion of the Chambers Judge, and that there was no appeal from his refusal to permit the cross-examination applied for. *Bank of Montreal v. Bent*, 34 N. S. Repts. 489.

2. Security for costs of—Insolvent appellant.—A motion for security for costs of an appeal, made on the ground that the defendant, the appellant, was insolvent and that the plaintiff's judgment was still unsatisfied, was dismissed with costs, to be set off against the costs in the cause. *Dixon v. Dauphinee*, 34 N. S. Repts. 546.

IV. ONTARIO—APPEAL TO COURT OF APPEAL.

1. Leave to appeal—Alimony—Lunatic—Admission to asylum—Removal—Summary judgment.—On a motion for leave to appeal from the judgment of a Divisional Court, 2 O. L. R. 541, 21 Occ. N. 560, affirming the decision of MEREDITH, C.J., 2 O. L. R. 289, 21 Occ. N. 525, and holding that the plaintiff in the action was not entitled to alimony, and (2) that on a motion by the plaintiff for summary judgment under Rule 616, judgment dismissing the action was properly given, the Court of Appeal, being of the opinion that the judgment was right, refused leave to appeal. *Hill v. Hill*, 22 Occ. N. 107, 3 O. L. R. 202.

2. Leave to appeal—Judgments on different branches of case—Special circumstances.—In an action which at the trial resolved itself into two branches, (1) the status of some of the parties, and (2) the testamentary capacity of the

testator and the validity of the will pro-
pounded, the trial Judge dealt with the validity of the will only, and, on an appeal, a Divisional Court dealt with the question of status only:—*Held*, upon an application for leave to appeal to the Court of Appeal, that, although the applicants had the judgment of two tribunals against them, they had the opinion of one Court only in respect of either branch of the case, and, in view of the value of the estate and the important consequences to them, sufficient special circumstances were shown to entitle them to leave to appeal. *Kidd v. Harris*, 22 Occ. N. 131, 3 O. L. R. 277.

3. Leave to appeal—Mortgage—Tender—Rate of interest—Costs.—Leave to appeal refused. *Middleton v. Scott*, 22 Occ. N. 369, 4 O. L. R. 459.

4. Leave to appeal—Order striking out jury notice—Powers of Judge in Chambers—Conflicting decisions.—In an action of covenant upon two mortgages, the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused:—*Held*, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof: R. S. O. c. 51, s. 77, s.s. (4), cl. (c). The power of a Judge in Chambers to strike out a jury notice has never been doubted. *People's Building and Loan Association v. Stanley*, 22 Occ. N. 254, 4 O. L. R. 90.

5. Leave to appeal—Promissory note—Presentment—Notice of dishonour.—See *Wiedeman v. Guittard*, 22 Occ. N. 129.

6. Leave to appeal—Public schools—Selection of school site—Grounds of appeal.—Motion for leave to appeal from the order of a Divisional Court allowing an appeal from an order of a Judge in Chambers and granting a mandamus to a township corporation requiring them to pass a by-law for the issue of debentures for \$1,000 for the purchase of a school site and the erection of a school house:—*Held*, that the circumstance of the first order having been made in Chambers, and the additional fact that the applicants for leave to appeal were the respondents in the Divisional Court, and would have been entitled to appeal as of course if the

motion had been heard in the first instance by a Judge sitting in Court, were material factors — when coupled with reasons of a substantial kind for questioning the judgment complained of—in affecting the discretion to be exercised. An important question was raised as to the true construction of a somewhat obscurely phrased section of the Public Schools Act. Plausible grounds of objection to the construction placed by the Divisional Court upon the legislative provisions in question were presented. Questions relating to the validity or invalidity or binding effect or otherwise of an award purporting to be made in pursuance of these provisions were also involved; and the matter was of some public interest. Leave granted upon the usual terms. *In re Cartwright School Trustees and Township of Cartwright*, 22 Occ. N. 288, 4 O. L. R. 278.

7. Leave to appeal—Status of judicial officer.—A Divisional Court reversed an order of a Judge in Chambers, which stayed proceedings in these actions and dismissed a motion for a reference to the drainage referee as an official referee. The Divisional Court decided that the drainage referee was an official referee for the purposes of the Arbitration Act:—*Held*, that leave to appeal should be granted on the ground that the decision involved the status, jurisdiction, and authority of a judicial officer, and the validity of the proceedings which might be taken by him under the order of the Divisional Court. *McClure v. Township of Brooke, Bryce v. Township of Brooke*, 22 Occ. N. 254, 4 O. L. R. 102.

8. Leave to appeal — Taxation of costs — Several causes of action — Judgment.—An application by the defendant for leave to appeal from an order of a Divisional Court dismissing an appeal from an order of a Judge in Chambers upon appeal from taxation of costs. The action was for slander. The statement of claim contained four paragraphs setting forth the slander in various ways. There was a verdict and judgment with costs for plaintiff on two paragraphs, and the same for the defendant on the other two. The defendant contended that the general costs should be apportioned throughout. But the taxing officer taxed to the plaintiff the general costs of the cause, less costs applicable to the paragraphs on which he failed, and to the defendant the costs of the issues arising on the latter, and his ruling was affirmed:—*Held*, not a case in which leave to appeal should be granted. There is no good reason why a judgment framed as was the judgment here, should not lead to the same result as the former Rule of Court. *Sparrow v. Hill*, 8 Q. B. D. 479, and *Jenkins v. Jack-*

son, [1801] 1 Ch. 89, referred to. *Davis v. Hord*, 22 Occ. N. 285, 4 O. L. R. 466.

9. Right of appeal—Order of Judge removing stay of execution—Discretion—Grounds for removal.—An appeal lies to the Court of Appeal from an order of a Judge thereof, in Chambers, under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal. Such an order is not a purely discretionary one; a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause. A Judge in Chambers having ordered the removal of the stay, his order was reversed by the Court, where the appeal appeared to be prosecuted in good faith and on substantial grounds, and the effect of an execution would practically be to close up the appellant's business. *Centaur Cycle Co. v. Hill*, 22 Occ. N. 253, 4 O. L. R. 92.

10. Right of appeal — Practice on appeal—Companies—Ontario Winding-up Act—Final order.—Section 27 of the Ontario Joint Stock Companies Winding-up Act, R. S. O. 1897 c. 222, contains the code of proceedings on an appeal from any order or decision of the Court under that Act, no provision being made in the Consolidated Rules or elsewhere. There is no provision that reasons for and against the appeal are required, or any delivery or settlement of the proposed case. The practice when the case has come before a single Judge has been to send up the original papers and have the appeal heard upon them. *Semble*, that an order of a County Court Judge rescinding an order previously made by him under s. 41 of the above Act for the dissolution of a company, is a final order, and therefore an appealable one. *In re Equitable Savings, Loan, and Building Association*, 22 Occ. N. 386, 4 O. L. R. 479.

11. Security for costs of appeal—Joint appeal—Security furnished by one party—Payment into Court—Abandonment—Motion for payment out—Costs—Set-off—Increased security.—Two defendants appealed to the Court of Appeal from a judgment of the High Court; the notice of appeal was a joint one; and \$200 was paid into Court, as security for the respondents' (plaintiffs') costs of appeal, by one of the appellants, but in the name of both and for the joint benefit:—*Held*, that the appellant who had paid the money in was not entitled, upon abandoning his appeal, to have the money paid out to him, the other appellant desiring and intending to avail himself of the deposit and to proceed with the appeal. The first appellant's motion for

payment out being dismissed with costs to the other appellant, and it appearing that by the judgment appealed against the first appellant was entitled to be indemnified by the other against all amounts payable by the first under the judgment, and to recover from the other any amount so paid and his costs of the action, &c.:—*Held*, that the costs of the motion should be set off against anything the first appellant might already have paid, or might ultimately have to pay, under the provisions of the judgment referred to, as the result of the appeal. *Held*, under the circumstances of the case, that the appeal would be more expensive than usual, and that the security should be increased to \$400, but that, upon the true construction of Rule 830, s.-ss. 1, 4, 8, where security is given by payment into Court, it cannot be increased to more than \$400. *Centaur Cycle Co. v. Hill*, 22 Occ. N. 386, 4 O. L. R. 493.

See EXECUTION, I. 2—EXTRADITION, 2.

V. ONTARIO—APPEAL TO HIGH COURT.

1. Divisional Court—County Court—Right of appeal from—New trial.]—Judgment having been pronounced by a junior Judge in a County Court action, a motion by way of appeal from or to set aside such judgment and to enter judgment for the defendants, or in the alternative for a new trial, was made to the senior Judge; and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action:—*Held*, that an appeal lay to the Divisional Court by the unsuccessful party to such appeal; and the fact that a new trial in the alternative was asked for was immaterial. The sub-sections of s. 51 of the County Courts Act, R. S. O. 1897 c. 55, applicable are s.-ss. 1, 2, and 5, and not s.-s. 3. *Leishman v. Garland*, 22 Occ. N. 109, 3 O. L. R. 241.

2. Divisional Court—Surrogate Court—Notice of appeal from—Description of appellate Court.]—On a motion to quash an appeal to a Divisional Court subsequent to the passing of 58 V. c. 13, s. 45 (O.), on the ground that the notice of appeal did not specify the Court to which the appeal was taken, and that the bond filed followed the Surrogate form "To the Court of Appeal":—*Held*, that the intention to appeal expressed in the notice was sufficient, and that the words "the Court of Appeal" in the bond might be read as an equivalent of "the proper appellate tribunal;" and a motion to quash was dismissed. *Taylor v. Delaney*, 22 Occ. N. 136, 3 O. L. R. 380.

3. Judge of High Court—Right of appeal from order of County Court Judge quashing quo warranto proceedings.]—See *Rea ex rel. McFarlane v. Coulter*, 22 Occ. N. 414, 4 O. L. R. 520.

VI. PRIVY COUNCIL.

1. Interference on appeal—Concurrent findings of fact by Courts below.]—See *Archambault v. Archambault*, [1902] A. C. 575.

2. Leave to appeal—Terms—Costs.]—See *Canadian Pacific R. W. Co. v. Roy*, [1902] A. C. 220.

3. Right of appeal—Amount in controversy—Patent of invention.]—An action for infringement of a patent of invention, wherein the plaintiff claims an injunction and \$15,000 damages, which he consents in writing to reduce to \$25, in order to escape costs of an *enquête*, is not, whatever may be the value of the patent, a cause in which an appeal lies as of right to the Privy Council. *Came v. Consolidated Car Heating Co.*, 4 Q. P. R. 256, Q. R. 11, K. B. 114.

See EXECUTION, I. 3.

VII. QUEBEC—APPEAL TO CIRCUIT COURT.

Judgment of board of delegates—Choice of forum for appeal—Time for appeal.]—Where an appeal from a judgment of a board of delegates of two counties may be taken either in a district like that of Montreal, in which every juridical day is a term day, or in another district like that of Iberville, in which the terms are fixed by proclamation of the Crown, during certain months of the year, the appellant is absolutely free to take his appeal in either of such two districts. 2. It is the situation of the municipalities in different districts which fixes the jurisdiction of the Circuit Court of one or other of such districts. 3. The time for lodging an appeal under Art. 1070, C. M., is always only a modality of the procedure followed as to time in the district in which the appellant is taking his appeal. 4. To decide the contrary would be to deprive the appellant of his choice between the jurisdiction of the Circuit Court of the district of Montreal and of that of the district of Iberville. *Arbec v. Lussier*, Q. R. 20 S. C. 543.

VIII. QUEBEC—APPEAL TO COURT OF KING'S BENCH.

1. Leave to appeal—Interlocutory judgment—Waiver of appeal—Compliance with order.]—Even if a judgment granting to a foreign plaintiff an additional delay to file a proper power of attorney comes under any of the conditions stipulated in Art. 46, C. P., leave to appeal shall not be granted when it appears that the plaintiff has complied with part of the order of the Court below, by furnishing security for costs, and has also, one day only after the expiry of the delay, filed a power of attorney, which, however, is insufficient. *Canadian Asbestos Co. v. Glasgow and Montreal Asbestos Co.*, 5 Q. P. R. 65.

2. Right of appeal—Conviction on summary trial—Recorder's Court.]—No appeal lies to the Court of King's Bench, Crown side, from a conviction by a Recorder's Court upon a summary trial under s. 783 of the Criminal Code. *Rea v. Portugais*, Q. R. 10 K. B. 567.

3. Right of appeal—Interlocutory judgment.]—In matters in which no appeal lies, such as those mentioned in Arts. 43 and 1006, C. P., there is no appeal from an interlocutory judgment any more than from a final judgment. *Grier v. David*, 4 Q. P. R. 417.

4. Right of appeal—Interlocutory judgment—Leave to prove new facts—Discretion.]—No appeal lies from an interlocutory judgment by which a Judge, in his discretion, permits or refuses to permit a party to prove by way of supplementary defence or reply material facts arising after the contestation. *Dupuis v. Dupuis*, 5 Q. P. R. 59.

5. Right of appeal—Interlocutory judgment—Removal of cause to another district.]—An appeal lies from an interlocutory judgment maintaining a declaratory exception and remitting the record to the Court of another district. *Gosselin v. Belley*, 4 Q. P. R. 233.

6. Right of appeal—Order of Judge—Revision of taxation.]—No appeal lies to the Court of King's Bench against a decision of a Judge of the Superior Court, in Chambers, reviewing and confirming the taxation by the prothonotary of the costs adjudged in favour of one of the parties. *La Vallée and Richelieu R. W. Co. v. Menard*, Q. R. 11 K. B. 1, 3 Q. P. R. 133.

7. Time for appealing—Interlocutory judgment—Sale of immovables by

sheriff.]—The time for appealing from an interlocutory judgment begins to run from the day of the pronouncing of the judgment, and not from its transmission to the prothonotary. 2. A judgment ordering a sheriff to sell *en bloc* immovables seized is a final judgment, from which an appeal lies *de plano*. *Connolly v. Stanbridge*, 4 Q. P. R. 186.

See COSTS, VII. 3—PAUPER.

IX. QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.

1. Right of appeal—Death of defendant—Inscription in name of—Nullity—Motion to amend.]—This cause was taken *en délibéré sur le mérite* on the 10th June, 1899, and final judgment was rendered on the 27th November, 1899. During the *délibéré* the defendant died, and after the judgment his solicitors, in ignorance of his death, inscribed the case for review in the name of the deceased. The plaintiffs' solicitors made a motion to set aside the inscription, upon the ground that only the legal representatives of the defendant could make it. The solicitors for the defendant made a cross-motion to substitute in the inscription the names of the executors of the defendant's will:—*Held*, reversing the decision of the Court of Review, that the inscription was void, and the motion to amend it could not be granted. *Fraser v. Price*, Q. R. 10 K. B. 511.

2. Right of appeal—Future rights—Municipal by-law—Telephone company.]—A judgment of the Circuit Court condemned the defendants to pay a penalty of \$25 for failure to paint their poles erected within the limits of the municipality plaintiff, as provided by a by-law ordering telephone and other poles to be painted and to be kept painted thereafter:—*Held*, that the demand (which was for \$50) did not relate to a matter "in which the rights in future of the parties may be affected," within the meaning of Art. 44, cl. 3, of the Code of Procedure, and therefore no appeal lay in such case to the Court of King's Bench sitting in appeal from a judgment of the Circuit Court, and consequently such judgment was not susceptible of revision by the Court of Review. (Art. 52, C. C. P.) *Town of Coaticook v. People's Telephone Co.*, 21 Occ. N. 351, Q. R. 19 S. C. 535.

3. Right of appeal—Inscription for review—Tutor—Judgment.]—Article 306, C. C., which forbids a tutor to appeal

from a judgment without having been authorized to do so by a Judge, upon the advice of a family council, does not apply to an inscription for review, which is only for a re-hearing before the same Court presided over by three Judges. *Beaumont v. Lamonde*, 5 Q. P. R. 113.

4. Right of appeal—Interlocutory judgment—Dismissal of exception—Objection to appeal—Costs.]—A judgment dismissing an exception to the form is only an interlocutory judgment, and is not appealable to the Superior Court in Review. 2. If the respondent in review has not complained by motion that the judgment is only interlocutory, but has raised this point only in his factum and his argument, the inscription in review will be set aside with costs only of a motion to set aside. *Migneron v. Yon*, 4 Q. P. R. 179.

5. Security—Deposit—Amount of—Amount in controversy.]—An inscription for review in an action to set aside a lease containing a contract for sale, when the value of the immovable in question is more than \$400, must be accompanied by a deposit of \$75, and the Court will order the party who inscribes to supplement his deposit of \$50. *Marsolais v. Grenier*, 4 Q. P. R. 392.

X. SUPREME COURT OF CANADA.

1. Leave to appeal—(Criminal case.)—The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court, 60 & 61 V. c. 34, applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code. Motion by the prisoner for leave to appeal from the judgment of the Court of Appeal, 4 O. L. R. 223, 22 Occ. N. 225, refused. *Rex v. Rice*, 22 Occ. N. 355, 32 S. C. R. 480.

2. Leave to appeal—Matters not of public importance]—A member of an Order held a benefit certificate entitling him, if he reached the age of seventy years or became entirely disabled, to receive a sum of money based on the membership of the Order. On reaching the age stated, he demanded the amount, and, on the Order refusing to pay, brought an action therefor, the defence to which was, that he had stated his age incorrectly in his application for membership, and violated certain conditions, which, however, the Court held were not set out nor referred to in the certificate. A judgment for the plaintiff at the trial was affirmed

by the Court of Appeal, and, the amount recovered being under \$1,000, the defendants moved the Supreme Court for special leave to appeal under 60 & 61 V. c. 34, s. 1 (e):—*Held*, that the questions involved not being of public importance, and the judgment of the Court of Appeal (2 O. L. R. 79, 21 Occ. N. 372) appearing to be well founded, the leave would not be granted. *Fisher v. Fisher*, 28 S. C. R. 494, followed. *Hargrove v. Royal Templars of Temperance*, 22 Occ. N. 1, 31 S. C. R. 385. (See, also, S. C. 2 O. L. R. 126, 21 Occ. N. 432.)

3. Leave to appeal—Time expired—Special circumstances.]—The appellants allowed the delay of 60 days, from date of judgment rendered by the Court of King's Bench, to elapse without applying for leave to appeal to the Supreme Court. Subsequently, they obtained leave to appeal to the Privy Council. They now moved for leave to appeal to the Supreme Court, and offered to desist from its appeal to the Privy Council if the present motion was granted:—*Held*, that the "special circumstances" referred to in s. 42 of the Supreme and Exchequer Courts Act, are circumstances which would make it unreasonable to impute the failure to act within the prescribed time to the negligence of the party seeking the appeal, e.g., illness, absence, ignorance of the rendering of the judgment, inability owing to poverty to find surties within the prescribed delay, but not circumstances which did not prevent the application from being made within the proper delay. *City of Montreal v. Montreal Street R. W. Co.*, Q. R. 11 K. R. 325.

4. Refusal to interfere—Matters of Procedure.]—The Court, following its usual practice, refused, on an appeal, to interfere with the action of the Courts below in matters of mere procedure, where no injustice appeared to have been suffered in consequence, although there might be irregularities in the issues as joined which brought before the trial Court a *demande* almost different from the matter actually in controversy. *Finnie v. City of Montreal*, 22 Occ. N. 356, 32 S. C. R. 335.

5. Refusal to interfere—Matters of procedure—Verdict—Weight of evidence.]—The Court refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, viz., whether a verdict of a jury was a general or special verdict.—The Court also refused to disturb the verdict on the ground that it was against the weight of evidence, after it had been affirmed by two tribunals below. *Balfour v. Toronto R. W. Co.*, 22 Occ. N. 221, 32 S. C. R. 239.

6. Refusal to interfere—Matters of procedure—Partnership—Account.]—The judgment appealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and the liquidation of the same, without producing full and regular accounts of the partnership affairs:—*Held*, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong, and, therefore, that the appeal should be dismissed. *Higgins v. Stephens*, 22 Occ. N. 195, 32 S. C. R. 132.

7. Right of appeal — Amount in controversy.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès-verbal* establishing a public highway, notwithstanding that the effect of the *procès-verbal* in question might be to involve an expenditure of over \$2,000 for which the appellants' lands would be liable for assessment by the municipal corporation. *Dubois v. Village of Ste. Rose*, 21 S. C. R. 65, *City of Sherbrooke v. McManamy*, 18 S. C. R. 594, *County of Vercheres v. Village of Yarenes*, 19 S. C. R. 365, and *Bell Telephone Co. v. City of Quebec*, 20 S. C. R. 230, followed. *Webster v. City of Sherbrooke*, 24 S. C. R. 52, 268, and *McKay v. Township of Hinchinbrooke*, *ib.* 55, referred to. *Reburn v. Parish of Ste. Anne*, 15 S. C. R. 92, overruled. *County of Tossignant v. County of Nicolet*, 22 Occ. N. 355, 32 S. C. R. 353.

8. Right of appeal—Amount in controversy — Claim and counterclaim — Leave to appeal.]—The plaintiffs claimed \$1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counterclaimed for \$1,223 demurrage. At the trial judgment was given for the plaintiffs for \$1,000, and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiffs' counsel stated that the plaintiffs' claim on the reference would be less than \$1,000, and contended that no appeal lay:—*Held*, however, that, as the plaintiff claimed \$1,500, and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of \$1,000,

so that the appeal lay. *Held*, also, that upon the counterclaim the sum of \$1,223 was involved, and that an appeal lay in respect thereof. The Court of Appeal declined to grant, *ex cautela*, leave to appeal to the Supreme Court, the case not being one in which leave, if it were necessary, ought to be granted. *Frankel v. Grand Trunk R. W. Co.*, 22 Occ. N. 229, 3 O. L. R. 703.

9. Right of appeal—Amount in controversy — Interest before action.]—A judgment for \$1,000 damages, with interest from a date before action brought, is appealable under 60 & 61 V. c. 34, s. 1 (c). *McNevin v. Canadian Railway Accident Ins. Co.*, 22 Occ. N. 223, 32 S. C. R. 194.

10. Right of appeal—Controverted election—Judgment dismissing petition—Want of prosecution.]—There is no right of appeal to the Supreme Court of Canada from a judgment dismissing a petition against the return of a member of the House of Commons for want of prosecution within the six months prescribed by R. S. C. c. 9, s. 32, the Controverted Elections Act. *In re Richelieu Dominion Election*, *Vanasse v. Bruneau*, 22 Occ. N. 193, 32 S. C. R. 118.

11. Right of appeal—Controverted election—Petition—Lost record — Substituted copy — Judgment on preliminary objections—Discretion of Court below—Jurisdiction.]—The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections, and, in re-transmission to the Court below, the record was lost. Under the procedure in similar cases in the Province where the petition was pending, a record was reconstructed in substitution for the lost record, and, upon verification as to its correctness, the Court below ordered the substituted record to be filed. Thereupon, the respondent in the Court below raised preliminary objections, traversing the correctness of a clause in the substituted petition, which was dismissed by the judgment appealed from:—*Held*, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to review the discretion of the Court below in ordering the substituted record to be filed. *In re Two Mountains Dominion Election*, *Ethier v. Legault*, 22 Occ. N. 192, 32 S. C. R. 55.

12. Right of appeal — Final judgment.]—The trial of an action to adverse an application for a certificate of

improvements for a mineral claim was begun, but before the plaintiff closed his case, an adjournment was granted to permit him to put in proof of the measurement shewing the extent of the encroachment of one mineral claim on the other. During the course of the trial it appeared that the map or plan filed by the plaintiff under s. 37 of the Mineral Act of British Columbia, was not made as a result of a survey, but from measurements taken by the plaintiff's brother. The defendants then urged a dismissal of the action contending that the map or plan was of no effect, but the trial Judge ordered it to be filed as part of the evidence, and declined to deal with its effect at that stage of the action. The defendants appealed from the trial Judge's refusal to dismiss the action, to the full bench of the Supreme Court of British Columbia, and there contended that the action should have been dismissed, and that a postponement should not have been granted, because the plaintiff had not filed with the Mining Recorder a map made as a result of a survey. With this view the majority of the Court agreed, and directed a judgment to be entered dismissing the action and allowing the appeal. From this judgment the plaintiff appealed to the Supreme Court of Canada:—*Held*, that under the interpretation of the words "final judgment" in the Supreme and Exchequer Courts Act, s. 24, the judgment appealed from dismissing the action was a final judgment. *Paulson v. Beaman*, 22 Occ. N. 425.

13. Right of appeal—Order quashing by-law—Appeal de plano—Leave to appeal.—Appeals to the Supreme Court from the judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 V. c. 34, and no appeal lies as of right unless given by that Act. Therefore, there is no appeal *de plano* from an order quashing a by-law, though an appeal is given in such case by the Supreme and Exchequer Courts Act. The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal, and leave has been refused. Application for leave to appeal from the decision in 3 O. L. R. 609, 22 Occ. N. 205, refused. *In re Village of Markham and Town of Aurora*, 22 Occ. N. 354, 32 S. C. R. 457.

14. Stay of Proceedings — Order granting new trial.—The defendant appealed to the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia, sitting *in banc*, granting a new trial. Security on the appeal having been given and allowed, an application

was made by the defendant to stay execution and all other proceedings. No opposition was made to the stay of execution, but the plaintiffs objected to a stay of the trial and of all other proceedings:—*Held*, that the trial and all other proceedings should be stayed pending the appeal, and a Judge of the Court appealed from had jurisdiction to impose such a stay. *Bartlett v. Nova Scotia Steel Co.*, 22 Occ. N. 261.

See CROWN, II. 1—MASTER AND SERVANT, II. 6.

APPEARANCE.

1. Limitation of — Submission to judgment—Irregularity.—The indorsement on the writ of summons was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of J. P., but erroneously described therein, were freed and discharged from the conditions and obligations to which they were subjected by the will in favour of the defendant and from all bequests, legacies, and other payments charged thereon by the will in favour of the defendant; and for damages against the defendant for wrongful refusal to execute a quit-claim deed of the lands when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against the defendant and for costs. The appearance also stated as follows: "Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant is also willing to execute a quit-claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will"—*Held*, that there was no authority in the Rules or in the practice for an appearance limited as was this one, in an action of the character disclosed in the indorsement of the writ of summons. The appearance was set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. *Padget v. Padget*, 22 Occ. N. 137.

2. Notice of.]—It is not necessary to serve a notice of appearance upon the opposite party. *Morin v. Jetté*, 5 Q. P. R. 69.

See AMENDMENT — ARREST, I. 2 — TRIAL, IV. 1.

AQUEDUCT.

See MUNICIPAL CORPORATIONS, I. 2.

ARBITRATION AND AWARD.

1. Accounts of Province of Canada—Common school fund and lands—Administration by Ontario—Remitting price of lands sold—Default in collections—Sale of lands—Jurisdiction of Dominion arbitrators.]—

By the submission of the 10th April, 1890, amongst other matters submitted to the Dominion arbitrators were the following: (h) The ascertainment and determination of the principal of the common school fund, the rate of interest which would be allowed on such fund, and the method of computing such interest. (i) In the ascertainment of the amount of such principal the arbitrators are to take into consideration not only the sum now held by the government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold. The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which have been lost; (3) for lands which might have, but have not, been sold; and (4) for all uncollected balances of purchase money:—*Held*, GWYNNE, J., dissenting, that the Dominion arbitrators had jurisdiction, under the submission, to hear and adjudicate upon these claims. *Province of Quebec v. Province of Ontario and Dominion of Canada, In re Common School Fund and Lands*, 31 S. C. R. 516.

2. Appointment of sole arbitrator—Submission—Arbitration Act.]—

A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient:—"*Held*, MACMAHON, J., dissenting, that the submission was one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R. S. O. 1897 c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other might appoint a sole arbitrator. *Decision of STREET, J.*, 2 O. L. R. 301, 21 Occ. N. 532, affirmed. *In re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls*, 2 O. L. R. 585, 21 Occ. N. 595, overruled. *Excelsior*

Life Ins. Co. v. Employers' Liability Assurance Corporation, In re Faulkner, 22 Occ. N. 94, 3 O. L. R. 93.

3. Appointment of third arbitrator—Parol appointment—Agreement—Revocation—Injunction.]—

Certain rights and easements of the plaintiffs were expropriated by a gas company under an Act enabling the company to make such expropriation and providing for the determination, by arbitration, of the amount of remuneration to be paid. The plaintiffs appointed C. to be one of the arbitrators, and the company appointed B. The plaintiffs claimed a declaration that D., who was alleged to have been agreed upon by C. and B. as the third arbitrator, was not duly appointed, and an injunction to prevent him from acting, (1) because the appointment of D. was not agreed to by C., (2) because the appointment was not made in writing, and (3) because the appointment, if agreed to by C. in the first instance, was revoked by C. withdrawing his consent thereto before action brought:—*Held*, that the onus of establishing the grounds relied upon was upon plaintiffs. The question as to whether C. did or did not assent to the appointment of D. was one of fact, and, the finding of the trial Judge on the point being adverse to the plaintiffs, and the weight of evidence being in favour of the finding, there was no reason for setting it aside. In the absence of anything to require the appointment of the third arbitrator to be made in writing the same law would govern as in the appointment of an umpire under a submission, which may be made by parol if no particular mode of appointment be prescribed. D. having been appointed, and having consented to act, his appointment could not be revoked by subsequent dissent of the parties. *Kedy v. Davison*, 34 N. S. Reps. 233.

4. Clerical error in award—Motion to refer back—Railway Act of Canada.]—

Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act:—*Held*, that if the Provincial legislation (R. S. O. 1897 c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (c)) to correct the mistake. If that legislation were not applicable, there was no power to remit the award, nor to correct the error upon this motion. Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through the arbitrators; and the Railway Act of Canada does not authorize the reopening of a reference. *In re McAlpine and Lake Erie and Detroit River R. W. Co.*, 22 Occ. N. 98, 3 O. L. R. 230.

5. Time for making award—Extension after lapse.]—Arbitrators, *amiables compositeurs*, and experts, become *functi officio* by the lapse of the delay fixed for the performance of their duties. If the period fixed has expired without any report having been made, the submission becomes inoperative, and the Court cannot thereafter grant an extension of the delay. *Beaudoin v. Dubrule*, Q. R. 20 S. C. 575.

See ATTACHMENT OF DEBTS, II. 3—LANDLORD AND TENANT, I. 6, IV. 1—MUNICIPAL CORPORATIONS, VI., X. 10—RAILWAY, IV. 1, 2—SCHOOLS, I. 3, 7.

ARCHITECT.

1. Contract to prepare plans—Work not proceeded with—Commission on estimated cost.]—The plaintiff was engaged by the defendants to prepare plans and specifications for an hotel building to cost not more than \$4,000 or \$5,000, for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, &c., were given by the defendants. Before the plans were completed changes were made, by additions to the original plan, involving an additional expenditure of \$1,500. The plans were approved of by the defendants, when completed, and tenders called for, and the work partly proceeded with. It was then found by the defendants that, owing to an advance in the price of materials, the building would cost much more than they had expected, and the work was stopped:—*Held*, that the plaintiff was entitled to recover from defendants the stipulated commission of two per cent. on the estimated cost of the building with the additions agreed upon. *Hutchinson v. Conway*, 34 N. S. Reps. 554.

2. Mistake in Estimates—Liability.]—Decision of IRVING, J., 8 Brit. Col. L. R. 7, holding the defendant, an architect, not liable for loss caused by error in estimates, affirmed by the full Court. *Grant v. Dupont*, 8 Brit. Col. L. R. 223.

See CONTRACT, II. 1 — MECHANICS' LIENS, III. 5.

ARREST.

- I. IN BRITISH COLUMBIA.
- II. IN NOVA SCOTIA.
- III. IN ONTARIO.
- IV. IN QUEBEC.

See BANKRUPTCY AND INSOLVENCY, IV. 3—CRIMINAL LAW—FALSE ARREST—MALICIOUS PROCEDURE—MANDAMUS, 1—PROHIBITION, 1—TRESPASS, 2.

I. IN BRITISH COLUMBIA.

1. Ca. re.—Affidavit—Debt—Identity of plaintiff.]—The affidavits leading to an order for *ca. re.* must shew that there is a debt due from the defendant to the plaintiff. It is not sufficient to shew that there is a debt due from the defendant to one who bears the same name as the plaintiff. A statement in an affidavit that deponent has caused a writ of summons to be issued against defendant, without stating in what action the writ was issued, is not sufficient to shew that plaintiff and deponent are one and the same person. *Wehrfritz v. Russell*, 9 Brit. Col. L. R. 79.

2. Ca. re.—Form of writ—Summons to set aside—Appearance—Costs—Terms.]—*Held*, on a summons to set aside a writ of *ca. re.*, that it was bad because it did not state the nature of the cause of action.—2. It is not necessary for a person arrested under a writ of *ca. re.* to enter an appearance before applying for his discharge.—3. The defendant having asked for costs, the order for his discharge should provide that no action be brought against the plaintiff or the sheriff by reason of the *capias* or the arrest. *Wehrfritz v. Russell*, 22 Occ. N. 217, 9 Brit. Col. L. R. 50.

3. Ca. re.—Irregularity or nullity—Waiver by giving bail.]—After the issue of the writ in an action, a summons was issued intituled "in the matter of an intended action:"—*Held*, that it was wrongly intituled. A Judge has power to direct a summons to be issued and made returnable in a registry other than that where the writ was issued. By the giving of special bail, a defendant arrested on a *capias* waives his right to object to the writ. *Tanaka v. Russell*, 22 Occ. N. 128, 9 Brit. Col. L. R. 24.

II. IN NOVA SCOTIA.

Intent to quit Province—Negotiating—Order set aside—Appeal—Inference—Effete order—Costs.]—The defendant was arrested under an order for arrest granted on the affidavit of the plaintiff's solicitor that he had probable cause for believing, and did believe, that the defendant, unless he was arrested, was about to leave the Province. The order for

arrest was set aside, and the bond directed to be delivered up to be cancelled by order of a Judge, who was satisfied, on reading the affidavits produced before him, that the defendant, at the time of his arrest, was not about to leave the Province:—*Held*, that the order was one that the Court, on appeal would not interfere with.—2. Following *Hunt v. Harlow*, 1 Old. 709, that a statement of belief that the defendant is about to leave the Province being all that is required under the practice to procure an order for arrest, the defendant is entitled to be discharged if he negatives that intention, unless the plaintiff can state facts from which it can be clearly inferred that it was the intention of the defendant to leave.—3. That such an inference was not to be drawn from affidavits merely tending to shew that defendant was keeping out of the way to avoid service of an order for his examination under the Collections Act.—4. That it would be futile to allow the plaintiffs' appeal, as, at the time the order for the defendant's examination under the Collections Act was served, the order for arrest was effete, and the bond cancelled, and no stay of proceedings had been obtained, and the liability of the sureties could not be restored.—5. That while the defendant was entitled to have the plaintiffs' appeal dismissed with costs, the costs must be set off against the plaintiffs' judgment in the action. *McLaughlin Carriage Co. v. Fader*, 34 N. S. Reps. 334.

III. IN ONTARIO.

Ca. sa.—Concurrent writ—Expiry of original—Invalid arrest—Application for new writ—Concealment of material facts.—A concurrent writ of *ca. sa.* should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 874, and a concurrent writ so issued will be set aside as having been improperly issued. The right to make a motion to be discharged from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon the application founded upon Con. Rule 1047, is confined to the case of an order for arrest made before judgment, and does not extend to a *ca. sa.* The defendant had been arrested under an invalid concurrent writ of *ca. sa.*, and was in the custody of a sheriff, to the knowledge of the plaintiffs' solicitor, who prepared an affidavit entirely suppressing the fact of the arrest, upon which he obtained an order for and issued a new writ of *ca. sa.* Upon an appeal to a Divisional Court from an order of a Judge in Chambers refusing to set aside the latter order and writ, and a

motion to be discharged:—*Held*, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application, having for its object the setting aside of the order and writ, must upon the authorities have failed: *Damer v. Busby*, 5 P. R. at p. 339. It was really an application to the undoubted jurisdiction of the Court to set aside, in its discretion, orders which had been made by the wilful concealment or perversion of material facts; and a clear case had been made out and the order and writ should be set aside and the prisoner discharged from custody. *Merchants Bank v. Sussex*, 22 Occ. N. 387, 4 O. L. R. 524.

IV. IN QUEBEC.

1. Capias—Affidavit—Intended departure—"Immediately."—The omission of the word "immediately," in the affidavit for *capias*, in connection with the intended departure of the debtor, is fatal, and the *capias* will be quashed and set aside. *Kidd v. McKinnon* Q. R. 20 S. C. 300.

2. Contrainte par corps—Release—Assignment of property—Security—Time.—A debtor in respect of damages adjudged against him for slander, and upon the point of being imprisoned under a writ of *contrainte par corps*, may obtain a stay of the writ if he makes an assignment of his property, provided that he furnishes security to place himself in the custody of the sheriff whenever he shall be required to do so. But the transfer of the property effected by the *contrainte par corps* does not permit of his being released before the expiration of the time allowed to creditors to contest it. *Fréchette v. Prevost*, 4 Q. P. R. 404.

3. Contrainte par corps—When claimable—Action for damages—Malice.—An action for damages against a person who has out of malice closed a tap used for the purpose of supplying his co-tenant with water, is not an action in which the plaintiff can claim *contrainte par corps* in default of payment of the damages awarded; and a claim for that relief will be struck out upon demurrer. *Phanouf v. Knight*, 5 Q. P. R. 70.

ASSAULT.

See EXTRADITION, 1—PARTIES, 8.

ASSESSMENT AND TAXES.

- I. DISTRESS FOR TAXES.
- II. EQUALIZATION OF ASSESSMENTS.
- III. EXEMPTIONS.
- IV. PROPERTY ASSESSABLE.
- V. SPECIAL TAXES.
- VI. TAX SALE.
- VII. VALUATION OF PROPERTY.

See LANDLORD AND TENANT, I. 2—LIMITATION OF ACTIONS, I. 2—MINES AND MINERALS, 7—MUNICIPAL CORPORATIONS, II. 1, III. 12, VII. 4, IX. 2—REVENUE—SCHOOLS—SURVEY—VENDOR AND PURCHASER, 4, 18.

I. DISTRESS FOR TAXES.

1. "Owner"—Agent for mortgagees—*Conditional purchase.*]—The plaintiff agreed with mortgagees in possession of the mortgaged land to purchase it at a sum equal to principal, interest, and costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, and in the meantime that he should, as their agent, manage the property:—*Held*, that the plaintiff, who had not been assessed for the property in question, and against whose name the taxes in question had not been charged on the collector's roll, was not an "owner" of the premises within s. 35, s.s. 3, of the Assessment Act, R. S. O. 1897 c. 224, whereby the collector is authorized to levy unpaid taxes "upon the goods and chattels of the owner of the premises found thereon;" and such taxes could not be levied upon his goods. *Lloyd v. Walker*, 22 Occ. N. 256, 4 O. L. R. 112.

2. "Owner"—Agreement for purchase—Part performance—Local improvement rates—Distress warrant—Abandonment of distress.]]—A purchaser, who has gone into possession and made part payment of the purchase money under an agreement for the sale of land unexecuted by the vendor, which provides for payment by the purchaser of the taxes, rates, and assessments rated or charged from the date of the agreement, is an "owner" within s. 135 of the Assessment Act, and is liable for the taxes accruing during his occupancy, although they may have been assessed against a former owner. Local improvement rates grouped with other taxes under the Assessment Act, and included in the collector's roll, are taxes, in a broad sense, and may be collected or realized by uniform statutory process.—2. A warrant of distress specifying two bailiffs is unobjectionable.—3. Where one

bailiff had rightly entered and seized, and had afterwards withdrawn by reason of the misstatements of the owner, it was held competent for another bailiff to return forthwith and continue the first lawful taking. *McDougall v. McMullen*, 25 C. P. 75, 92, followed. *Sawers v. City of Toronto*, 22 Occ. N. 25, 380, 2 O. L. R. 717, 4 O. L. R. 624.

II. EQUALIZATION OF ASSESSMENTS.

Appeal to County Court Judge—Time for judgment—Imperative enactment.]—The provision in s.s. 7 of s. 88 of the Assessment Act, R. S. O. 1897 c. 224, that the judgment of the County Court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative. Proceedings for equalization of the assessment, and the rolls of what financial year are to be equalized, considered. Judgment in 3 O. L. R. 169, 22 Occ. N. 48, reversed. *In re Township of Nottawasaga and County of Simcoe*, 22 Occ. N. 172, 4 O. L. R. 1.

III. EXEMPTIONS.

1. *Canadian Pacific Railway—Branch lines—Buildings—Superstructure—Valuation.*]—Clause 16 (relating to exemption from taxation) of the agreement between the Canadian Pacific Railway Company and the Government of Canada, as embodied in 44 V. c. 1, is not applicable to the Crow's Nest Pass Railway, but is applicable only to the main line of the Canadian Pacific Railway Company, and to such branches thereof as the company was authorized by clause 14 of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the company may have been subsequently authorized to construct. Under the Ordinance respecting the Assessment of Railways, C. O. 1898 c. 71, s. 3, the round-houses, station, or office buildings, section houses, employees' dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Ordinance. Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. When only two and a half stalls of a round-house were situated within the

municipality, and the round-house was shewn to be worth \$900 a stall, the assessment was fixed at \$2,250. *In re Canadian Pacific R. W. Co. and Town of Macleod*, 5 Terr. L. R. 192.

2. Portion of building—Assessment of remainder.]—The fact that a portion of a building assessed for taxes under the Municipal Ordinance, is occupied by the Crown under lease, and is therefore exempt under s. 121, s.s. 1, of that Ordinance, does not prevent the remaining portion being assessed for a proportionate part of the value of the whole. *Macleod Improvement Co. v. Town of Macleod*, 5 Terr. L. R. 190.

3. Property of companies—"Plant and appliances"—*Public streets of municipality.*]—The words "plant and appliances" used in s.s. 4 of the new s. 18 of the Assessment Act, substituted by 2 Edw. VII. c. 31, s. 1, are confined to any plant and appliances located upon the streets, roads, highways, and other public places in the municipality, such words taking this limited meaning because they must be referred to the words "rolling stock" which immediately precede them in the same sub-section, and because it was manifestly the intention of the Legislature in enacting a new s. 18 to deal only with the method of assessing so much of the property of the companies named in s.s. 2 as was situate upon the public streets of the municipality. *In re City of Toronto Assessment*, 22 Occ. N. 390.

4. School taxes—Recovery of taxes paid by mistake—Court of Revision.]—Certain of the plaintiff's lots were by-law of the defendant municipality "exempted from payment or taxes," for the year 1890 and other years. The said lots were assessed for taxes for the said year "for school purposes only." Thereafter the plaintiff received from the defendant a statement and demand for payment within 30 days of the taxes on the said lots for the said year, and "in consequence of the said demand" paid the same:—*Held*, that, assuming the plaintiff was entitled to exemption from taxation for school purposes, this did not amount to such an involuntary payment as would entitle the plaintiff to recover the amount so paid. Effect of decision of Court of Revision discussed. *Spring-Rice v. Town of Regina*, 5 Terr. L. R. 171.

5. Unoccupied lands of Crown—Land grant of Canadian Pacific Railway Company.]—Crown lands which have been set apart for the land grant of the Canadian Pacific Railway Company, and earned by that company as part of its land grant under the schedule to 44 V.

c. 1, "An Act respecting the Canadian Pacific Railway," but which have never been sold or occupied by the company, are exempt from taxation by school districts in the Territories, by virtue of s. 16 of the schedule. Construction of statutes discussed. *Balgownie Protestant Public School Trustees v. Canadian Pacific R. W. Co.*, 5 Terr. L. R. 123.

See VII. 3.

IV. PROPERTY ASSESSABLE.

1. Homestead—Crown.]—The plaintiff's husband, in 1892, became the holder of a homestead claim, part of the Dominion railway belt, and in October, 1897, a Crown grant was issued to the plaintiff at the instance of her husband and herself. The defendants sought to assess the land for taxes from 1892 to 1897:—*Held*, that where the fee still remains in the Crown, the interest of the holder of a homestead claim is not subject to taxation by a municipality, although the holder personally is. *King v. Municipality of Matsqui*, 22 Occ. N. 42, 8 Brit. Col. L. R. 289.

2. Income of locomotive engineers.]—The earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives, are not "income" within the meaning of that term as used in the Assessment Act prior to the amendment of 1901, and are therefore not liable to taxation. Decision in 9 Brit. Col. L. R. (6) reversed. *In re Assessment Act*, 9 Brit. Col. L. R. 200.

3. Interest of lessee from Crown—Local improvements—Sidewalk.]—Under an agreement of the 20th March, 1889, entered into by the Crown, as representing the University of Toronto, and the city of Toronto, confirmed by 32 V. c. 53 (O.), College street in the city of Toronto has become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction, as a local improvement, of a sidewalk in front of the leased land, even though the lease has been made before the agreement. *In re Leach and City of Toronto*, 22 Occ. N. 406, 4 O. L. R. 614.

4. Land and improvements belonging to Dominion Government—Assessment of occupier of—Description—Municipal Clauses Act—Court of Revision—Appeal—Action.]—The defendant was the occupier of one of several stores on the ground floor of a building belonging

to the Dominion Government, and was assessed under s. 168, s.-s. 4 (a), of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1, 605, and 1, 607, block 1; measurement 23 x 66; Government street; land, \$12,650; improvements, \$920; total, \$13,570."—*Held*, that the defendant was an occupant of part of the improvements only, and not of the land.—2. The assessment was invalid because the lands and improvements were insufficiently described.—3. The Act provides no procedure for such an assessment.—4. Where an assessment is illegal, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes. *City of Victoria v. Bowes*, 22 Occ. N. 218, 8 Brit. Col. L. R. 303.

5. Personal property of bank—*"Diligent inquiry"*—*Statute—Imperative or directory—Notes and cheques on other banks.*—The failure of an assessor to make "diligent inquiry," is not fatal to the validity of the assessment; the provision in the Municipal Ordinance in that respect being merely directory. Commercial paper (such as notes and cheques on other banks) held by a branch of a chartered bank are "personal property," and a branch bank holding such paper is liable to assessment in respect thereof. *Union Bank of Canada v. Town of Macleod*, 22 Occ. N. 310, 4 Terr. L. R. 407.

V. SPECIAL TAXES.

1. Local improvements—Establishment of district—Notice—Error in number—Wrong name—Time for assessing—Exceptional tax—Construction of taxing statutes—Conditions subsequent.—The designation of a local improvement district by an incorrect number, while its name was otherwise correctly stated in the notice in the Gazette constituting the district, did not invalidate the notice.—2. The assessment of the defendants was not invalid by reason of their being assessed under the name of "The Hudson's Bay Company"—a name by which they were commonly designated by themselves and the public.—3. That, though the district in question was not constituted until July, 1899, and the defendants not assessed till August, 1899, they were liable for the whole amount for which they were assessed, the rate of assessment being a fixed rate per acre, irrespective of time, and the assessor being expressly authorized to assess at any time during the year.—4. That the assessment of the defendants under the

Ordinances in question is not an exceptional tax upon them within the meaning of the Imperial Order in Council of 23d June, 1870, inasmuch as it was equal and uniform throughout the district. The construction of statutes generally and of the Ordinances relating to local improvements in particular discussed. The construction of taxing statutes discussed. The effect of non-fulfilment of statutory conditions subsequent discussed. *McGowan v. Governor and Company of Adventurers in England Trading into Hudson's Bay*, 22 Occ. N. 64, 5 Terr. L. R. 147.

2. Local improvements—*Unclosed lands under lease from Crown—"Occupant"—Personal liability.*—Where lands are held under lease from the Crown, and, though they are not enclosed or fenced, the lessee uses them as pasture for his sheep, the lessee is an "occupant" of the lands within the meaning of the Local Improvement Ordinance C. O. 1898, 73, s. 15. Notwithstanding the words of s. 16, s.-s. 2, and of s. 17, of the said Ordinance, the effect of the provisions of ss. 15, 20, and 23 is to create a personal liability to pay, upon which the occupant may be sued. *Crosskill v. Sarnia Roving Co.*, 21 Occ. N. 577, 5 Terr. L. R. 125.

3. Local tax—Insurance company—Agency.—In an action against an insurance company under the Fire Companies Aid Amendment Act of 1871, which applies only to Victoria, for taxes due by it as a company issuing policies within the city limits, it was held at the trial, in dismissing the action, that the plaintiff had failed to establish agency.—*Held*, on appeal, that the action was misconceived, that the tax sought to be recovered was not on the company directly, but in respect of a special form of agency described in the statute; and the evidence negatived the existence of such an agency. *Dowling v. Union Assurance Society*, 9 Brit. Col. L. R. 196.

VI. TAX SALE.

1. Purchaser at—Liability for taxes of year of sale—Statutes—Amendment.—Certain lots in the city of Calgary were, on the 27th June, 1896, sold for arrears of taxes due thereon for certain years prior to 1896; the sales were fully confirmed by the Court, and on the 10th July, 1897, and 27th June, 1898, the purchaser received certificates of title in due form from the Registrar of Land Titles, and entered into and remained in possession of the lots as owner. The lots were duly assessed for taxes for the year 1896, but no sale was struck until after the sale. The said

taxes for 1896 remained unpaid for two years. Section 81 of the Ordinance incorporating the city of Calgary provides that the transfer from the treasurer to the purchaser shall vest in the purchaser all the rights of property of the original holder of the land, and purge and disincumber it from all incumbrances of whatever nature other than existing liens of the city and the Crown:—*Held* that the lots in question were liable to be sold for taxes for the year 1896, and that, under s. 51 of the same Ordinance, the purchaser was personally liable to the city for the amount of the taxes. Section 81 was amended by Ordinance 1900 c. 39, s. 4, by the addition after the word "Crown" of the words "including all taxes unpaid upon such land at the day of the date of such transfer, and whether imposed before or after the day of the date of the tax sale at which said lands were sold:"—*Held*, that this amendment did not raise the presumption that the section as it originally stood had not the same meaning; that the amendment was probably made to remove doubts that may have existed. *In re Lougheed and City of Calgary*, 5 Terr. L. R. 200.

2. Time for redemption—Statute—Retroactivity—Constitutional law.—Section 80 of the charter of the city of Calgary (Ordinance 33 of 1893) provides that if land sold for taxes be not redeemed within one year after the date of the sale, the purchaser shall be entitled to a transfer, which shall have the effect of vesting the land in him in fee simple or otherwise, according to the nature of the estate sold; and s. 81 provides that the transfer shall not only vest in the purchaser all rights of property which the original owner had therein, but shall purge and disincumber such land from all payments, lien charges, mortgages, and incumbrances whatever, other than existing liens of the city and the Crown. Certain lots in the city of Calgary were sold for taxes on 16th April, 1900, and a transfer was given to the purchaser on 8th May, 1901, the owners not having offered to redeem within the year:—*Held*, that s. 2 of Ordinance 12 of 1901, "an Ordinance respecting the Confirmation of Sales of Land for Taxes," passed 12th June, 1901, giving a right to redeem at any time before the hearing of the application for confirmation, is not retrospective, and that the original owners could not take advantage of its provisions. *Held*, further, that ss. 80 and 81 of the charter of the city of Calgary are not *ultra vires* as being in conflict with ss. 54 and 57 of the Land Titles Act, 1894. *Wylie v. Jellett*, 2 N. W. T. Reps. No. 1, p. 125, 26 S. C. R. 282, applied. *In re Kerr*, 5 Terr. L. R. 297.

See LAND TITLES ACT, N. W. T. 13—MORTGAGE, 6—MUNICIPAL CORPORATIONS, IX. 4—REAL PROPERTY ACT, MANITOBA, 2.

VII. VALUATION OF PROPERTY.

1. Appeal from assessment—Value of lands and buildings—Burden of proof.—Under ordinary circumstances, it is incumbent upon an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed, but where, although this is not shewn, it appears that, under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellant's lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment. A school district assessor assessed certain of the appellants' lands at \$800, and the dwelling houses thereon at \$2,000:—*Held*, that the assessment should stand, although the more correct course would have been to assess the whole as "land" and place a single value upon both soil and buildings as "land." *In re Canadian Pacific R. W. Co. and MacLeod Public School District*, 5 Terr. L. R. 187.

2. Electric companies—Rails, poles, and wires—Wards—Franchise.—The Act 1 Edw. VII. c. 29, s. 2, has made no difference in the mode of valuing for assessment purposes the rails, poles, wires, and other plant of electric companies erected or placed upon the highways of municipalities, which was held to be proper by the decision in *In re Bell Telephone Company Assessment*, 25 A. R. 351; MACLENNAN, J.A., dissenting. That Act merely removes one of the difficulties pointed out in the previous case, but does not extend the principle on which the value of such property, apart from the franchise of the company or its use as a going concern, is to be ascertained by the application of the rule provided by s. 28 of the Assessment Act for ascertaining its value. It is now to be valued as if it were all in one ward, that is to say, as a whole or as an integral part of a whole, but still without reference to its connection with a franchise or its use as the property of a going concern. *In re Toronto Electric Light Co. Assessment (and other assessments)*, 22 Occ. N. 206, 3 O. L. R. 620.

3. Income—Basis of assessment—Exemption.—Although a person assessed for income tax under the Municipal Ordinance was not during the previous year a

resident of the municipality, the previous year's income, wherever earned, may be taken as a basis for determining the amount for which he should be assessed. Income to the extent of \$600 is exempt. *Lamontaigne v. Town of Macleod*, 5 Terr. L. R. 199.

4. Lands acquired for railway—Real value — Farm purposes — Village lots.]—The railway company had acquired a parcel of land of more than 200 arpents for the purposes of their railway, but, changing their intention, they leased it as a farm, by a lease for a year, renewable from year to year, with the condition that it should not be used except for the purposes of pasturage, for which it was quite unfit. The company had prepared a plan of subdivision of the land into lots, and had made application to the corporation and the government to have it adopted and registered. They had also advertised the sale of the property in lots:—*Held*, that the land should be valued for assessment purposes according to its real value, and not according to the value which it might have for agricultural purposes only. *In re Canadian Pacific R. W. Co. and Village of Verdun*, Q. R. 20 S. C. 194.

5. Measure of value — Municipal Clauses Act, B. C.]—The measure of value for purposes of taxation prescribed by s. 113 of the Municipal Clauses Act is the actual cash selling value, and not the cost. *In re Dunsmuir*, 8 Brit. Col. L. R. 361.

6. Modification by Judge—Error in principle.]—The Judge ought not to vary the valuation of a property made upon oath by the assessors of a municipality, unless it has been made in consequence of an erroneous principle, or is so evidently erroneous that a competent and honest man could not arrive at the same result. *Bugg v. Town of St. Louis*, Q. R. 20 S. C. 149.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

ASSIGNMENT OF CHOSE IN ACTION.

See CHOSE IN ACTION, ASSIGNMENT OF.

ASSIGNMENTS AND PREFERENCES.

See BANKRUPTCY AND INSOLVENCY.

ATTACHMENT.

See CONSERVATORY ATTACHMENT.

ATTACHMENT OF DEBTS.

I. GENERALLY—WHAT DEBTS ATTACHABLE.

II. PRACTICE AND PROCEDURE IN GARNISHMENT.

III. OTHER CASES.

See BANKRUPTCY AND INSOLVENCY, I. 9, 11—COSTS, I. 5, V. 2, 3—EXECUTION, V. 2 — HUSBAND AND WIFE, VII. 3 — MONEY IN COURT.

I. GENERALLY — WHAT DEBTS ATTACHABLE.

1. Alimentary allowance — Pension.]—A pension granted by the Montreal Harbour Commissioners to a sick pilot, from the "Decayed Pilots' Fund," is an alimentary allowance, and is exempt from seizure, under Art. 599, s. 9, C. C. P., except for an alimentary debt. 2. An alimentary pension can only be seized for an alimentary debt incurred while the pension is in force, and not for a debt incurred before the pension began to run. *Hamelin v. Perrault*, Q. R. 21 S. C. 51.

2. Bank Deposit — Attachment for debt of depositor—Claim of true owner—Intervention.]—The fact of a person depositing sums of money in his own name in a bank does not take away from the true owner of such sums the right of recovering such sums. The true owner, as a third party, may assert his rights by intervention in a garnishing cause, and have annulled the *seizure-arret* of such sums by the garnishing creditor. *Stephens v. Higgins*, 5 Q. P. R. 1.

3. Fire insurance moneys — Hypothecary creditor—Contingent debt.]—The indemnity due by an insurance company, in case of fire, is a simple debt resulting from a contingent contract, and, except in the case of an assignment of the anticipated indemnity, an hypothecary creditor has no preferential claim upon such indemnity, and therefore the indemnity cannot be attached in the hands of the insurance company. *Leroux v. Cholette*, 4 Q. P. R. 193.

4. Juror's indemnity.]—Money due to a petit juror for his indemnity, as such, is not garnishable. *Brouillard v. Shawl*, 4 Q. P. R. 181.

5. Moneys due by Crown.]—A sum of money due to a school teacher, as a subsidy payable out of the fund appropriated by the Legislature as allowance to institutions and superior schools, being money due by the Government of the Province, and not money due as the salary of a public officer, is not seizable in the hands of the Government under a writ of attachment by garnishment. *Beauchemin v. Fournier*, Q. R. 20 S. C. 272.

6. Salary—"Due or accruing due."]—Where the salary of an employee was a fixed amount per month payable at the end of the month:—*Held*, that a garnishee summons served on the last day of the month did not bind the current month's salary, inasmuch as no part of the amount was due, that is, recoverable by the employee, till the last day of the month had expired, nor was any part accruing due, inasmuch as the liability of the employer to pay was contingent upon the completion of the month's service by the employee. *Main v. McInnis*, 4 Terr. L. R. 517.

II. PRACTICE AND PROCEDURE IN GARNISHMENT.

1. Action by judgment debtor against garnishee—*Special pleading.*]

—In a suit to recover moneys which have been attached, brought by the defendant in the attachment against the garnishee, the latter may, instead of proceeding regularly, file a declaration that he submits his rights to the Court, at the same time stating, with documents in support of his statements, the previous proceedings which prevent him from paying what he owes to the plaintiff, namely, the garnishing proceedings pending, a judgment already given requiring him to pay one-fifth to a creditor, and the fact that another creditor has made a motion for a declaration that the whole salary of the plaintiff is exigible. *Noel v. Corporation of Pilots for the Harbour of Quebec*, 5 Q. P. R. 90.

2. Affidavit—Information and belief—*Grounds.*]—The affidavit for attachment *en mains tierces*, when founded upon information or belief, must state the grounds of such belief and the sources of such information, and in the absence of such statement the seizure will be quashed on petition. *Duclos v. Beaumier*, Q. R. 20 S. C. 237.

3. Affidavit—Irregularity—Claimant—*Judge by consent trying issue summarily—Appeal—County Court.*]—The plaintiffs in County Court proceedings issued

several garnishee summonses, and subsequently in Supreme Court actions judgment creditors of the defendants in the County Court actions issued attaching orders against the same garnishees. The judgment creditors in the Supreme Court actions contended that the County Court garnishee summonses were nullities, as they were issued on an affidavit which did not comply with the statute, and all the interested parties agreed that the County Judge might decide the matter in a summary way. He held that the County Court plaintiffs were entitled to the moneys garnished:—*Held*, on appeal, following *Eade v. Winsor*, 47 L. J. C. P. 584, that the County Judge was in effect an arbitrator; and no appeal lay from his decision. *Per* DRAKE, J.—(1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action, and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnished. *Harris v. Harris*, 22 Occ. N. 73, 8 Brit. Col. L. R. 307.

4. Declaration of garnishee—*Contestation of—Claim for damages.*]—A garnishee is not obliged to declare hypothetical and possible debts: his declaration is sufficient if it admits debts of which he knows the cause and the amount. 2. Facts which may serve as the basis of an action for damages by a defendant against the garnishee do not justify a contestation of the declaration of the garnishee, when the additional claim of the defendant against the garnishee is not liquidated nor established nor stated in any manner, and when the garnishee cannot be presumed to have known it at the time of his declaration. 3. In this case, the garnishee, being indebted to the defendant in the sum of \$100 by virtue of a judgment, was not obliged to declare that, besides such sum, he owed \$200 as damages caused to the defendant by the allegations of a certain plea which he alleged to be false; and a contestation of the declaration of the garnishee based upon default of declaring something else besides an ascertained debt, was dismissed upon inscription in law. *Germain v. Dussault*, 5 Q. P. R. 96.

5. Declaration of garnishee—*Contestation of—Requirements.*]—When a *tiers-saisi* has declared that he owes nothing, it is not sufficient to allege, in contestation thereof, that it is false: a contestation of a declaration of a *tiers-saisi* has for its object a different basis

of facts whereon to determine the liability of the garnishee from that furnished by his declaration: it must, if for less than the amount of the judgment, set forth the exact amount of the alleged indebtedness; it must be as specific as, and proved like, the contents of the declaration in an ordinary suit, and it creates a real cause, in which the *tiers-saisi* is a defendant. *Canadian Congregational Missionary Society v. Larivière*, 4 Q. P. R. 290.

6. Judgment by default against garnishee — Irregularity in service — Right of appeal — Return — Consent.—A garnishee against whom a judgment has gone by default, without service of process personally or at his domicile, has the right to move against such judgment by way of appeal. 2. A party who garnishes after judgment cannot return his writ of *saisie-arrêt* after the three days following the day for such return without the consent of all the parties to the cause, and the consent of one of the defendants alone is insufficient. *Perrin v. Tate*, 5 Q. P. R. 116.

7. Judgment by default against garnishee — Opening up — Terms — Costs.—A garnishee against whom judgment has been given by default, and who wishes to open up the judgment, must pay the costs of the motion and of the proof of the disbursements incurred upon his default, and a supplementary fee, if that was necessary. *St. Denis v. Goulet*, 4 Q. P. R. 318.

8. Saisie-arret — Affidavit for — Information and belief.—An affidavit in support of a *saisie-arrêt* before judgment which is simply based upon the belief of the deponent as to the loss of recourse by the plaintiff, in place of positively affirming such loss as a fact, is insufficient, and the *saisie-arrêt* will be set aside on petition. *Michaud v. Clement*, 5 Q. P. R. 25.

9. Saisie-arret — Non-service — Motion to discharge.—A motion by the defendant for the discharge of a *saisie-arrêt* because it has not been served nor returned, will be dismissed with costs, because the defendant cannot apply for the discharge of a writ which has no existence. *Devlin v. Charlebois*, 4 Q. P. R. 281.

10. Saisie-arret — Notice of desistment — Costs.—If a plaintiff desists from a *saisie-arrêt*, and gives notice of his desistment, without mentioning the costs, to the defendant and the garnishee the defendant has a right to demand the dismissal of the *saisie-arret* by motion, and with costs. *Bank of British North America v. Laporte*, 5 Q. P. R. 67.

11. Saisie-arret — Second writ — Exception de litispendance.—To afford ground for an *exception de litispendance* against a second *saisie-arrêt* after judgment, while the first is pending, it must appear that the second writ attached the same debt as the first writ. *Leith v. Hall*, 4 Q. P. R. 398.

12. Saisie-arret — Time for plea to — Inscription.—In summary causes a defendant has two days to plead to the *saisie-arrêt*; if he does not plead within this time, the plaintiff has two days to contest the declaration of the garnishee; after this time, he may, if he does not contest it, inscribe the case for judgment in terms of the declaration. *Goldberg v. Giffin*, 4 Q. P. R. 376.

13. Saisie-arret — Wages — Occupation of defendant — Neglect to state.—Where in an attempt to garnish wages alleged to be due to a judgment debtor, the writ of *saisie-arrêt* did not state the occupation of the defendant, as required by Art. 678, C. C. P., the service of such writ was held to be of no effect. *De Sièyes v. Painchaud*, Q. R. 20 S. C. 230.

14. Service — Officers of bank — Priorities.—Interpleader proceedings were taken by the Bank of Nova Scotia to determine the priority of attaching process served on it by two creditors of an absconding debtor. Order IX., Rule 8, of the Judicature Act provides that process may be served on a corporation by serving the same on the principal officer thereof or on the clerk or secretary. One of the creditors served the president and secretary of the bank at its head office. The other creditor, before making any service in the same manner, and before the service of the first mentioned creditor, served the process on the manager of the branch of the bank in which the absconding debtor's money was deposited, and he contended that he thereby acquired priority:—Held, that priority must be given to the first service on the president at the head office. *Kinsman v. Onderdonk*, 22 Oct. N. 262.

15. Set-off between defendant and garnishee.—A debt due by the defendant to the garnishee which did not become due until after an attachment, cannot be set off against the debt of the garnishee to the defendant, being the debt attached. *Hogue v. Ogilvie*, 4 Q. P. R. 317.

III. OTHER CASES.

1. Division Court — Cheque — Payment stopped — Payment into Court — Sale

of goods.]—A vendor of goods, after receiving payment therefor, fraudulently sold them to another purchaser, who bought in good faith, giving in payment his cheque drawn on a bank at T., but cashed at a bank in O., on payment being guaranteed by an indorser. The second purchaser, on being served by the first with a garnishee summons issued out of a Division Court, stopped payment of the cheque, and paid the amount into Court. The indorser, meanwhile, paid the bank at O.:—*Held*, that he was entitled to the money paid into Court. *Wilder v. Wolf*, 22 Occ. N. 293, 4 O. L. R. 451.

2. County Court — Garnishee summons before judgment — Partnership action.]—An application by the defendant to set aside a garnishee summons issued under s. 102 of R. S. B. C. c. 52, which enables a plaintiff at the time of issuing a summons for a debt or liquidated demand, or at any time previous to judgment, upon filing an affidavit, &c., to obtain a garnishee summons. The action was brought to have a partnership dissolved and for an account and payment:—*Held*, that the action was not for a debt or liquidated demand; and the garnishee summons was set aside. *Walter v. Rooke*, 50 L. J. Q. B. 470, *Howell v. Metropolitan District R. W. Co.*, 51 L. J. Ch. 158, and *Randall v. Lithgow*, 53 L. J. Q. B. 518, referred to. *Cicognia v. McHeather*, 22 Occ. N. 309.

3. Insolvency of debtor—Judgment making garnishment absolute — Attack upon by another creditor.]—After the creditor who has issued a writ of *saisie-arrêt* has obtained, without fraud, a judgment ordering the garnishee to pay him the amount which the garnishee acknowledges he owes the debtor, another creditor of the latter cannot, by *tierce-opposition*, cause such judgment to be annulled on the ground of the insolvency of the debtor; the allegation of insolvency must be made before the judgment making absolute the *saisie-arrêt*. *Manseau v. Bruyère*, Q. R. 11 K. B. 16.

4. Insolvency of debtor — Opposition by other creditors — Knowledge of attaching creditor.]—In order that there may be ground for an opposition *à fin de conserver*, based upon the insolvency of the debtor, after judgment has been given upon a writ of *saisie-arrêt*, it is necessary that the attaching creditor should have known of the insolvency of the debtor. *Hanscreau v. Bradshair*, 4 Q. P. R. 198.

ATTACHMENT OF GOODS.

Setting aside — Fraudulent intent — Non-disclosure — New evidence.] — The

plaintiff's affidavit, upon which an order for attachment of goods was granted, stated that he had good reason to believe and did believe that the defendant had disposed of her real estate with intent to defraud her creditors, and that she was about to dispose of her personal property with the same intent, and was about to leave Manitoba as soon as the goods should be disposed of (giving the source of his information). The defendant, on motion to set aside the order, by affidavit denied having had the intention to leave Manitoba permanently, and gave reasons for leaving temporarily. In reply the plaintiff swore to a chattel mortgage on the defendant's property, and a seizure thereunder:—*Held*, that the bare fact that the defendant had disposed of her real estate raised no inference of fraud; the affidavit of the plaintiff in reply disclosed facts on which his belief of intent to defraud was properly grounded; but these facts, being within the plaintiff's knowledge at the time of the original application, should then have been disclosed. The fact of the plaintiff's holding security should also have been stated. *Newton v. Bergman*, 21 Occ. N. 485, 13 Man. L. R. 563.

ATTORNEY-GENERAL.

See MALICIOUS PROCEDURE, 5 — MINES AND MINERALS, 5 — MUNICIPAL CORPORATIONS, X. 2 — WILL, I. 3.

AUCTION.

See VENDOR AND PURCHASER, 12.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See ARREST I. 3 — CRIMINAL LAW, III. 14 — EXTRADITION, 2.

BAILIFF.

1. Costs of judicial sale—Right to retain.] — Whether there is or is not opposition *à fin de conserver*, the bailiff who has made a judicial sale has the right to keep his costs out of the moneys which he returns, provided such costs have been taxed. *Turgeon v. Shannon*, 4 Q. P. R. 274.

2. Service of papers — Report — Amendment.]—A bailiff effecting service of a proceeding commits a grave irregularity if he corrects his report after it has been filed in Court. *Hall v. Kenton*, 4 Q. P. R. 375.

See EXECUTION, III. 3—WRIT OF SUMMONS, II. 1.

BAILMENT.

Negligence — Storage — Duty of periodical examination.]—The defendants were keepers of an elevator, and on the 24th April, 1897, received from the plaintiff a quantity of corn for storage, and stored it in several large bins. On the 22nd May, 1897, desiring to use one of these bins (No. 49) for another purpose, the defendants removed the corn over into another bin, and in so doing discovered that it had become heated, whereupon, by exposing it to the air, they stayed the process of heating, and the corn recovered. They also notified the plaintiff by telegram on discovering the heating in the bin No. 49, but they did not themselves examine the remainder of the corn to see whether it also was becoming heated, nor did the plaintiff ask them to do so. When, on the 3rd June, the corn was run out to be shipped, a quantity of it was found to be in an advanced condition of fermentation:—*Held*, that the defendants had been guilty of negligence, under the above circumstances, and were liable to the plaintiff for the loss sustained by him. *Dunn v. Prescott Elevator Co.*, 22 Occ. N. 257, 4 O. L. R. 103.

See RAILWAY, II.

BALLOTS.

See MUNICIPAL ELECTIONS, 10—PARLIAMENTARY ELECTIONS, IV. 2, 3, 4, 5, 6.

BANKRUPTCY AND INSOLVENCY.

- I. ASSIGNMENT FOR BENEFIT OF CREDITORS.
- II. CURATOR OF INSOLVENT ESTATE.
- III. EXAMINATION OF INSOLVENT OR THIRD PARTY.
- IV. PREFERENCE.
- V. OTHER CASES.

See ATTACHMENT OF DEBTS, III. 3.—COMPANY—CROWN, IV. 1—FRAUDULENT CONVEYANCE—HUSBAND AND WIFE, IV. 4—PARTIES, IV. 3 — — SALE OF GOODS, II. 2.

I. ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Demand for — Cessation of payments — Costs.]—The cessation of payments is an essential condition of a demand for an assignment of property for the benefit of creditors. However, if the defendant, by his default, has occasioned the demand for an assignment, and has not since discharged his obligation, but, on the contrary, has caused considerable expense to the creditor requiring the assignment, the demand for an assignment will be dismissed without costs. *Hetu v. Poirier*, 4 Q. P. R. 242.

2. Demand for — Contestation — Discovery by debtor.]—There is no provision of the Code of Civil Procedure whereby a debtor, contesting a demand of assignment made upon him, can be ordered to exhibit and give communication, to a creditor of his books of account, letter-heads, or any documents or books of whatsoever nature. *Wistar v. Dunham*, 3 Q. P. R. 79.

3. Demand for — Petition to set aside — Affidavit — Notice of presentation.]—There is no need of an affidavit in support of a petition to set aside a demand for an assignment of property, even if the facts relied upon do not appear upon the record. 2. It is not necessary to give notice of the presentation of such petition for a day fixed, a notice of filing it as part of the record being sufficient. *Dufresne v. Superior*, 5 Q. P. R. 28.

4. Execution after time provided in deed — Originating summons — Costs.]—A proceeding by originating summons to determine the rights of certain creditors who executed a deed of assignment for the benefit of creditors after the expiration of the time provided in the deed, but before any dividend was paid. Some of the creditors had not learned of the assignment until after the time had elapsed; others had sent instructions and power of attorney to execute within the time, but the same miscarried, and the execution did not take place until after the time had elapsed. The assignment contained no release:—*Held*, on the authority of *Whitmore v. Turquand*, 3 D. F. & J. 107, *Haliburton v. DeWolfe*, 1 N. S. D. 12, and *Douglas v. Samson*, 1 N. R. Eq. 137, that the creditors who executed after the expiration of the time limited

in the assignment but before payment of a dividend were entitled to participate *pari passu* with the creditors who executed within the period. *Held*, also, following *Gunn v. Adams*, 8 C. L. J. 211, that the costs of all parties should be paid out of the estate. *Capstick v. Hendry*, 22 Occ. N. 35.

5. Exemptions—Alien—Costs.—An alien is entitled to the statutory exemption of a part of his property from seizure and sale under execution. He is not barred therefrom by s. 3, s.s. 1, of the Naturalization Act. Where an alien made an assignment for the benefit of his creditors of all his property not exempt by law, an order for payment of the costs of certain proceedings by the creditors out of a fund representing the value of his exemptions, was reversed. *In re Demaurez*, 21 Occ. N. 457, 5 Terr. L. R. 84.

6. Judgment—Execution—Sheriff — Sale of land.—Under a writ of *fiat facias* a sheriff seized the interest of a judgment debtor in certain lands, and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R. S. O. 1897 c. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale, and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the land to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent:—*Held*, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void, and the sheriff's vendee entitled to possession of the land. *Gillard v. Milligan*, 28 O. R. 645, followed. *Elliott v. Hamilton*, 22 Occ. N. 412, 4 O. L. R. 585.

7. Preferential claim — Wages — One month — Computation—Statutes.—By the Creditors' Trust Deeds Act, 1901, an assignee is required to pay in priority to the claims of ordinary creditors the wages of persons in the employ of the assignor at the time of the assignment, or "within one month before." The assignment was made on the 27th November, 1901:—*Held*, that a workman who was in the employ of the assignor previous to and including the 26th October, 1901, was not entitled to a preference. Interpretation Amendment Act, 1902, applied.

In re Clayoquot Fishing and Trading Co., 0 Brit. Col. L. R. 80.

8. Provisional guardian — Change of—Creditors.—The fact that the provisional guardian named by the prothonotary in the case of an assignment for creditors is a creditor for a less sum than that claimed by another creditor is not a sufficient ground for an order of the court to replace the provisional guardian by the other creditor.—2. The Court will not order a change of provisional guardian except upon proof of incompetence or dishonesty. *In re Bonhomme and Burnett*, 5 Q. P. R. 40.

9. Right to rank on estate—Annuitant—Attachment of debts—Assignments Act.—An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R. S. O. 1897 c. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. \$100 per quarter on the first day of each quarter during her natural life:—*Held*, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R. S. O. c. 147 to rank upon the estate of the insolvent for the present value of such payments. *Grant v. West*, 23 A. R. 533, and *Mail Printing Co. v. Clarkson*, 25 A. R. 1, followed. *Seem*, that such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. *In re Cowan's Trust*, 14 Ch. D. 638, has been disapproved in *Webb v. Stenton*, 11 Q. B. D. 518. *Carwell v. Langley*, 22 Occ. N. 97, 3 O. L. R. 261.

10. Right to rank on estate—Claim for inchoate dower — Competition with creditors—Registration of hypothec — Radiation—Rights of curator.—Where by the marriage contract a prefixed or conventional dower payable in one sum, has been stipulated in favour of the wife, she is not entitled to rank for that sum as a conditional obligation, in competition with the creditors of her insolvent husband, before the opening of the dower by the death of the husband.—2. A prefixed dower, or any other right derived from the husband, does not come under the terms of Art. 2029, C. C. The only way in which such rights can be protected is by special conventional hypothec, which must describe the property affected.—3. The curator to an insolvent estate is entitled to bring action for the radiation of the registration of a hypothec affecting the insolvent's immovable property, where such registration is illegal, without waiting to see whether the estate is sufficient to pay all the creditors in full. *Bilodeau v. Benoit*, Q. R. 20 S. C. 241.

11. Rights of assignee — Recovery of portions of estate — Garnishment — Creditors.] — The curator to an assignment of property may recover from the insolvent property which the insolvent has not given up or which he has secreted, but the curator cannot exercise against the debtor rights of action which belong individually to each one of his creditors (Art. 931, C. P.) for the balance of the claims of such creditors against the debtor, by way of garnishment of the party paid out of the proceeds of the property given up by the debtor. *Desmarceau v. Viau*, 4 Q. P. R. 282.

12. Sale of land under execution.] — After an assignment of his property by a debtor for the benefit of his creditors, and the nomination of a curator, a creditor of such debtor cannot cause his lands to be seized and sold, but such lands must be sold by the curator or upon his authority. *Guimond v. Gravel*, Q. R. 10 S. C. 568, 4 Q. P. R. 17.

See LANDLORD AND TENANT, I. 4, II. 2 — LIMITATION OF ACTIONS, II. 4.

II. CURATOR OF INSOLVENT ESTATE.

1. Authorization to defend petition for property of estate.] — The curator of an insolvent estate cannot, without the consent of the creditors or the inspectors, and the authorization of a Judge, reply in writing to a summary petition to recover possession of goods which are in his hands by reason of the assignment. *Royce v. Hyde*, 5 Q. P. R. 64.

2. Insolvent party to action — Substitution of curator — Application for — Wherein made.] — An authorization to litigate an action in the name of a party who has become insolvent since the institution of the action must be obtained upon petition made in the matter of the insolvent estate, and not in the action in which the curator proposes to litigate in the place of the insolvent. *Clark v. Wilder*, 5 Q. P. R. 24.

See COSTS, VIII. 4.

III. EXAMINATION OF INSOLVENT OR THIRD PARTY.

1. Advocate — Cross-examination — Discovery.] — By virtue of Arts. 882 and 883, C. P. C., a creditor of the insolvent, or the curator, with the authorization of the inspectors, may subpoena the debtor to

appear before the Judge or the prothonotary, and interrogate him on oath with regard to his schedule and the state of his affairs. The insolvent is not entitled to be represented or assisted by an advocate upon such examination, and at any rate the advocate of the insolvent has no right to cross-examine him; the examination authorized by these Articles being only preliminary and for the purpose of furnishing information to the creditors or to the curator. *In re Riopelle and Kent*, 4 Q. P. R. 180.

2. Refusal to answer — Contempt of Court.] — An insolvent cannot be imprisoned for contempt of Court because he refuses to answer one question put to him by the curator while under examination. *Saxe v. Kent*, 5 Q. P. R. 94.

3. Third party — Examination by creditor — Scope of — Order for by prothonotary — Review.] — Under Art. 883, C. P., the Judge cannot order a third party to appear before him, or before the prothonotary, to be interrogated under oath in regard to the liquidation of the property of an insolvent, but such third party can be subpoenaed and examined pursuant to Art. 882, C. P., only as to the schedule and the state of the affairs of the insolvent. 2. An order to subpoena such a third person, made by the prothonotary in the absence of the Judge, by virtue of Art. 33, C. P., upon a petition which does not follow the terms of Art. 882, C. P., is subject to review. *In re Smith and Lavière*, 4 Q. P. R. 385.

IV. PREFERENCE.

1. Debt not due — Set-off.] — The state of insolvency of a debtor fixes the position of his creditors, and on account of such insolvency no one of them can obtain a preference over the others. 2. One of such creditors, who is at the same time a debtor of his debtor, but whose debt is not yet exigible, cannot, by renouncing the benefit of the term by which the debt to him is not yet due, and by asserting a set-off, acquire such a preference. *Ville-Marie Bank v. Vannier*, 1 Q. R. 20 S. C. 545.

2. Extension agreement — Secret advantage — Voluntary payment — Action by assignee — Status.] — S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing, by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim, and took from S. notes, aggregating

in amount \$708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for the benefit of his creditors, when the arrangement between him and V. first became known, and the assignee and other creditors brought an action to recover \$708 from V. as part of the insolvent estate:—*Held*, affirming the judgment of the Court of Appeal, 3 O. L. R. 5, 21 Occ. N. 551, and that at the trial, 32 O. R. 216, 20 Occ. N. 437, that S., having paid the notes voluntarily without oppression or coercion, could not himself have recovered back the amount, and his assignee was in no better position. *Langley v. Van Allen*, 22 Occ. N. 222, 32 S. C. R. 174.

3. Imprisonment of insolvent.]—A debtor who arranges with one of his creditors, his relative, to make an assignment for the benefit of creditors, after having handed over to his relative goods in payment of part of what he owes him, and moreover does not give the names of all his creditors, will, upon proof of these facts, be committed to gaol as provided by Art. 888, C. P. *In re Thibault and Gardiner*, 4 Q. P. R. 259.

4. Knowledge of insolvency — Pressure.]—Where there is good consideration a mortgage comprising the whole of a debtor's property will not be set aside, notwithstanding that the mortgagor is in insolvent circumstances, to the knowledge of the mortgagee, and that the effect of the mortgage is to defeat, delay, and prejudice the creditors, if there is pressure. *Adams v. Bank of Montreal*, 8 Brit. Col. L. R. 314.

5. Pressure—Intent.]—In giving the chattel mortgage impeached in this action it appeared that the dominant motive of the debtor was to make an arrangement for continuing his business, the defendant having induced him to give it by promises of assistance in carrying him along and in arranging with other creditors, although not in any definite way enforceable in a court of law:—*Held*, that, under s. 33 of the Assignments Act, R. S. M. c. 7, as amended by 63 & 64 V. c. 3, s. 1, there must still be the intent on the part of the debtor to prefer the particular creditor, in order to set aside the impeached conveyance; and, while the effect of it may be to place that creditor in a more advantageous position than other creditors, and the debtor may recognize at the time that such will be the effect, yet if he gave it for some other purpose or in the hope that he might thus be enabled to avoid insolvency, it cannot be considered that he gave it with intent to give a preference, and the security should stand. *Stephens v. Mc-*

Arthur, 19 S. C. R. 446, *New Prance and Garrard's Trustee v. Hunting*, [1897] 2 Q. B. 19, S. C., *sub nom. Sharp v. Jackson*, [1899] A. C. 419, *Lawson v. McGeech*, 20 A. R. 464, and *Armstrong v. Johnson*, 32 O. R. 15, followed. Although the amending Act declares that a *prima facie* presumption of an intent to prefer is to arise from the effect of such a transaction, this does not justify the Court in looking only to the effect and refusing to attach any weight to the proved facts as to the actual intent. The presumption being only *prima facie* may be rebutted by evidence:—*Held*, also, that the Court need not determine whether the preferred creditor was acting *bona fide* or really anticipated that the other creditors could be arranged with and the business continued, it being only the debtor's mental attitude that should be considered. *Codvile v. Fraser*, 22 Occ. N. 123, 14 Man. L. R. 12.

6. Pressure—Intent — Notice.]—A debtor mortgaged all his real estate to the defendant, and shortly afterwards made an assignment to the plaintiff for the benefit of his creditors generally. Before the giving of the mortgage he was and knew himself to be insolvent. On the day the mortgage was given the defendant went to the debtor and asked for payment, and the debtor informed him he could make none, and then gave the mortgage. The evidence was contradictory as to whether there was a request for security:—*Held*, that when the debtor gave the mortgage he was in insolvent circumstances; the execution of it had the effect of giving the defendant a preference over the unsecured creditors; it must be presumed that the mortgage was executed with intent to prefer and that it constituted a preference. *Stephens v. McArthur*, 19 S. C. R. 446, followed.—2. At and before the execution of the mortgage, the defendant had notice of the insolvency and of the mortgage being made with intent to give him a preference over other creditors and having such effect. *Schwartz v. Winkler*, 21 Occ. N. 574, 13 Man. L. R. 493.

7. Promissory notes — Composition — Cases of action.]—1. Where a creditor, who was also one of the inspectors of the insolvent estate, exacted promissory notes from the insolvent as a condition of his assent to a compromise, such notes were illegal, null and void, as made in fraud of the other creditors, and against public order, and no action could be maintained on the notes by the creditor, or by a *prête-nom*. *Brigham v. Banque Jacques-Carrière*, 30 S. C. R. 429, followed. 2. The Judge at the trial dismissed the action "with costs." The Court of Review declined, under the circumstances, to inter-

fere with the discretion thus exercised. *Cartier v. Genser*, Q. R. 21 S. C. 139.

8. Transfer by insolvent debtor—Attacking—Time—Division Court proceeding—Collateral inquiry—Pressure—Evidence of.]—A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor \$200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the Division Court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference:—*Held*, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it:—*Held*, also, *FALCONBRIDGE, C.J.*, dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor. *Molsons Bank v. Halter*, 18 S. C. R. 88, and *Stephens v. McArthur*, 19 S. C. R. 446, followed. *Morphy v. Colwell*, 22 Occ. N. 111, 3 O. L. R. 314.

V. OTHER CASES.

1. Creditor—Inspector—Promissory notes—Fraud.]—A creditor of an insolvent estate was appointed one of the inspectors thereof. A compromise was proposed, but this inspector would only agree to the same upon the insolvent giving him promissory notes in return for his assent to the arrangement. An action was subse-

quently brought on these notes:—*Held*, that the notes were null and void, both because they were made in fraud of the other creditors, and also as being against public order; and that, therefore, no action could be maintained on them, either by the creditor himself or by a *prête-nom*. *Cartier v. Genser*, 22 Occ. N. 416.

2. Debtor of insolvent—Acquisition of claim—Set-off.]—A debtor of an insolvent (not in bankruptcy) may acquire the claim of a third person against such insolvent, and, after notice of the assignment of the claim, there may be a set-off between the two claims. *Villeneuve v. Matte*, Q. R. 11 K. B. 192.

3. Distribution of assets of insolvent—Procedure—Allegations—Proof—Opposition—Acknowledgment—Error of law.]—It is not necessary that the allegation of the insolvency of the debtor, in an opposition *à fin de consacrer*, or in an opposition *en distribution*, should be supported by a deposition under oath, in order to authorize an appeal by creditors; such deposition is required only for the purpose of proving that the sum claimed by the opposant is justly due.—2. An acknowledgment based upon an error of law may not be invoked against the party who made it. *Décary v. Bro dit Pomarville*, Q. R. 19 S. C. 563, 4 Q. P. R. 202.

4. Fraudulent secretion of assets—Proof of—Discrepancy in statements—Penal provisions of Code.]—1. Proceedings instituted under Art. 885, C. P., against a debtor who has made a judicial abandonment, are of a penal nature, and the rules and principles which govern evidence, and its effects in criminal cases, must be applied, and to justify a conviction the guilt of the debtor as to omission to enter property in his statement, or secretion of property, must be established by clear and conclusive evidence.—2. A discrepancy between two statements made by the debtor,—one made 31st December, 1900, shewing a surplus of \$1,227, and the other, made 26th July, 1901, shewing a deficit of \$1,849, while it raises a presumption of mismanagement of his business and of extravagance in his expenses, does not shew conclusively any omission to enter property belonging to him, in the statement filed with his declaration of abandonment, or secretion of any part of his property. *Bryce v. Wilks*, Q. R. 11 K. B. 464.

BANKS AND BANKING.

1. Bank Act, s. 46—Inspection of customer's account—Evidence in action—Company—Manager—Private liabilities—

Winding-up — Liquidator — Promissory notes—Consideration.—Section 46 of the Bank Act, 1890, 53 V. c. 31 (D.), does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks. The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—*Held*, that the liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party. *Held*, also, that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no further. *Held*, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank. *In re Chatham Banner Co., Bank of Montreal's Claim*, 22 Occ. N. 22, 2 O. L. R. 672.

2. Banker's Lien — Overdrawn accounts — Partner's separate account — Costs — "Good cause" — Scale of costs.—Decision of MARTIN, J., 21 Occ. N. 576, 8 Brit. Col. L. R. 143, in favour of the plaintiff in an action for damages against a bank for refusing to pay a cheque, affirmed by the full court:—*Held*, that there was no good cause for depriving the plaintiff of costs, but his costs should be on the scale of the County Courts, the recovery being for \$199.97, and interest. *Richards v. Bank of British North America*, 8 Brit. Col. L. R. 209.

3. Bill of lading—Draft attached—Examination of goods—Surrender of bill

—Pleading—Amendment.—Where a consignor of perishable goods draws through a bank upon the consignee at sight for the amount of the contract price, and attaches the bill of lading to the draft, the consignee is entitled to examine the goods before accepting them or paying the draft. If it is necessary to obtain the bill of lading from the bank and surrender it to the carriers in order to make the examination, the fact that the consignee does so, and thereby makes it impossible to return the bill of lading to the bank, does not render him liable to pay the draft. Under s. 73 of the Bank Act the bank has no other or higher rights than the consignors. The fact that the bank indorses the bill of lading to the consignee in order to enable him to examine the goods does not transfer the right of property in them to the consignee, and if the latter deals with the goods as his own by reshipping and selling them he becomes liable to the bank, in an action for conversion, for the goods or their value. Where, therefore, the bank, in such circumstances, sued for the amount of the draft, and the defendant pleaded that a large portion of the goods were worthless, and paid into Court the invoice price of the portion sold by him, and it appeared in evidence that the portion unsold was absolutely worthless, the Court directed an amendment of the statement of claim so as to make it an action of detinue, and gave judgment for the amount paid into Court, but without costs. *Imperial Bank v. Hull*, 4 Terr. L. R. 498.

4. Collateral securities — Account of—Payments on—Evidence—Reversal of finding of fact.—A creditor who has received collaterals as security for a debt is bound, after payment of the debt, to return them or account to the debtor for their face value, in the absence of evidence to shew that the respective amounts of them could not be collected. *Driffl v. McFall*, 41 U. C. R. 313, followed. The County Court Judge disallowed certain sums of money which the defendants swore the plaintiff bank had received on certain collateral securities held for them, because their evidence shewed that these sums had first been received by defendants, and they were unable to give dates and particulars of the payments to the bank, and had no books or memoranda to support their statements, and he was of opinion that they should have given undoubted evidence of the times of receipt and payment to the bank, or in some other way brought home to the bank conclusively the receipt and non-credit of the money, but his verdict was not based on any finding that the defendants were unworthy of belief as witnesses:—*Held*, that, under the circumstances, it was proper for the Court above to review the

finding of the County Court Judge upon the evidence, and that, taking into consideration the bank's duty to produce or account for the collaterals, which it had failed to do, and the presumption to be drawn from such failure, the defendants had sufficiently proved the receipt of said moneys by the bank, and were entitled to judgment. *Union Bank v. Elliott*, 22 Occ. N. 331, 14 Man. L. R. 187.

5. Lien of bank—Forests products—Manufactured wood.]—A bank cannot, under s. 74 of the Bank Act, obtain a lien upon the products of the forest for a pre-existing debt.—2. Manufactured wood, that is to say, wood transformed into joists, planks, plinths, and mouldings, does not constitute a forest product within the terms of s. 74; HALL, J., dissenting on this point; and WURTELE, J., pronouncing only on the first point. *Molsons Bank v. Beaudry*, Q. R. 21 S. C. 212.

6. Winding-up of bank—Contributory—Institute.]—One who holds bank shares as institute may be held liable as a contributory when the bank is put into liquidation. *Vile Marie Bank v. Kent*, 4 Q. P. R. 429.

See ASSESSMENT AND TAXES, IV. 5—ATTACHMENT OF DEBTS, I. 2, II. 14—BILLS OF EXCHANGE AND PROMISSORY NOTES, 5—CHOSE IN ACTION, ASSIGNMENT OF, 7—COMPANY, V. 12—CROWN, IV. 1—EVIDENCE, I. 7—EXECUTION, IV. 1—GIFT, 2—HUSBAND AND WIFE, IV. 2—REVENUE, 4—SET-OFF, 2.

BAR OF ACTION.

See PEREMPTION.

BARRISTER.

See LAW SOCIETY.

BASTARD.

Proof of paternity—Commencement of proof in writing—Deposition of mother—Admission of father—Presumption.]—A deposition on oath before a justice of the peace by the mother of an illegitimate child cannot serve as the commencement of proof in writing, according to the terms of Art. 233, C. C., in an action for a declaration of paternity subsequently begun by the child's tutor, although such deposition has been made part of the record without objection from the opposite

party.—2. However, it matters little whether the existence of "the facts there appearing," which may, in such an action, authorize proof by witnesses (Art. 232, C. C.), be demonstrated before or during the *enquête*; it is enough that such facts be established and proved before the oral evidence is admitted.—3. When, in such an action, the defendant admits carnal relations with the child's mother, but at a date outside (though very near) the period fixed by Art. 227, C. C., as that of the longest gestation, such avowal of the defendant constitutes a presumption and an indication resulting from "facts there appearing," and weighty enough to determine the admission of proof by witnesses; and then, if it appears that the mother has not had relations with other men about the time of conception, the Court will give credit to her declaration under oath that the defendant is the father of her child, especially if such declaration is supported by circumstances and evidence supporting it. *McAulay v. McLean*, Q. R. 20 S. C. 205.

See MARRIAGE, 3.

BAWDY HOUSE.

See CRIMINAL LAW, III. 6, 7.

BENEFIT SOCIETY.

See COURTS, VIII. 2—INSURANCE, IV. 4, 5, 6.

BETTING.

See CRIMINAL LAW, III. 8.

BIAS.

See CERTIORARI, 1.

BILL OF COMPLAINT.

See PLEADING, I.

BILL OF LADING.

See BANKS AND BANKING, 3—CARRIAGE, 1—SHIP, I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Absence of consent of maker—Mistake as to nature of instrument—Holder for value—Damages.]—A promissory note being a contract, the consent of the parties to it is of its essence as in other contracts. If a person signs a note wishing to sign and believing that he is signing an order for goods, the note is completely void even in the hands of a holder for value given in good faith. *Quere*, whether, where one who has so signed a note has done so negligently, he can be sued for damages for quasi-tort by such holder. *Jacques Cartier Bank v. Lalande*, Q. R. 20 S. C. 43.

2. Acceptance—Account stated—Mistake—Opening account—Pleading—Amendment.]—Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill. In order to open a settled account it is necessary to particularize specific errors in the account. In an action by the drawer of bills of exchange against the acceptor, the defendant pleaded generally that he accepted the bills under a mistake as to the state of the account. This defence was struck out, with leave to the defendant to amend on terms of filing an affidavit verifying the facts to be set out in the proposed amended defence. The proposed amended defence alleged that when the defendant accepted the bills he did so under the mistaken idea that he was indebted to the plaintiff in the amount whereof; that such mistaken belief was occasioned by the plaintiff having represented to him, by statements of account in writing and by drawing the bills, that he justly owed the plaintiff that amount, whereas, in fact, he was not indebted to him in any amount; that the defendant had dealt extensively with the plaintiff for over six years; that in course of such dealings plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges, and that if accounts were taken it would be found that the defendant was not indebted to the plaintiff in any amount. This proposed defence and a counterclaim, based on the same allegations, for an account, were *held* bad; and were not allowed to be filed, and there being, therefore, no defence on file, judgment was given for the plaintiff. *Clark v. Hamilton*, 5 Terr. L. R. 178.

3. Accommodation acceptor—Release—Payment by drawer.]—The plaintiff agreed to sell certain cattle to M., on condition that M. would procure some one to accept a draft for the price. The defendant, at the request of M., accepted a draft for the amount, and a second draft

given in renewal of the first, and agreed to accept a third draft in renewal of the second, but afterwards refused to do so at the instance of M., who, in the meantime, had become insolvent. The plaintiff furnished all the money used to retire the second draft with the exception of \$10 paid by M.:—*Held*, that the defendant was not relieved from his liability on the second acceptance by the payment made by the plaintiff, and that the plaintiff was entitled to judgment for the amount of the acceptance, less the \$10 paid by M. *Held*, that the case was distinguishable from one where the acceptor accepts for the accommodation of the drawer, who takes up the bill at maturity and negotiates it to some one who sues the acceptor. *Dill v. Wheatley*, 34 N. S. Repts. 526.

4. Accommodation indorser—Waiver of notice of protest.]—Action on a promissory note against the defendant Q. as indorser. The defendant pleaded that he was only a guarantor on the note, and had received none of the proceeds thereof, and that, as he had received no notice of protest, he was discharged from all liability. The evidence shewed that when the note fell due Q. had gone to the plaintiff, offered a renewal note, and had asked for time in which to pay:—*Held*, that this action on the part of Q. was a waiver of protest under the Bills of Exchange Act. *Smith v. Lang*, 22 Occ. N. 418.

5. Accommodation maker—Conditional delivery—Bank—Notice to agent.]—In an action brought by the plaintiffs against the defendant M., as indorser of a promissory note made by S., and as joint and several maker with S. of two other promissory notes, the defence chiefly relied on was that the notes were signed by M., and delivered to the plaintiffs' agent under a special agreement, of which the plaintiffs had notice, that they were not to be used until they had been indorsed or signed by certain other parties, as co-sureties. The evidence shewed that the defendant S. was largely indebted to the plaintiffs for advances made by the plaintiffs' agent, for which the plaintiffs were anxious to obtain collateral security, and that the notes were taken for that purpose, and not as ordinary discounts; also, that the signature of the defendant M. to the notes was obtained by the plaintiffs' agent, under instructions from the cashier of the bank; also, that, at the time the notes were signed, the plaintiffs' agent was told by M. not to take them unless the other signatures were obtained, and replied, "that is all right:" also, that the notes were signed in the defendant's office, and that no part of the transaction took place in the office of the bank:—

Held, setting aside the findings of the jury, that the signature of M. was obtained in the course of the business of the agency, and within the scope of the agent's authority, and that his knowledge of the condition upon which the signatures were obtained must be held to be the knowledge of the bank. *Held*, also, that if the agent, acting under the authority of the cashier, applied to the defendant M. to sign the notes, and, in order to induce him to do so, agreed to any condition, or did anything to lead M. to believe that they would not be used by the bank until another person had signed them, the bank would be bound, although the conduct of the agent was unauthorized, and knowledge thereof was concealed from their officers. *Commercial Bank of Windsor v. Smith*, 34 N. S. Reps. 426.

6. Accord and satisfaction—*Agreement to accept land in payment of debt—Solicitor's authority—Agent's authority.*]

—One C., a commercial traveller in plaintiffs' employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C. in company with defendant inspected the land. C. wrote plaintiffs submitting the proposition and giving a specific description of certain land. Plaintiffs wrote a solicitor instructing him to prepare a conveyance thereof. The solicitor, finding that there had been a misdescription in the letter to plaintiffs, accepted a conveyance of the land actually shewn by defendant to C.:—*Held*, in an action on the note, that plaintiffs were bound as by an accord and satisfaction and could not recover. *Pither v. Manly*, 9 Brit. Col. L. R. 257.

7. Act of commerce—*Joint and several judgment.*—A person who signs a negotiable instrument, although not a trader, does an act of commerce, and, if he has contracted along with others, may have a judgment given against him jointly and severally with them. *Gauthier v. Drouin*, 5 Q. P. R. 63.

8. Conditional indorsement—*Principal and agent—Knowledge of agent—Constructive notice—Deceit.*—A promissory note indorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the indorser where the condition has not been fulfilled. *Pym v. Campbell*, 6 E. & B. 370, followed. The principal is affected by notice to the agent, unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the principal to shew that the agent had an interest in deceiving his principal.

Ketnewell v. Watson, 21 Ch. D. 685, and *Richards v. Bank of Nova Scotia*, 26 S. C. R. 381, referred to. *Commercial Bank of Windsor v. Morrison*, 22 Occ. N. 196, 32 S. C. R. 98.

9. Consideration—*Settlement of disputed account—Subsequently discovered error in account.*—The defendant was agent of the plaintiff to collect rents and profits of a wharf property. On the termination of the defendant's agency, the plaintiff brought an action for an accounting, which was settled by the defendant agreeing to pay the plaintiff the sum of \$376, by paying \$125 in cash and giving his note for the balance, and by the plaintiff agreeing to assign to the defendant all debts due in respect to the property during the period covered by the agency. The defendant refused payment of the note given by him on the ground that, before it became due, it was discovered that \$100 had been paid the plaintiff on account of one of the debts assigned to the defendant, and that the defendant was entitled to credit for this amount on the note:—*Held*, GRAHAM, E.J., dissenting, that, as the defendant's attorney had knowledge of the error, before the compromise which resulted in the giving of the note was effected, and as by the compromise the plaintiff was prevented from going fully into the accounts, and perhaps establishing a greater liability on the defendant's part, she was entitled to recover the full amount of the note. *Worrall v. Peters*, 35 N. S. Reps. 26.

10. Delivery—Consideration—Onus.—Motion by the plaintiffs for summary judgment under Rule 616 in an action upon a promissory note. The defendant in his examination for discovery admitted the making of the note, and said that he left it with the officers of the Consolidated Pulp and Paper Company, to be used by them in procuring an advance from the plaintiffs, the payees of the note, for the purposes of the company, and that the note was, instead, deposited with the plaintiffs by the officers of the company as security for past advances. Fraud was not alleged. Notice to the plaintiffs of the terms on which the note was given was not alleged, and the only defence was want of consideration:—*Held*, that the onus of the defence lay on the defendant, and he had failed to sustain it: *Watson v. Russell*, 3 B. & S. 34; *Bills of Exchange Act*, s. 21, s.s. 3. *Ontario Bank v. Young*, 21 Occ. N. 565, 2 O. L. R. 761.

11. Demand—Prescription—Payments—Parol evidence—Indorsements on note.—A promissory note in these terms, "12 janvier, 1896. A demande je promets

de payer à.....la somme de.....d'ici au 15 février sans intérêt, et après le 15 avec intérêt à 6 par cent," is payable on demand from the day of its date.—2. Where a promissory note is payable on demand, prescription runs from the date of the note, and not from the date of demand of payment.—3. Proof by parol is inadmissible of payments alleged to have been made by the maker on account of the note, for the purpose of establishing interruption of prescription.—4. Indorsements on a note of payments on account have no effect against the maker as regards proof of interruption of prescription. *Bachand v. Lalumière*, Q. R. 21 S. C. 449.

12. Effect of indorsement—Maker—Proof of signature—Presentment—Notice of dishonour.—An indorsement of a negotiated promissory note, even though the indorser really be a surety, admits, *prima facie* at all events, the ability and signature of all prior parties. In an action by the holder of a promissory note and chattel mortgage against the makers of the mortgage and makers and indorser of the note, the plaintiff failed to prove the signature of one of the makers of the note, and the action, as far as the note was concerned, was dismissed as to that maker, although a judgment was recovered on the chattel mortgage. At the trial a defendant, an indorser of the note, although represented by counsel, gave no evidence, and judgment was given against her. She appealed to a Divisional Court, and her appeal was dismissed. She now applied for leave to appeal to the Court of Appeal. The plaintiff gave evidence at the trial that, in payment for "the property" sold, he received a mortgage and the note in question and cash for the balance; that the note was not paid at maturity and was protested after presentment and notice sent. It was contended that no one could tell what notice was sent or to whom:—*Held*, that it should be inferred from the evidence, in the absence of any weakening of it by cross-examination, that presentment was made on the day the note became due, that payment was refused, and that due notice of dishonour was given; and leave to appeal was refused. *Wiedeman v. Guittard*, 22 Occ. N. 129.

13. Holder for value—Holder for collection—Pleading.—In an action based upon a promissory note, where the defendant pleads that plaintiff is not a regular holder for value, the latter may reply that he holds the note for collection on behalf of the last indorser, and such answer will not be rejected on motion, as changing the basis of the action. *Legal and Financial Exchange v. Cameron*, 5 Q. P. R. 98.

14. Indorser—False signature of maker—Holder in due course.—The indorser, for accommodation or for value, of a bill or note cannot set up against the holder in due course that the signature of the maker is false. *Choquette v. Leclaire*, Q. R. 19 S. C. 521.

15. Notice of dishonour—Sufficiency—Husband and wife—Agency.—Notice is merely knowledge, and notice to an indorser, who is also agent for another indorser, at once becomes in law the knowledge of the principal, with all its consequences. In an action against husband and wife, indorsers on a promissory note given as one of a series of renewals during some years, under an agreement, of which the husband had knowledge, in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. T. O. L.'s note for \$3,500 in your favour, indorsed by yourself and wife, and held by our estate was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount, as there is no surplus on hand:" addressed and sent to the husband only:—*Held*, on the evidence, that the husband was agent for the wife, and that such letter was a sufficient notice of dishonour to both the husband and wife. *Paul v. Joel*, 3 H. & N. 455, followed. Judgment of *FALCONBRIDGE, C.J.*, 2 O. L. R. 582, 21 Occ. N. 563, affirmed. *Counsell v. Livingston*, 22 Occ. N. 360, 4 O. L. R. 340.

16. Order on debtor—Acceptance—Unincorporated body—Officers—Personal liability—Mechanics' liens—Drawback.—The plaintiff brought an action on the following document: "The Board of Managers, Presbyterian Church, Moose Jaw. Please pay H. McDougall the sum of \$817.85 on my account and oblige me. James Brass:" which was accepted as follows: "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer." It was found as a fact that McLean and Potter were members of the board, an unincorporated body:—*Held*, that the document was a bill of exchange; and, following *Owen v. Van Uster*, 10 C. B. 318, that McLean and Potter were personally liable thereon. Brass was the contractor with the board for the erection of a manse. If the contract had been completed, \$817.85 would have been owing to him; but the trial Judge found that it had been left uncompleted to the value of \$80. This was allowed to be set off against the amount of the plaintiff's claim; and it was contended that the defendants were entitled further to retain 10 per cent. of the contract price for thirty days after the completion of the contract, under the provisions of the Mechanics' Lien Ordinance:—*Held*,

that the defendants were not so entitled. *McDougall v. McLean*, 1 Terr. L. R. 450.

17. Renewal — Consideration — Acknowledgment of value — Connection.—The company respondents sued on a promissory note signed by the appellant and payable to the order of the respondents, for value received. The respondents admitted that they paid no cash consideration to the appellant for this note, but stated that it was given in part renewal of a previous note for a similar amount, which appellant executed in favour of one S., and which was indorsed and transferred to the respondents, with another of like amount, in settlement of the overdrawn account of S., who was their general manager:—*Held*, that where the connection between the first note, for which valid consideration was received, and the notes given in renewal thereof, is clearly established, want of consideration is not a valid defence to an action by the payee against the maker on a renewal note in which the latter acknowledges to have received value.—2. Such connection may be proved, as in this case, by a consecutive and uninterrupted series of dates in the payee's books in regard to the transaction, together with the probability that the payee would not have surrendered a valid note without receiving a valid renewal.—3. Even in the absence of positive proof that the first note was indorsed by S. to the company, the Court may reasonably presume that such was the case from the fact that it was delivered to the company and was in the custody of the company's cashier, together with the fact that the note now sued upon was given by appellant for value received and was payable directly to the company. *Ross v. Western Loan and Trust Co.*, Q. R. 11 K. B. 202.

See ASSESSMENT AND TAXES, IV. 5—ATTACHMENT OF DEBTS, III. 1—BANKRUPTCY AND INSOLVENCY, IV. 7, V. 1—BANKS AND BANKING—COMPANY, I. 1—EVIDENCE, II. 2—EXECUTORS AND ADMINISTRATORS, 3—HUSBAND AND WIFE, VII. 2—INSURANCE, IV. 5—LIMITATION OF ACTIONS, II. 1—PLEADING, III. 3—PRINCIPAL AND SURETY, 2—SET-OFF, 2—WRIT OF SUMMONS, III. 5.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Absolute transfer — "Defeasance"—Oral understanding—Property remaining in grantor's possession—Filing—Renewal.—The defendant, a constable, levied upon goods and chattels in the possession of S. under an execution issued on a judgment recovered against S.

by M. At the time of the levy the goods were covered by a bill of sale to the plaintiff to secure \$150. The document purported on its face to be an absolute transfer, with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, and the evidence shewed that there was an understanding, not reduced to writing, that S. should get the property back on payment of the amount secured. After the filing of the bill of sale, the property was allowed to remain in the possession of S.:—*Held*, that the fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the trial Judge, and he having found that the amount named as the consideration was due from the grantor to the grantee, and that the transaction was not tainted with fraud, and the amount of property transferred not being excessive, there was no reason for disturbing his finding. The same principle would apply to the fact that the provision for redemption of the property covered was not reduced to writing. The oral agreement for the return of the property was not a "defeasance" in the sense in which that term is used, and the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it, was not applicable. The bill of sale having been made and filed prior to the passage of the Bills of Sale Act of 1890.—*Held*, that it was validly filed subject to the special clause as to the filing of a renewal statement, and, the time prescribed for the filing of a renewal statement not having elapsed, that the bill of sale was in no way affected by that provision. *Fraser v. Murray*, 34 N. S. Reps. 186.

2. Consideration — Indorsement of promissory note.—Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note, not indorsed by the payee, is liable as an indorser to the latter. Judgment of the Court of Appeal, 2 O. L. R. 63, 21 O. N. 375, on this point reversed. The provisions of the Ontario Bills of Sale Act requiring the consideration of a chattel mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration, and then sets out the note. Only the facts need be stated, not their legal effect. Judgment of the Court of Appeal on this point affirmed. *Robinson v. Mann*, 22 O. N. 2, 31 S. C. R. 484.

3. Document having effect of bill of sale—Taking possession under—Necessity for filing—"Hire, lease, or bargain."—Action for a declaration that a transfer of goods from the defendant, to his brother, was void under c. 11 of

the Acts of 1898, and ss. 1, 3, and 4 of R. S. N. S., 5th ser., c. 92, because it was not filed. By the document in question the defendant transferred a stock of goods in store to the amount of \$1,500, and agreed to pay for the same by paying notes of B. & Co. to the amount of \$500, and by giving ten notes for the balance of \$100 each, one payable every six months. The document concluded: "The said G. H. to hold the goods in store, and whatever goods may come in after shall become the property of the said G. H. until the said G. H.'s claim is paid in full. If I fail to pay any of the above named notes, the said G. H. can take over possession of the business and all stock in the said store at time of me failing to meet or pay above or aforesaid named notes." This document was not filed, and was not accompanied by any affidavit. After G. H. had taken possession of the stock of goods under the power, plaintiffs attached the goods as the property of an absent or absconding debtor, and sought to have the transfer set aside:—*Held*, that the document in question came within the term "bill of sale," as defined by R. S. N. S. c. 92, s. 10, and should have been filed, and was liable to be defeated for non-filing up to the time that G. H. took possession under it. *Held*, also, that G. H. did not come within the category of a "hirer, lessor, or bargainor," within the meaning of s. 3 of c. 92, and that such section had therefore no application. *Manchester v. Hills*, 34 N. S. Reps. 512.

4. Valid agreement to give mortgage—*Mortgage subsequently given—Right to rely on agreement.*—Where an agreement to give a chattel mortgage is duly made and registered under R. S. O. c. 148, s. 11, and subsequently a mortgage is made and registered, the giving of such mortgage, whereby the legal estate becomes vested in the mortgagee, does not revert in the debtor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the legal mortgage is ineffectual for any purpose. Judgment of *Boyd, C.*, 2 O. L. R. 128, 21 Occ. N. 378, affirmed. *Fisher v. Bradshaw*, 22 Occ. N. 281, 4 O. L. R. 162.

See COMPANY, V. 6 — COURTS, IV. — SALE OF GOODS, II. 2.

BISHOP.

See WILL, II. 2.

BOARD OF DELEGATES.

See APPEAL, VII. — MUNICIPAL CORPORATIONS, VII. 1.

BOND.

See COMPANY, V. 14.—COSTS, VII. 14—INFANT, 1, 2—LIEN, 2—LIMITATION OF ACTIONS, I. 1—MUNICIPAL CORPORATIONS, X. 1 — PRINCIPAL AND SURETY, 1—RAILWAY, 1.

BONUS.

See LANDLORD AND TENANT, IV. 2—MUNICIPAL CORPORATIONS, I.

BOUNDARIES.

Trespass—Line fence—New trial—Onus.—The plaintiff and defendant were owners of adjoining lots of land, the title to which was derived from the same original grantor. The plaintiff's lot was described as being bounded on the north by the south line of the defendant's lot. In an action for trespass the plaintiff complained that the defendant, in erecting a new fence, had placed it on a line different from the line of the fence which existed previously, and which was admitted to have been on the true line between the two lots. The question whether the defendant had, as a matter of fact, departed from the old line or not, having been left undetermined:—*Held*, that there must be a new trial. *Per* WEATHERBE, J. (dissenting), that the burden was upon the plaintiff to prove the south line of the defendant's lot, and that, as she had failed to do so, she could not recover. *Dixon v. Dauphinee*, 34 N. S. Reps. 239.

See MUNICIPAL CORPORATIONS, II. — SCHOOLS, I. 7—TITLE TO LAND.

BREACH OF TRUST.

See TRUSTS AND TRUSTEES, 1, 2.

BRIBERY.

See PARLIAMENTARY ELECTIONS, II.

BRIDGE.

See WAY, II. 1.

BROKER.

See GAMING—INSURANCE, V. 1.

BUILDING CONTRACT.

See CONTRACT, II.

BUILDING SOCIETY.

See MORTGAGE, 2 — TRUSTS AND TRUSTEES, 7.

BUILDINGS.

See ASSESSMENT AND TAXES, III. 1, 2, VII. 1—EASEMENT, 3—FIXTURES—LANDLORD AND TENANT, IV. 1, 4—MASTER AND SERVANT, II. 1—MECHANICS' LIENS—MUNICIPAL CORPORATIONS, X. 8—NUISANCE, 3—PARTIES, III. 1—PLEADING, VII. 18.

BY-LAWS.

See COMPANY — MUNICIPAL CORPORATIONS, III.—WAY, III. 2, 4.

CALLS.

See COMPANY, IV. 1, 8, V. 3.

CANADA TEMPERANCE ACT.

1. Conviction—Costs and expenses—Variance between minute and conviction—Conveyance to gaol—Criminal Code.]—A conviction for selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, provided for the imprisonment of defendant for the period of forty days "unless the said sums (the penalties and costs of conviction) and the costs and charges of the said distress and of the conveying of the said M. D. V. to the common gaol shall be sooner paid:—"*Held*, that the expression "costs and charges" in the conviction, and the expression "costs and the expenses" in the Criminal Code, s. 872 (a), mean the same thing. There was a variance between the minute of conviction and the conviction—the minute providing for payment of the costs of conveying to gaol, and the conviction for the "costs and charges of the said distress and of the conveying," &c.:—*Held*, that, as the provi-

sion was properly set out in the conviction, and its insertion in the minute was unnecessary, the variance was immaterial. A second conviction for a similar offence omitted the provision as to the costs of conveyance to gaol:—*Held* (MEAGHER, J., dissenting), that the conviction was bad and must be set aside with costs, not having been made in conformity with the terms of the Code, s. 872 (a). *Regina v. McDonald*, 26 N. S. Reps. 94 (where the imposition of costs under the provisions of the Summary Convictions Act, R. S. C. c. 178, s. 66, was held discretionary), distinguished. *Regina v. Vancassel*, 34 N. S. Reps. 79.

2. Jurisdiction of Provincial magistrates—Conviction—Justices of the peace—Adjournment—Proof of service—Delay in hearing.]—The defendant was convicted before two justices of the peace for the county of Kings of the offence of having unlawfully kept for sale in his hotel at K., in said county, intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act then in force in said county:—*Held*, that the Provincial Legislature having made provision for the appointment of justices of the peace, and having conferred jurisdiction upon them to impose penalties and punishments for the enforcement of Provincial statutes, it was competent for the Parliament of Canada, by statute, to provide that punishments and penalties for the enforcement of laws of the Parliament of Canada might be recovered and inflicted before these Courts.—Therefore, the magistrates had jurisdiction. — The justices having met at the hour appointed did not lose jurisdiction by the fact of their having adjourned the hearing until a later hour of the same day.—Proof of the service of the summons being a part of the hearing, it was not necessary that the justices should have had such proof before them as a preliminary to making the adjournment.—The delay in the hearing of the case from the hour of ten o'clock in the morning until about two o'clock in the afternoon of the same day was not unreasonable. *Res v. Wipper*, 34 N. S. Reps. 202.

3. Jurisdiction of stipendiary magistrates—County and town.]—The defendant was convicted by the stipendiary magistrate for the county of Cape Breton, of the offence of having kept for sale upon his premises intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The offence was committed within the limits of the town of Sydney, an incorporated town in the county of Cape Breton. Under the provisions of R. S. N. S. 1900 c. 33, relative to the appointment and authority of

stipendiary magistrates, it is enacted that "every stipendiary magistrate shall have jurisdiction, power, and authority throughout the whole of the county for which he is appointed."—*Held*, that, in the absence of legislation giving exclusive jurisdiction to the stipendiary magistrate for the town of Sydney, the words of the statute must be construed as including that part of the county embraced within the limits of the town. Section 14 of c. 33, which was relied upon as indicating a contrary intention, was not to be given such a construction, but was merely intended to give certain powers to stipendiary magistrates for the counties, where exclusive jurisdiction had been conferred upon the magistrates for incorporated towns. *Rex v. Giovanetti*, 34 N. S. Reps. 505.

4. Offence against—Sale of liquor outside county—Delivery and collection of price—Agent.]—The agent of an express company in the county of W., where the Canada Temperance Act was in force, in the ordinary course of business, delivered a parcel containing intoxicating liquor to the person to whom it was addressed, and collected from him the price thereof, the liquor, by the buyer's instructions, having been sent to him by express, c. o. d. The sale of the liquor was effected at a place outside of the county of W.:—*Held*, that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the Act. *Regina v. Cahill, Ex p. Trenholm, Ex p. Mitton*, 21 Occ. N. 55, 35 N. B. Reps. 240.

5. Previous conviction — Evidence—Defendant represented by counsel.]—On application to quash a conviction for a fourth offence against the provisions of the Canada Temperance Act, on the ground that the question whether the defendant had been previously convicted was not addressed to him, as required by s. 115 (a) of the Act:—*Held*, dismissing the application with costs, that it was not necessary that the question referred to should be addressed to the defendant in a case where he was represented by counsel:—*Held*, that, if the defendant could be adequately represented by counsel in pleading to and trying the main case (which it was clear he might be, under ss. 850, 854, 855, 856, and 857 of the Code), he could equally be represented by counsel in respect to this inquiry. *Rex v. O'Hearon*, 34 N. S. Reps. 491.

CANALS.

See CROWN, III. 2.

CAPIAS.

See ARREST.

CARRIAGE OF GOODS.

See CARRIERS—RAILWAY, II.

CARRIERS.

1. Express company—Liability for damaged goods—Connecting lines—Bill of lading—Clause limiting liability.]—An express company is not responsible for damages to goods intrusted for carriage, when the accident happened on another and connecting line of transfer, and the bill of lading contained a clause by which the company was relieved from any liability if the loss or injury happened at a place beyond its lines or control. *Neil v. American Express Co.*, Q. R. 20 S. C. 253.

2. Special contract—Variation of, by bill of lading—Owner's risk.]—The defendant company, as a common carrier, in June, 1899, contracted with the plaintiff, a Dawson merchant, to carry for him from Puget Sound and British Columbia ports general merchandise, the rates being according to tariff annexed to contract. Three of the terms of the contract were: "Date of shipment—Throughout season of 1899. Consignees—T. G. Wilson, Dawson City. Quantity—Exclusive contract for season of 1899." Annexed to the contract was the freight tariff giving the rates to be charged on the different classes of goods, "with guaranteed delivery of shipments during the season of 1899." The company decided not to receive, after 20th August, any more freight with guaranteed delivery during 1899, and so notified P., a wholesale dealer of Victoria, of whom the plaintiff was a customer. P. afterwards shipped goods to Dawson, consigned to the "Canadian Bank of Commerce, notify T. G. Wilson," and received from the company bills of lading marked with a special condition thus: "This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899." The company failed to deliver the goods, and Wilson sued for damages caused him by being deprived thereof:—*Held*, that the goods were not carried under the exclusive contract for the season of 1899, by which delivery was guaranteed that same season, but that they were carried under the terms of the bills of lading, and the

company were not liable for the loss. As the plaintiff's cause of action, if any, would be against the company for refusing to carry under the original contract, a new trial was granted with leave to the plaintiff to amend his pleadings. *Wilson v. Canadian Development Co.*, 22 Occ. N. 271, 9 Brit. Col. L. R. 82.

See JUDGMENT, I. 4—RAILWAY, II.—SHIP.

CAUTION.

See DEVOLUTION OF ESTATES ACT.

CERTIFICATE OF IMPROVEMENTS.

See MINES AND MINERALS.

CERTIORARI.

1. Justice of the peace—Jurisdiction—Interest—Statute taking away right—Appeal—Crown—Discretion.]—1. *Certiorari* and not appeal is the appropriate remedy to raise the question of want of jurisdiction, e.g., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. **2.** A statutory provision taking away the right to *certiorari* does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. **3.** When there is a defect in the jurisdiction of justices or inferior courts, the common law right of *certiorari* should not be refused merely because a new trial might be had by means of an appeal. **4.** Even where an appeal is pending, a *certiorari* for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. **5.** A writ of *certiorari* may be claimed by the Crown as a matter of right on application of the Attorney-General, without the production of any affidavit. **6.** Except where applied for on behalf of the Crown, a *certiorari* is not a writ "of course," and the Court must be satisfied that there is a sufficient ground for issuing it. **7.** No more latitude is given the Court for the exercise of its discretion in granting or refusing a *certiorari* than in respect to other applications which are in the discretion of the Court. *Re Ruffles*, 35 N. S. Reps. 57.

2. Recorder's Court—Jurisdiction—Review of judgment.]—*Certiorari* does not lie to review the decision of the Recorder in a case in which he has jurisdiction, and the Superior Court will not upon

certiorari inquire whether his judgment is right or wrong. *Wolf v. Weir*, 4 Q. P. R. 430.

3. Removal of conviction notwithstanding statute—Jurisdiction.]—Notwithstanding the amendment to s. 7 of the Ontario Summary Convictions Act, by s. 14 of 2 Edw. VII. c. 12, taking away the right to *certiorari*, a conviction made by a magistrate without jurisdiction may be removed by *certiorari*; and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is not within the statute which gives the power to pass a by-law, there is such absence of jurisdiction as warrants the issue of a *certiorari*. *Rez v. St. Pierre*, 22 Occ. N. 233, 4 O. L. R. 76.

4. Security—Deposit—Preliminary objections.]—A deposit by the accused with the proper officer of \$100 cash, though unaccompanied by any written document, is a sufficient compliance with the requirements of Rule 13 of the Consolidated Rules of Court, 1895. After a writ of *certiorari* has issued preliminary objections thereto should be raised promptly and by means of a substantive motion to quash the writ. *Regina v. Davidson*, 21 Occ. N. 98, 4 Terr. L. R. 425.

See CRIMINAL LAW, V. 4—JUSTICE OF THE PEACE, 1, 2—LANDLORD AND TENANT, III. 2.

CHAMPERTY.

See SOLICITOR.

CHARGE ON LAND.

See SOLICITOR, 6—VENDOR AND PURCHASER, 7, 13—WILL, I. 6.

CHARITIES.

See WILL.

CHARTER.

See MUNICIPAL CORPORATIONS, II. 2.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEQUE.

See ATTACHMENT OF DEBTS, III. 1—
EVIDENCE, I. 7—INSURANCE, IV. 5.

CHILD STEALING.

See EXTRADITION, 3.

CHOSE IN ACTION — ASSIGNMENT OF.

1. Litigious rights—Offers — Contract—Conditions—Action by contractor before completion of work.]—A defendant may plead at the same time the nullity of the obligation invoked against him and the fact that it constitutes a litigious right. **2. Offers made on condition that the party to whom they are made gives a quittance upon receipt of the sum offered, are legal offers.** **3. If in a contract for the performance of work it is stipulated that the contractor will be paid in the course of the work to the extent of 75 per cent. of the value of the work done as certified by the architect charged with the superintendence of the work, and the balance 30 days after completion, such contractor cannot, without having finished the work, sue for such balance, even where he offers to deduct the cost of the work remaining to be done.** **4. The smallness of the price paid for an assignment of a debt is a circumstance which raises a presumption that the claim is a litigious one.** **5. The litigious character which a claim has at the time of its first transfer remains attached to it if it is again transferred by the first transferee.** *Crevier v. Evans*, Q. R. 21 S. C. 399.

2. Notice—[Cause of action.]—Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in the assignor. *Okell v. Dickson*, 9 Brit. Col. L. R. 151.

3. Notice—Sufficiency.]—The defendants had insured the stock in trade of the J. E. company. A fire having destroyed the property covered by the policy, the insured company transferred its claim to the plaintiffs. The advocates of the plaintiffs by letter demanded payment from the defendants of the amount of the insurance, and at the same time sent the defendants by a clerk an uncertified copy of the document of transfer, intimating to the defendants that the original was at the advocates' office, where it could be

seen:—*Held*, affirming the judgment in Q. R. 19 S. C. 434, that the transfer of the claim of the J. E. company to the bank had not been validly notified to the defendants, and therefore the plaintiffs had not at the time they brought their action a useful possession as against the defendants. *Bank of Toronto v. St. Lawrence Fire Ins. Co.*, Q. R. 21 S. C. 251.

4. Requirements—Intention.]—To constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required, but any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient. *Hughes v. Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163.

5. Transfer pendente lite—Action—Parties.]—Where the plaintiff has transferred his debt after issue joined, he may, nevertheless, continue the action and obtain judgment in his own name. *Larivière v. Town of Richmond*, Q. R. 21 S. C. 37.

6. Validity—Assignee not named—Evidence to supply omission.]—By an informal instrument in writing an insolvent debtor professed to assign all his interest in certain specified property and "all moneys due to me from any source whatever," but did not in the operative part of the instrument name the assignee, who was indicated only by these words at the end of the document: "And I hereby appoint the said G. D. B. my irrevocable attorney . . . to receive any and all moneys owing to me from any source whatever." G. D. B. was the agent of the plaintiffs to whom the insolvent was indebted, and the insolvent sent the assignment to G. D. B. in an unsigned letter in his own handwriting, in which he wrote, "I have made an assignment of everything to you." A debt due to the insolvent having been attached by the defendants, who were also creditors, the plaintiffs claimed the amount under the assignment to their agent, and an issue was directed:—*Held*, that the letter could be looked at to aid the assignment, and the assignee's name should be read in; and, therefore, the plaintiffs were entitled to the money. *Newell v. Bradford*, 37 L. J. C. P. 1, *Catling v. King*, 64 L. J. Ch. 384, *Warner v. Wilmington*, 25 L. J. Ch. 662, *Re Bacon's Will*, 31 Ch. D. 460, *Turner v. Hellard*, 30 Ch. D. 390, *Pearce v. Gardner*, [1897] 1 Q. B. 688, and other cases, considered. *Bank of Montreal v. Burns*, 22 Occ. N. 342.

7. Validity—Notice—Bank Act—Statute of Elizabeth—Execution—Interest in partnership—Sale—Action—

Parties.]—Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898:—*Held*, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor. Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity. *Per* ARMOUR, C.J.O.—Debts are not included in the expression "goods, wares, and merchandise," as used in the Bank Act. The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her. *Per* OSLER, J.A.—The husband was not a proper party. Judgment in 1 O. L. R. 303, 21 Occ. N. 183, affirmed. *Rennie v. Quebec Bank*, 22 Occ. N. 171, 3 O. L. R. 541.

See DISCOVERY, I. 6.

CHURCH.

1. Discipline—Expulsion of minister—Domestic forum—Appeal.]—Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Judgment of the Court of Appeal, 27 A. R. 602, 21 Occ. N. 21, affirmed. *Ash v. Methodist Church*, 22 Occ. N. 3, 31 S. C. R. 497.

2. Power to allot free seats—Power to rent pews.]—Under the trusts set out in the schedule to 47 V. c. 88 (O.) and 47 V. c. 146 (D.), the trustees of a Methodist church have no power to allot free seats to particular members of the congregation, although they have the general power possessed by the officers of any place of public worship, to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during the service. They have, however, the power to rent pews at a reasonable rent to particular members, reserving as many free seats where and as may be thought necessary or expedient. *Carleton Place Methodist Church Trustees v. Keyes*, 22 Occ. N. 50, 3 O. L. R. 165.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 16—MARRIAGE, 1, 2—WILL, I. 3, II. 2, 4, V.

CIRCUIT COURTS.

See APPEAL, VII.—COURTS, VIII

CIVIL SERVICE ACT.

See CROWN, IV. 3.

CLERK OF THE PEACE.

See MALICIOUS PROCEDURE, 5.

CODICIL.

See WILL.

COLLATERAL SECURITIES.

See BANKS AND BANKING, 4—PRINCIPAL AND SURETY, 2.

COLLISION.

See MASTER AND SERVANT, II. 11—SHIP, II.—STREET RAILWAYS, 2.

COLLUSION.

See SOLICITOR, 4.

COMMISSION.

See ARCHITECT, 1—MORTGAGE, 9—PRINCIPAL AND AGENT, 1, 7.

COMMISSIONER OF CROWN LANDS.

See CROWN, I. 2.

COMMISSIONERS OF SCHOOLS.

See SCHOOLS, I. 1.

COMMISSIONERS FOR TAKING AFFIDAVITS.

See OATHS—PARLIAMENTARY ELECTIONS, III. 1.

COMMUNITY.

See HUSBAND AND WIFE, II.

COMPANY.

- I. DIRECTORS—POWERS OF.
- II. FOREIGN COMPANIES.
- III. PROMOTERS.
- IV. SHARES AND SHAREHOLDERS.
- V. WINDING-UP.

See APPEAL, I. 7—BANKS AND BANKING, 1—CONTRACT, I. 2—DEBENTURES—DISCOVERY, I.—EVIDENCE, I. 3—INSURANCE—JUDGMENT, I. 4—LANDLORD AND TENANT, I. 4—MASTER AND SERVANT, II. 1—NUISANCE, 1—PARTIES, I. 1—PENALTIES AND PENAL ACTIONS, 2—RAILWAY—WRIT OF SUMMONS, I. 2, II. 2, 8.

I. DIRECTORS—POWERS OF.

1. Hypothec—Promissory note—Payment by indorser—Absence of protest—Recovery by indorser.]—Under the Joint Stock Companies Act of the Province of Quebec, directors may contract a hypothec, which will be binding on the company, if made in the interest of the company. 2. A director of the company who accepts such hypothec, to secure indorsations made by himself and other directors, cannot afterwards, in good faith, question the legal right of the directors to author-

ize the granting of such hypothec. 3. Where no proof of a protest, or the waiver of protest, is made, the indorser of a promissory note who pays, cannot recover, and he must be held to have paid without any obligation to do so; and the payment must be attributed to his own generosity. 4. Where the person who accepts an hypothec to secure the payment of certain debts, does not bind himself personally, there is no obligation on his part which renders him liable in case the debtor does not pay. *Savaria v. Paquette*, Q. R. 20 S. C. 314.

2. Mortgage—Consent of shareholders—Ratification.]—A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow, may be ratified by the shareholders. *Adams v. Bank of Montreal*, 8 Brit. Col. L. R. 314.

3. Purchase and sale of land—Irrregularities in proceedings.]—A mining company subject to the provisions of the Ontario Companies Act, R. S. O. 1897 c. 191, and the Ontario Mining Companies Incorporation Act, R. S. O. 1897 c. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, for there is nothing to prevent the business of the company being continued by the purchase of other land. Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company, and are in carrying out the sale furthering the interests of that rival company. Judgment of STREET, J., 1 O. L. R. 654, 21 Occ. N. 291, affirmed. *Ritchie v. Vermillion Mining Co.*, 22 Occ. N. 382, 4 O. L. R. 588.

See II. 1, IV. 5.

II. FOREIGN COMPANIES.

1. Authority to representatives—Directors—Advocates.]—The authority which a foreign company gives to its advocates or to its representative ought to be the act of the company itself, or of its directors sitting as a board of direction and acting for the company, and not that of a majority of the directors acting individually. 2. An authority given by an insurance company to one of its servants, authorizing him to inspect the agencies and to sue, does not authorize him to give

advocates the authority required by Art. 177, C. P. *Kavanagh v. Norwich Union Fire Ins. Co.*, 4 Q. P. R. 229.

2. Compliance with requirements of foreign statute—*Nova Scotia statute requiring filing of returns—Enforcement—Pleading—Admissions.*]—The plaintiff was a citizen of the United States, and was a shareholder in the defendant company, incorporated under the laws of West Virginia. The defendants had their principal place of business in Nova Scotia. It was alleged in the pleadings that by statute of West Virginia applicable to the company, the company should make an annual report to the shareholders shewing in detail the condition of the company, its debts, expenditures, shareholders, &c., and this allegation was admitted in the defence. Certain statutes of the Province of Nova Scotia require incorporated companies doing business in Nova Scotia to file with the registrar of deeds a list of shareholders, &c. Neither the West Virginia statutes nor the Nova Scotia statutes were complied with, and the plaintiff brought this action for a mandamus, or in the alternative an injunction, to enforce compliance with the said statutory enactments:—*Held*, that the Nova Scotia Court can maintain an action founded on the enactment of a foreign state: *Dennick v. Railroad Co.*, 103 U. S. 11; *Higgins v. Central Co.*, 155 Mass. 176. The alienage of the plaintiff is no bar to the action, and under English law he can maintain his action, the Court having jurisdiction over the company:—*Held*, also, that the admission in the defence was equivalent to the statement of an expert as to the foreign statute, and the Court can construe it, the rules of construction in both countries being presumed to be the same: *Davidson v. Hill*, [1901] 2 K. B. 617:—*Held*, also, that as to the Nova Scotia statutes the plaintiff cannot enforce compliance, as they are for the benefit of the public, and the judgment appealed from must be varied accordingly, but the defendants to pay the costs of the appeal. *Merritt v. Copper Crown Mining Co.*, 22 Occ. N. 239.

3. Inspection of books—Shareholder—Mandamus—Interlocutory order—Costs.]—The plaintiff, a shareholder in the defendants, a foreign corporation, doing business in the Province of Nova Scotia, obtained a mandamus ordering the defendants to produce for the inspection of the plaintiff the register of stockholders shewing the names and the places of residence of persons holding shares and stock in the company, and the number of shares held by each person; also, to produce and file in the office of the Provincial Secretary

an abstract of receipts and expenditures, profits and losses of the company within the Province for each year during which the company did business within the Province; also, to file at the office of the Commissioner of Mines for the Province a copy of the charter or Act of incorporation of the company, and of the by-laws and regulations of the company, together with a list of officers, &c.:—*Held*, setting aside the order, that it was not just and convenient to grant the order, as the effect of it would be to decide the whole case upon affidavit, leaving nothing to be disposed of at the hearing. While such an order might be useful in some cases, in order to preserve the rights of parties, or the subject-matter, until there could be a deliberate disposition made of it at the hearing, or where the matter could not wait until a hearing, it should not otherwise be disposed of in a summary way. *Semble*, that under the Rules enabling a case to be set down for hearing at any time, a strong case must be made out for pursuing a different course. As the merits of the case must be disposed of later, the costs of both parties to the appeal ought to abide the event. *Merritt v. Copper Crown Mining Co.*, 34 N. S. Reps. 416.

III. PROMOTERS.

Agent to solicit subscriptions—False representations—Ratification—Benefit.]—Promoters of a company employed an agent to solicit subscriptions for stock, and W. was induced to subscribe, on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters:—*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 261. 21 Occ. N. 493, that the latter, having benefited by the sum paid by W., were liable to repay it, though they did not authorize and had no knowledge of the false representations of their agent. *Per STRONG, C.J.*, that neither express authority to make the representations, nor subsequent ratification or participation in benefit, were necessary to make the promoters liable; the rule of *respondet superior* applies as in other cases of agency. *Wilson v. Hotchkiss*, 22 Occ. N. 3; S. C. sub nom. *Milburn v. Wilson*, 31 S. C. R. 481.

IV. SHARES AND SHAREHOLDERS.

1. Calls—Representatives of deceased shareholder—Defences to action.]—In an action by an incorporated company to

enforce, against a shareholder's legal representatives, a call on shares subscribed for by the *de cujus*, the defendants cannot plead that the conditions of the Act of incorporation have not been complied with, and that the company has for more than a year carried on the business of insurance in violation of the conditions of the statute incorporating it. *Victoria-Montreal Fire Ins. Co. v. O'Neil*, 5 Q. P. R. 4.

2. Payment for shares—Equivalent for cash—Written contract.]—M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed:—*Held*, affirming the judgment of the Court of Appeal, 27 A. R. 386, 20 Occ. N. 300, that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash, under s. 27 of the Companies Act, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the company. *Union Bank v. Morris, Union Bank v. Code*, 22 Occ. N. 45, 31 S. C. R. 594.

3. Preference shares — Interest — Dividends.]—The Halifax Academy of Music, a body corporate, in pursuance of a resolution of shareholders to that effect, issued preferential stock, the same to be a first charge upon the property of the company and its earnings, and to bear "interest" at a stated rate, payable half-yearly. For a number of years there were not sufficient earnings to pay interest or dividends to either the preferred or common stockholders. Latterly, however, the earnings increased, and a contest arose between the holders of the preferential stock and the holders of the common stock, the latter contending that the former should not be paid interest or dividends for the years during which there were no sufficient earnings for the purpose:—*Held*, that the holders of the preferential stock are entitled to receive out of the earnings what is called cumulative interest covering the past years in which dividends or interest remained unpaid on the preferential stock before any dividends are paid on the common stock. *Crockett v. Academy of Music*, 22 Occ. N. 301.

4. Preference shares—Memorandum incorporating agreement by reference—Special voting powers.]—The provisions of the Companies Act, 1890, that the members and stockholders of a company incorporated under it shall be subject to the conditions and liabilities in the Act imposed and to none others, and that in the election of trustees each stockholder shall be entitled to as many votes as he

owns shares of stock, do not render it *ultra vires* of a company to validly stipulate in its memorandum of association that a certain limited class of stockholders shall have the privilege of electing a majority of the trustees, and such stipulation may be contained in a document incorporated merely by reference in the memorandum of association. *Per* DRAKE and MARTIN, JJ.:—Preference stock means stock that has any advantage over other stock and is not confined to stock having a preference in regard to the payment of dividends. *Per* HUNTER, C.J., and MARTIN, J.:—The preference stock mentioned in s. 1 of the Companies Act Amendment Act, 1891, means stock having a preference in regard to the payment of dividends and not merely superior voting powers. *Dunsmuir v. Colontist Printing and Publishing Co.*, 9 Brit. Col. L. R. 275.

5. Reserve fund—Dissentient minority—Director—Investment—Trustee—Purchase and resale—Profits.]—It is an elementary principle that a Court has no jurisdiction to interfere with the internal management of companies acting within their powers. The company must sue to redress a wrong done to it; but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must shew that the acts complained of are either fraudulent or *ultra vires*. A company formed by letters patent under Canadian Act 27 & 28 V. c. 23 is not bound to divide all its profits on each occasion amongst its shareholders. It can legally reserve any portion thereof at its own discretion, and a Court has no jurisdiction to regulate it. Whether the undivided portion is retained to credit of profit and loss or carried to credit of a reserve, it may lawfully, in the absence of any express power, be invested on such securities as the directors may select, subject to the control of a general meeting, but not restricted to such investments as trustees are authorized to make. It is not *ultra vires* for a company to invest in the name of a sole trustee. He is strictly accountable, but the dissentient shareholders are not entitled to an injunction against the directors and the company in respect of such investments so long as it appears to be *bona fide*. Where a director purchased property without mandate from the company and under such circumstances as did not make him a trustee thereof for the company, and thereafter resold the same to the company at a profit:—*Held*, that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made. *In re Cape Breton*

Co., 26 Ch. D. 221, 20 Ch. D. 795, approved. Judgment in 21 Occ. N. 16, 27 A. R. 540, varied. *Burland v. Earle*, [1902] A. C. 83.

6. Subscription — Allotment — Failure to organize company — License—Insurance Act.]—To constitute a binding contract to take shares in a company, when such contract is constituted by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of the allotment having been made. The subscription for stock amounts to nothing more than an offer, and requires to be completed by an allotment of stock to the subscribers. The company in question here never was organized; it had no business existence; it never had stock to allot; it never had directors; and therefore it never could make an allotment:—*Held*, also, that, as no license was obtained by the company from the Minister of Finance within two years from the passing of the Act incorporating the company, such Act expired and ceased to be in force on the 13th June, 1900, and the company ceased to exist.: The Insurance Act, R. S. C. c. 124, s. 24. *Hodgins v. O'Hara*, 22 Occ. N. 29, 133.

7. Subscription—Condition — Notice of allotment—Contributory.]—Where an applicant had agreed to take shares in a company conditional on his receiving certain moneys which would enable him to pay for them:—*Held*, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the company of his inability, owing to non-receipt of the moneys, to pay for the shares; and that he was not liable as a contributory. *In re Publishers' Syndicate, Mallory's Case*, 22 Occ. N. 162, 3 O. L. R. 552.

7. Subscription—Contract by deed—Delivery — "Issue" — "Allotment" — Calls—Resolutions — "Offer" — Preference shares.]—*Held*, reversing the judgment of LOUNT, J., 2 O. L. R. 390, 21 Occ. N. 500, that the defendant's undertaking to take shares in the plaintiff company, when issued and allotted, being by deed, for valuable consideration, and being delivered to an agent of the company, was not revocable as a mere offer would be, and that the resolutions of the company and the letters to the defendant were a sufficient "issue" and "allotment" of the shares. *Xenos v. Wickham*, L. R. 2 H. L. 296, followed. *Naemith v. Manning*, 5 A. R. 126, 5 S. C. R. 417, distinguished:—*Held*, also, that (provision

having been made therefor in the memorandum and articles of association, the preference shares of the company were lawfully created. *Nelson Coke and Gas Co. v. Pellatt*, 22 Occ. N. 382, 4 O. L. R. 481.

8. Subscription — Prospectus — [Unreasonable delay—Departure—Res judicata.]—On the 28th January, 1899, the defendant and others subscribed for a certain number of shares of the stock of a projected company, the purpose of which was to build an hotel. The prospectus stated that it was intended to apply for a charter forthwith, and to commence building as soon as \$40,000 of the stock had been subscribed, and that the buildings were estimated to cost about \$45,000, and to be ready for opening at the beginning of the summer season of 1899. The company, however, was not formed, nor was anything done towards getting the hotel ready for occupation by the time mentioned. Prior to the 24th October, 1899, only \$28,700 had been subscribed, but additional subscriptions obtained on that date and shortly afterwards brought the total up to \$40,150. On the 24th November, 1899, letters patent of incorporation were issued. About the 1st July, 1900, the hotel was completed, and cost about \$15,000 more than originally contemplated:—*Held*, that, as the undertaking had not been proceeded with within a reasonable time from its inception, and as the defendant had not at any time after the 1st October, 1899, agreed to be bound by his subscription, or approved of then proceeding with the erection of the hotel, or that it should cost the sum it was afterwards erected for, he could not now be held bound to pay for the shares. *Semble*, that a judgment in an undefended action brought by the defendant against the company, declaring that the defendant was not a shareholder, was not a defence to this action, brought by other subscribers to compel the defendant to pay for the shares he had subscribed. Change in the law as to who become shareholders in a company incorporated by letters patent (R. S. O. 1897 c. 191, s. 9). *Peterson v. Turner*, 22 Occ. N. 163, 3 O. L. R. 373.

See I., II. 3, V. 10, 19.

See, also, GAMING—MORTGAGE. 2. 5—TRUSTS AND TRUSTEES, 7.

V. WINDING-UP.

1. Action against company—Leave of Court.]—An action brought against a company in course of winding-up, without the permission of a Judge, will be

dismissed upon exception to the form. *Soucy v. Electric Printing Co.*, 5 Q. P. R. 105.

2. Action against company—Leave of Court.]—An action brought against a bank in liquidation, without the previous authorization of the Court, will be dismissed upon exception to the form. *Marcoste v. Turcot*, 4 Q. P. R. 342.

3. Calls—Action for—Petition by liquidator to continue action—Opposition to.]—A shareholder, sued for calls by a company which has gone into liquidation after action brought, cannot oppose the petition of the liquidator for permission to prosecute the action in the name of the company, by alleging that the obligation of the defendant to contribute to the assets of the company can only be worked out by virtue of a fresh call made by the liquidator, which must be based upon the amount necessary to discharge the debts of the company and the costs of liquidation, which would render useless the former calls, but the shareholder will be permitted to plead these grounds in the action continued by the liquidator. *Victoria Mutual Fire Ins. Co. v. Derome*, Q. R. 21 S. C. 319.

4. Claims of creditors—Contestation—Particulars—Time.]—In a contestation of the claim of a creditor against an insolvent company in liquidation, it is too late for the contestant to demand particulars a month after the filing of the contestation of the claim. *In re Montreal Cold Storage and Freezing Co., Mullin's Claim*, 4 Q. P. R. 340.

5. Claims of creditors—Delay in presenting—Excuse—Merits—Leave to renew application—Statute.]—In the winding-up of a life insurance company, the liquidator's list of claimants was filed in the Master's office on 5th June, 1900, and a proper advertisement was published requiring claims to be delivered to the liquidator on or before the 7th May, 1900. On the 19th April 1901, the claimant applied to the Master to amend the list of claimants by increasing the amount for which he was entitled to rank:—*Held*, that the claimant, coming in after the time allowed for filing claims, was bound to shew upon affidavit some *prima facie* case of merit, and to explain the reasons for his delay in coming in with his claim. The claims of creditors should not be shut out so long as there remains unadministered a portion of the fund applicable for their payment. Even where an application is dismissed for want of an affidavit shewing merits and explaining delay, the dismissal may well be without prejudice to a further application upon proper

material; but in this case the rights of the claimant had been entirely cut off by an enactment of the Legislature, to which a retrospective effect had been given, and it would, therefore, be of no assistance to the claimant to permit him to renew his application. *In re Merchants Life Association of Toronto, Hoover's Claim*, 22 Occ. N. 21.

6. Claims of creditors—Lien on goods sold—Right of liquidator—Conditional Sales Act—Bills of Sale Act.]—The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company, one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it to H., subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only:—*Held*, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act, nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale to H., and they were entitled to recover the full amount due under the terms of the order out of the estate. *In re Canadian Camera and Optical Co., A. R. Williams Co.'s Claim*, 22 Occ. N. 677, 2 O. L. R. 677.

7. Claims of creditors—Secured creditors—Withdrawal.]—Creditors holding fully secured claims and content to rely thereon, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in the winding-up proceedings under the Dominion Winding-up Act, R. S. C. c. 129, and have them adjudicated upon therein; and where such creditors, without any intention to submit to such adjudication, had filed with the liquidator affidavits proving their claims, leave was given them to withdraw such claims, leave also being given to one of such creditors, who had an unsecured debt, to file a claim limited thereto. *In re Brampton Gas Co.*, 22 Occ. N. 370, 4 O. L. R. 509.

8. Claims of creditors—Set-off.]—Against a claim of a person upon the assets of a company in liquidation, based

upon a lease, the company cannot set off damages which it alleges it has suffered by reason of the claimant; and allegations of such damages will be struck out upon demurrer. *In re Montreal Cold Storage and Freezing Co., Mullin's Claim*, 4 Q. P. R. 341.

9. Debenture-holders — Mortgage—Receiver.]—In a suit to enforce a mortgage to secure debentures issued by the defendant company, a receiver was appointed. Subsequently a winding-up order was made against the company, and official liquidators were appointed. The liquidators disputed the validity of the mortgage and the extent of the property covered by it:—*Held*, that the receiver should not be discharged. An order appointing a receiver on behalf of debenture-holders secured by the mortgage was varied to be limited to property described in the mortgage. *Bank of Montreal v. Maritime Sulphide Fibre Co.*, 22 Occ. N. 37, 2 N. B. Eq. Repts. 328.

10. Distribution of surplus — Shareholders — By-laws — Resolutions.]—A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and for payment of the liabilities and the costs of winding-up, &c., and directing that the surplus should be distributed amongst the members according to their interest. By by-law of the company, holders of second preference shares were to be paid dividends at 6 per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders; but none of them exercised this option. The by-law also provided that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference

stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets:"—*Held*, that the second preference shareholders were not entitled to share in the surplus assets:—*Held*, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares not to the amounts paid on their shares. *Birch v. Cropper*, 14 App. Cas. 525, followed. *Morrow v. Peterborough Water Co.*, 22 Occ. N. 326, 4 O. L. R. 324.

11. Final order—Appeal—Security—Waiver.]—A winding-up order is a final order. The respondent in an appeal from a winding-up order, after the time limited by s.s. 3 of s. 27 of the Companies Winding-up Act, 1898, for furnishing security had expired, demanded security for the costs of the appeal:—*Held*, that the respondent had waived his right to have the appeal dismissed on the ground that the security was not originally furnished in time. *In re Florida Mining Co.*, 22 Occ. N. 244, 8 Brit. Col. L. R. 388.

12. Intervention of creditor — Costs.]—The creditor of a bank in liquidation may intervene in an action begun by the liquidator against one of the debtors of such bank, even where such creditor does no more than support, for the same reasons, the position taken by the liquidator, and alleges no new facts, bringing it to the trial Court to mulct the intervenant in costs if his intervention has been inopportunistly made. *Community of Sisters of Charity of Providence v. Bank*, Q. R. 11 K. B. 64.

13. Liquidator — Claim against prior to winding-up—Use of company name—Creditor — Intervention — Status—Costs.]—The liquidator of a bank in liquidation has no status to sue one of the debtors of such bank, upon a promissory note which became due before the bank went into liquidation, but the action should be brought in the name of the bank.—2. Although a creditor of a bank in liquidation may intervene, in an action begun by the liquidators against a debtor of the bank, to watch the proceedings and continue them in case the plaintiffs should neglect to proceed with diligence or to adduce matters favourable to the creditors, he has no right, at a time when the plaintiffs have relied to a point of such debtor and have asked that it be struck out for special reasons, to enter upon a contestation with the defendant for the purpose of having the same point struck out for the reasons also invoked by the plaintiffs, and where he does so, he should be ordered to pay the costs of his contestation. *Kent v. Community of Sisters of Charity of Providence*, Q. R. 13 S. C. 556.

14. Liquidator—Bond of—Money received as assignee—Appeal—Finality of certificate.]—After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds, he was appointed liquidator under the Winding-up Act and gave security by a bond which recited all the proceedings and orders, and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator:—*Held*, that the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such, and that the sureties were responsible for his subsequent misappropriation thereof. The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties, and should form a valid and binding charge against them:—*Held*, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court. *In re Army and Navy Clothing Co. of Toronto*, 22 Occ. N. 11, 3 O. L. R. 37.

15. Liquidator—Powers of—Amount in controversy.]—The Judge may allow the liquidator of an insolvent company to exercise his powers under the Winding-up Act without further authorization, in all cases where the amount involved is under \$100. *In re Victoria-Montreal Fire Ins. Co.*, 4 Q. P. R. 315.

16. Order for—Discretion to refuse—Absence of assets—Examination of officers—Time for.]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R. S. C. c. 120. *Re Maple Leaf Dairy Co.*, 2 O. L. R. 590, followed. A company will not be compulsorily wound up at the instance of unsecured creditors, where it is shewn that nothing can be gained by a winding-up, as, for example, where there would not be any assets to pay liquidation expenses. On the hearing of a winding-up petition which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the company:—*Held*, on appeal, that it was too late then to grant an inquiry. *In re Okell and Morris Fruit Preserving Co.*, 9 Brit. Col. L. R. 153.

17. Order for—"Just and equitable"—Shareholder's petition—Contributory.]—An order for compulsory winding-up may be made under s. 5 of the Companies Winding-up Act, 1898 (B.C.), notwithstanding the winding-up is opposed by the company. In winding-up proceedings instituted by a shareholder it appeared that shares had been unlawfully issued at a discount and at different percentages of

their face value to different purchasers; that the substratum was gone and that the company was unable to carry on business; that there was a question as to the liability of the company to the principal shareholder, who had always been in practical control of the company:—*Held*, that it was just and equitable that the company should be wound up. *In re Florida Mining Co.*, 22 Occ. N. 273, 9 Brit. Col. L. R. 108.

18. Security for costs of contestation.]—A claimant in a winding-up proceeding who demands security for costs from a contesting creditor, should make it appear that he is liable to lose the costs which he will incur in the contestation. *In re Montreal Cold Storage and Freezing Co.*, 4 Q. P. R. 294.

19. Voluntary winding-up—Meeting of shareholders—Notice of—Powers of attorney—Appointment of liquidator.]—A notice sent by post to all the shareholders of a company summoning them to a special general meeting with the object of placing the company, which is not insolvent, in voluntary liquidation, and accompanied by powers of attorney by which the shareholders may authorize their representation at such meeting, is sufficient, and if a resolution is passed authorizing the placing of the company in liquidation, there is no necessity for a further notice to the shareholders of the presentation of the petition to the Court.—2. The intention to name a certain person as liquidator sufficiently appears by the mentioning of his name upon the blank forms of power of attorney sent in order that anyone interested may not allege that he is taken by surprise if such person is subsequently appointed liquidator. *In re North-West Cattle Co.*, 5 Q. P. R. 30.

See APPEAL, IV. 10 — BANKS AND BANKING, I. 6 — CROWN, IV. 1 — SET-OFF, 2.

COMPENSATION.

See CROWN, II. — MUNICIPAL CORPORATIONS, VI. — RAILWAY, III., IV. — SET-OFF.

COMPOSITION.

See BANKRUPTCY AND INSOLVENCY, IV. 7.

CONCILIATION.

Action for agricultural service—Summary procedure—Motion—Preliminary exception—Time for filing.]—There is

no necessity for a preliminary citation to conciliation in the case of an action by a farmer to recover the price of a service by his bull.—2. An action of that kind may properly be the subject of a summary proceeding.—3. A motion for default of conciliation is in the nature of a preliminary exception.—4. An exception of this sort must be filed within three days after the entry of the cause. *Charbonneau v. Alarie*, 5 Q. P. R. 89.

CONDITIONAL SALES.

See SALE OF GOODS, II.

CONDITIONS.

See CHOSE IN ACTION, ASSIGNMENT OF, 1—CONTRACT, II. 1, III.—DEED, 3—INSURANCE—LANDLORD AND TENANT, I. 1—LIQUOR LICENSE ACT, I. 1—MINES AND MINERALS, 2—MUNICIPAL CORPORATIONS, X. 3—RAILWAY, VIII.—SALE OF GOODS, III. 1, VI., VII. 1—SCHOOLS, I. 3—WILL.

CONSEIL JUDICIAIRE.

Proceedings by—Disavowal—Common interest.]—A conseil judiciaire has no right to take, in the name of him to whom he has been named conseil, judicial proceedings, even when such conseil has a personal interest in such proceedings. *Beauchamp v. Gourde*, Q. R. 20 S. C. 260.

CONSERVATORY ATTACHMENT.

Affidavits for—Grounds of belief—Donation—Debt—Demand.]—An affidavit for conservatory attachment, founded upon belief, must state the grounds of such belief.—2. Where a conservatory attachment is based upon a donation, the affidavit, and not only the declaration, must shew that the debt is due and exigible, and that the deed of donation has been registered, and must also state that a demand of payment has been made of the moneys claimed in virtue of such donation. *Lefebvre v. Castonguay*, 4 Q. P. R. 431.

CONSPIRACY.

See CRIMINAL LAW, III. 13—TRADE UNION.

CONSTABLE.

See MALICIOUS PROCEDURE, 3—MUNICIPAL CORPORATIONS, IX. 1, X. 6.

CONSTITUTIONAL LAW.

1. Customs legislation—Conflict with Imperial enactment—Duty upon foreign-built ship—Construction of statutes—Crown—Interest—Tort—Servant of Crown.]—The Parliament of Canada has legislative authority to impose a customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship.—2. The provision in item 409 of the Customs Tariff Act of 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambiguous imposition of the duty, such as would support the right of the Crown to exact the payment of such duty.—3. Interest can only be recovered against the Crown by contract or under statute.—4. In the absence of statutory provision, the Crown is not liable to answer for the wrongful act of its officer or servant. *Algoma Central R. W. Co. v. The King*, 22 Occ. N. S. 7 Ex. C. R. 239.

2. Expenses of criminal justice—Powers of Provincial Legislatures—Imposing on municipalities expenses of criminal justice—57 V. c. 19, s. 1 (N. B.)—*Intra vires.*]—See *McLeod v. Municipality of Kings*, *Morison v. Municipality of Kings*, 35 N. B. Reps. 163.

3. Indian lands—Surrender—Treaty—Crown patent—Precious metals—Acquiescence.]—Decision of a Divisional Court, 21 Occ. N. 23, 32 O. R. 301, affirmed on appeal to the Supreme Court of Canada for the reasons given by Boyd, C., 20 Occ. N. 110, 31 O. R. 300. *Ontario Mining Co. v. Seybold*, 32 S. C. R. 1.

4. Liquor Act of Manitoba—Powers of Provincial Legislature.]—The Manitoba Liquor Act of 1900, for the suppression of the liquor traffic in that Province, is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the Province, within the meaning of British North America Act, 1867, s. 92, s. s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the Province. *Attorney-General for Ontario v. Attorney General for the Dominion*, [1896] A. C. 348, followed. Judgment in 21 Occ. N.

212, 13 Man. L. R. 239, reversed. *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A. C. 73.

5. Monopoly — Powers of Provincial Legislature—Municipal corporation—By-law—Statute validating—Electric light company. — See *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A. C. 237.

6. Sunday observance — Powers of Provincial Legislatures — Police regulations. — Section 1 of 62 V. c. 11, whereby the sale of real or personal property or the exercise of any worldly business or work on Sunday is prohibited, is within the authority of the Legislature of New Brunswick. Therefore, where G. was convicted under the above section of selling cigars on Sunday a rule *nisi* for a *certiorari* to bring up the conviction was discharged. The fact that the Parliament of Canada can make the doing of such an act on Sunday a crime, and prohibit it under the general criminal law, does not necessarily shew that a local Legislature has no jurisdiction to deal with it under its powers to make regulations of a police or municipal nature. A subject matter of legislation, though falling within some of the classes entrusted to the federal Parliament by s. 91 of the British North America Act, may likewise, when looked at from another point of view, come within some of the classes, over which, by s. 92 of the same Act, the Provincial Legislatures have exclusive jurisdiction. *Ex p. Green*, 35 N. B. Reps. 137.

7. Sunday observance — Powers of Provincial Legislature—Theatres—Prohibition of—Interference with criminal law—Municipal by-law. — Under the provisions of cl. 16 of s. 92 of the B. N. A. Act, the Provincial Legislature had power to enact cl. 5 of s. 123 of the charter of the city of Montreal, 37 V. c. 51, and to confer, as it has done, upon the council the power to pass by-law No. 103 of the council of the city; and such by-law does not exceed the powers conferred upon the council.—2. Neither the statute nor the by-law has the effect of modifying or abrogating the criminal law.—3. The statute and by-law are limited to the city of Montreal.—4. The imposition of imprisonment provided for by the by-law, under the authority of s. 124 of the statute, is legal.—5. Under the provisions of cl. 15 of s. 92 of the B. N. A. Act, and of cl. 8 of the same section, the Provincial Legislature could, as it has done by ss. 123 and 124 of the above statute, delegate to the council of the city of Montreal the power to pass a by-law prohibiting the opening of theatres on Sunday under penalty of

imprisonment.—6. The opening of theatres on Sunday is prohibited by the statute, and is a contravention of the by-law. *McLaughlin v. Recorder's Court of the City of Montreal*, 4 Q. P. R. 304.

8. Telephone company — Dominion and Provincial statutes — Construction — Inconsistent provisions — Property and civil rights — Streets — Poles and wires — Consent of municipality. — 1. Under the B. N. A. Act the Canadian Parliament may grant charters to companies with Canadian, as distinguished from Provincial, objects, but, except as to companies incorporated for carrying into effect some of the purposes mentioned in s. 91, cannot confer the right of interfering with property and civil rights in the Provinces.—2. The defendants, being incorporated under 43 V. c. 27 (D.), were by 45 V. c. 71 (O.) authorized to exercise the powers therein mentioned; by 45 V. c. 95 (D.) the Act of incorporation was amended, and it was declared that the Act of incorporation and the works thereunder authorized were for the general advantage of Canada.—*Held*, that the defendants were thenceforward subject to the exclusive jurisdiction of the Dominion Parliament, but the Provincial Act was not repealed, and its provisions were abrogated only in so far as they were inconsistent with the Dominion legislation.—3. The effect of one of the provisions of the Provincial Act was to forbid the defendants carrying any poles or wires at all along any street without the consent of the council of the municipality—not merely poles and wires of a certain height.—4. The Ontario Act should be treated as conferring special rights upon the defendants in regard to their works in that Province, and at the same time subjecting them to the necessity of obtaining the consent of the local municipalities to the use of the streets, while leaving to their Act of incorporation its full operation in other Provinces.—5. The defendants had no right to carry any poles or wires (either above or under ground) along any street in the city of Toronto, without consent; but they had the right to carry their wires across streets, either above or under ground, subject to the direction of the council and its engineer as to location and manner of work, unless such direction should not be given within one week after notice in writing, and subject to the other provisions of the Act of incorporation. *City of Toronto v. Bell Telephone Co. of Canada*, 22 Occ. N. 142, 3 O. L. R. 465.

See ARBITRATION AND AWARD, 1 — ASSESSMENT AND TAXES, VI. 2—CROWN, I. 1—LIQUOR LICENSE ACT, I. 1, 2, 3—MUNICIPAL CORPORATIONS, III. 6, 11, X. 4—RAILWAY, X. 2.

CONTEMPT OF COURT.

See BANKRUPTCY AND INSOLVENCY, III.
2—EXTRADITION, 3.

CONTRACT.

- I. BREACH.
- II. BUILDING CONTRACT.
- III. CONDITIONS.
- IV. CONSTRUCTION.
- V. ILLEGALITY.
- VI. MAKING THE CONTRACT.
- VII. RESCISSION.
- VIII. STATUTE OF FRAUDS.

See APPEAL, I. 7—ARBITRATION AND AWARD, 3—BANKRUPTCY AND INSOLVENCY, IV. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES—BILLS OF SALE AND CHATTEL MORTGAGES—CARRIERS—CHOSE IN ACTION, ASSIGNMENT OF COMPANY—CROWN, III. 1, 2, IV. 2—INSURANCE—INTEREST—JUDGMENT—LANDLORD AND TENANT—LIMITATION OF ACTIONS, II. 2—MASTER AND SERVANT—MECHANICS' LIENS—MORTGAGE—MUNICIPAL CORPORATIONS, IV. 1—PLEDGE, 1—SALE OF GOODS—SET-OFF, 1—SHIP—SOLICITOR, 1, 2—SPECIFIC PERFORMANCE—STREET RAILWAYS—VENDOR AND PURCHASER—WRIT OF SUMMONS, II. 4, 5, 6, 7.

I. BREACH.

1. Cause of action, where arising—*Sale of goods—Place of delivery—Superior Court—District.*—In the absence of agreement to the contrary, goods sold should be delivered and the price paid at the domicile of the purchaser.—2. Default of delivery of the goods sold and of payment of the price constitutes a cause of action.—3. An action can only be begun before the Court of the place where the cause of action arose (if such Court is not that of the domicile of the defendant), when all the causes of action arose in the same place. *Lipschitz v. Rittner*, 4 Q. P. R. 311.

2. Company—Contract before incorporation—Agency—Authority—Consensus—Evidence.—In the absence of a new agreement made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract for the company is not binding on the company, although the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. *In*

re Sully, 33 Ch. D. 16, followed. A person who enters into a contract, expressly as agent for a principal, impliedly warrants his authority; and if he has in fact no such authority he may be sued under that implied contract, and is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. *Collen v. Wright*, 8 E. & B. 617, followed. In an action on an oral contract, the evidence as to its terms being contradictory, and shewing that, if each of the parties to the contract gave in evidence a truthful statement of its terms according to his recollection, there was a misunderstanding between them as to whether a certain important provision (the existence of which was the whole basis of the action) formed part of it, the trial Judge declared himself unable to ascertain the truth, and, applying the principle laid down in *Falck v. Williams*, [1900] A. C. 176, that it is for the plaintiff in an action for breach of contract to shew that his construction is the right one—dismissed the action. *Coit v. Dowling*, 4 Terr. L. R. 464.

3. Mining claim—Agreement for sale—Construction—Enhanced value.—By an agreement in writing, signed by both parties, B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should have a reasonable amount of the stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims, or that the agreement should be specifically performed:—*Held*, reversing the judgment of the Supreme Court of British Columbia, 8 Brit. Col. L. R. 402, that the dual agreement above mentioned was for a transfer, at a nominal price, in trust to enable N. to capitalize the properties and form a company to work them, on such terms as to allotting stock to B. as the parties should mutually agree upon; and that on breach of said trust B. was entitled to a recoupance of his interest in the claims and an account of moneys received, or that should have been received, from the working thereof in the meantime. *Briggs v. Newschwander*, 22 Occ. N. 277, 32 S. C. R. 405.

4. Supply of gas—Shutting off—Non-payment—Other premises.—Under

12 V. c. 183, s. 20, where a customer of the Montreal Gas Company has more than one building to which gas is being supplied, and he fails to pay for the gas supplied to any one of them, the gas company is entitled to cease supplying gas to all the buildings belonging to him. *Montreal Gas Co. v. Cadieux*, Q. R. 11 K. B. 93. (Reversed, 28 S. C. R. 382, but restored, [1899] A. C. 589.)

II. BUILDING CONTRACT.

1. Architect's certificate—Finality — [Action — Condition precedent.] — The written contract between the parties provided that the plaintiffs were to erect and complete a building for defendant according to certain drawings and specifications by a fixed date, and to the satisfaction of an architect named, to be certified by him under his hand forthwith after completion. It also provided for payment on the certificates of the architect of 85 per cent. on the work done from time to time, and that the balance unpaid on the completion of the work should become payable within one month after the architect should have certified. The architect gave two so-called final certificates, the first of which was in part as follows: "I hereby certify that D. Bros. are entitled to \$416.36 in full for above contract and extras, less \$4.25, which amount may be held back till the items of work in the following list are done." It proceeded to specify the items covered by the \$4.25, and added: "Note.—I consider the guarantee in specification will cover any leak in roof." The contractors had in the specification guaranteed the roof for five years against ordinary wear and tear. Annexed to and forming part of the certificate was a statement shewing that in arriving at the sum of \$416.36 a deduction of \$50 had been made for "bad floor, &c." The second and last certificate of the architect was as follows: "This is to shew that by certificate given by me on 23rd January, 1900, I certified that D. Bros. were entitled to \$416.36, from which the amount of \$4.25 was deducted to cover some small items left undone. These have now been attended to, and I therefore certify that D. Bros. are entitled to \$416.36 in full of contract and extras." — *Held*, that the two certificates should be read together, and being so read they shewed that in respect of the floor and roof the work had not been properly completed, and did not constitute a certificate that the contract work had been completed to the satisfaction of the architect; and such a certificate was a condition precedent to the plaintiffs' right to recover. *Davidson v. Francis*, 22 Occ. N. 328, 14 Man. L. R. 141.

2. Specific sum — Destruction of building before completion — Quantum meruit. — [The defendant, who had taken a contract for the erection of a dwelling house at \$4,050, accepted the plaintiff's tender to do the plumbing and tinsmithing work for \$500; but before the completion of the plaintiff's contract, though after he had done work up to \$488, the building was destroyed by fire. The defendant had received two sums of \$1,500 on account of his contract, but he denied that any portion of it was for work done by the plaintiff. In an action by the plaintiff to recover the \$488 on a quantum meruit:—*Held*, that where, as here, the contract is to do work for a specific sum, and this applies as well to original as to sub-contracts, there can be no recovery until the work is completed, unless the failure to do so is caused by the defendant's fault; and, as the plaintiff admitted the non-completion by suing on a quantum meruit, and there was nothing to shew any fault on the defendant's part, there could be no recovery. *Appleby v. Meyers*, L. R. 2 C. P. 630, followed. *King v. Low*, 22 Occ. N. 107, 3 O. L. R. 234.

See PRINCIPAL AND AGENT, 8.

III. CONDITIONS.

1. Certificate—Condition precedent—Mechanic's lien. — The plaintiff agreed with S. to do tunnelling in mineral claims in which S. and McL. were interested, and the agreement was contained in correspondence, part of which read: "I'll pay you on the completion of each 80 feet of tunnelling. All you have to do is to have McL. to certify that you have done the work." McL. did not give a certificate. In an action by the plaintiff to enforce a mechanic's lien:—*Held*, that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover. *Leroy v. Smith*, 22 Occ. N. 72, 8 Brit. Col. L. R. 293.

2. Default — Application of alternative rate of payment. — A contract between a newspaper proprietor and a customer, for 12,000 lines of advertising to be furnished within a year, based upon a price of four cents a line for advertising, if the conditions of the contract as to prompt payment, &c., be strictly complied with by the customer, and of fifteen cents per line in case of failure to comply with such conditions, is an alternative contract, and where the customer makes default to comply with the conditions, the other party is entitled to recover the higher alternative rate for the work actually done. Article 1076, C. C., does not apply

to such case, the claim not being based upon the enforcement of a penalty but upon the application of a condition. *Berthiaume v. Kent*, Q. R. 11 K. B. 312.

3. Extras — Authority of agent — Setting aside findings of jury.—M. contracted to erect a building in Vancouver for the defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. S., who had intended to occupy the building for the purposes of a bottling company, of which he was a member, ordered extras, but no indorsement thereof was made on the contract. In an action by M. for the price of the extras, the jury found "that S., as authorized agent for the company, ordered the extras for it, and that it did either hold out or permit S. to hold himself out as its agent for the purpose of ordering extras:"—*Held*, that such indorsement on the contract was a condition precedent to the plaintiff's right to recover. *McKinnon v. Pabst Brewing Co.*, 22 Occ. N. 39, 8 Brit. Col. L. R. 265.

IV. CONSTRUCTION.

1. Covenant to deliver possession of land—Dominion Lands Act—Assignment or transfer—Mistake—Rectification.—A covenant contained in an agreement for farming "on shares" to deliver possession of land in which the covenantor has homestead rights only, is not an assignment or transfer within the meaning of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 29, s. 5. Rectification of contract for mistake discussed. *Spence v. Arnold*, 5 Terr. L. R. 176.

2. Divisibility—Completion.—By a contract to remove spans from a wrecked bridge in the St. Lawrence, the contractors agreed "to remove both spans of the wrecked bridge and put them ashore, for the sum of \$25,000, to be paid, \$5,000 as soon as one span is removed from the channel, and another \$5,000 as soon as one span is put ashore, and the balance as soon as the work is completed. . . . it being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season:"—*Held*, reversing the judgment of the Court of Appeal (21st September, 1901), *TASCHIEREAU* and *DAVIES, J.J.*, dissenting, that the contract was divisible, and the contractors, having removed one span from the channel and put it ashore, were entitled to the two payments of \$5,000 each, notwithstanding

that the whole work was not completed in the second season. *New York and Ottawa Co. v. Collins Bay Rafting and Forwarding Co.*, 22 Occ. N. 250, 32 S. C. R. 216.

3. Option—Refusal.—A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons, and not less than 10,000 as required by the second party, does not bind the second party to supply more than 10,000 tons. *Haggerty v. Lenora Mount Sicker Copper Mining Co.*, 22 Occ. N. 106, 9 Brit. Col. L. R. 6.

4. Sale of cattle—Substituted agreement—Terms of trade—Usage.—On the evidence it was found that, by usage among cattle-men in the McLeod District, calves under six months old and unbranded are, in the buying or selling of a herd of cattle by the head, included with the cows with which they are running. Where an agreement related to two classes of things, and one of which alone was subsequently dealt with by a substituted agreement, and a new agreement dealing with the other class was made for the purpose of continuing the first agreement regarding it, the first agreement was properly looked at to interpret the second. The same expressions used in different parts of the same document should ordinarily be interpreted in the same sense. *Woolf v. Allen*, 21 Occ. N. 49, 4 Terr. L. R. 431.

5. Sale of goods—Delivery—Place—"At," meaning of.—A tender by H. to supply coal to the town of Goderich, pursuant to advertisement therefor, contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto, where directed by you. (Meaning by a committee of the council.) The tender was accepted, and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from a vessel upon the dock about 80 feet from the shed, and separated from it by a road:—*Held*, reversing the judgment of the Court of Appeal (15th November, 1901, unreported), that the coal was not delivered "at the coal shed," as provided by the contract signed by the parties, which was the binding document.—*Held*, also, that if the contract was to be decided by the terms of the tender, the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto." (See, also, 20 Occ. N. 303.) *Holmes v. Town of Goderich*, 22 Occ. N. 222, 32 S. C. R. 211.

6. Sale of homestead and stock—Entire contract—Invalidity as regards homestead—Conversion.—The plaintiff

signed a written memorandum as follows: "I hereby agree to sell, and make and execute the necessary papers to convey, all my right, title, and interest in (describing his homestead, for which he had not been recommended), also (3 horses, a waggon and a plough), and any other implement or chattel of which I am now the owner to (the defendant) for the sum of \$480 to be paid as soon as the necessary papers are executed." The defendant, without the plaintiff's knowledge, took possession of the horses; the plaintiff immediately objected to this. The plaintiff sued for conversion and the defendant counterclaimed for damages for breach of the agreement:—*Held*, that the contract was an entire one, and that, according to its terms, the property in the personal property would vest only on a proper conveyance of the land. (2) That the agreement, being one for the assignment of an unrecommended homestead, was void, and that, although an agreement may be void in part and valid in part, yet this being an entire contract was wholly void. Judgment was therefore given for the plaintiff for damages for conversion of the horses; and the defendant's counterclaim for damages for breach of the agreement was dismissed. *Flannaghan v. Healy*, 4 Terr. L. R. 391.

V. ILLEGALITY.

Statutory prohibition—Penal statute—Wholesale purchase—Liquor license—Guarantee—Validity of—Forfeiture.—An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect. The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute. *Brown v. Moore*, 22 Occ. N. 190, 32 S. C. R. 93.

VI. MAKING THE CONTRACT.

1. Acceptance—Purchase of goods—Acceptance by delivery.—The plaintiff, who had had previous dealings with the defendants, wrote to them on the 5th May asking them if they were going to buy cucumbers that year, and what they were going to pay for them: adding, "please let me know, as I want to make a contract with some one for them, as I want to put in quite a few this year." The defendants replied: "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at same price as last year. We will see you later on and make final arrange-

ments." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties:—*Held*, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged. *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, distinguished. *Boston v. Toronto Fruit Vinegar Co.*, 22 Occ. N. 232, 4 O. L. R. 20.

2. Cause of action, where arising—Correspondence—Place of making—Sale of goods—Place of delivery—Superior Court—District.—A contract by correspondence is completed at the place where the acceptance is received, to the knowledge of the acceptor. 2. An action for damages on account of the insufficiency and poor quality of goods sold may be begun in the district in which such goods ought to be delivered, inspected, and paid for. *Reeves v. McCulloch*, 4 Q. P. R. 285.

3. Correspondence—Place of completion—Acceptance.—A contract by correspondence is complete at the place whence the acceptance is sent. *Ward v. Johnston*, 5 Q. P. R. 123.

4. Want of consensus—Misrepresentation.—The defendant, negotiating with the plaintiffs' agent for the purchase of a stacker, was asked to sign an order for one. The agent filled up a form of order, and the defendant said to him: "Now, if there is anything in this order that binds me to keep the stacker if it does not give satisfaction, I won't sign it." To which the agent replied that there was not, that he could take the stacker out and keep it ten days, and if it did not give satisfaction he need not settle for it, but could bring it in and leave it on the agent's platform at B. The defendant then signed the order without reading it, as he was in a hurry to catch a train. By the terms of the order only one day's trial of the machine was allowed, and the buyer, if it did not give satisfaction, was to return it to the plaintiffs at C. There was a printed direction at the top of the order to give the purchaser a duplicate, but none was given to him. On receipt of the machine the defendant tried it and, not finding it to work satisfactorily, returned it within ten days to the agent at B. At the trial the agent admitted that, at the time the order was signed, he thought it provided for a ten days' trial:—*Held*, that there was no such

consensus ad idem between the parties as is necessary to create a binding contract, and that the verdict of the County Court Judge in favour of the defendant in an action by the plaintiffs for the price of the machine should be sustained, and the plaintiffs' appeal dismissed with costs. *Foster v. McKinnon*, L. R. 4 C. P. 704, *Smith v. Hughes*, L. R. 6 Q. B. 597, and *Murray v. Jenkins*, 28 S. C. R. 565, followed. *Saults v. Eaket*, 11 Man. L. R. 597, distinguished. *Jones Stacker Co. v. Green*, 22 Occ. N. 264, 14 Man. L. R. 61.

VII. RESCISSION.

1. Duration — Right to cancel — Repugnant clauses.—A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. . . . Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer:—*Held*, reversing the judgment of the Court of Appeal, 1 O. L. R. 73, 21 Occ. N. 105, that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. *Ottawa Electric Co. v. St. Jacques*, 22 Occ. N. 77, 31 S. C. R. 636.

2. Misrepresentations — Sale of mining areas — Evidence — Speculative property.—In an action to set aside a sale of gold bearing areas purchased by the plaintiffs from the defendant, who was joint owner with H., the plaintiffs relied upon evidence shewing that they were induced to make the contract by certain representations as to value contained in a report prepared by H. and handed by the defendant to L., who was acting for the plaintiffs, as a means of inducing the sale. Evidence was given on behalf of the defendant to shew that at the time the report was handed to L., he was given to understand that the defendant could not say anything as to its correctness, and that L. must verify it for himself. The trial Judge decided the action in favour of the defendant, and on appeal the Court *in banc* was divided, both as to the effect of the evidence and as to the admissibility of evidence taken (under an order) after the judgment of the trial Judge. *Leckie v. Stuart*, 34 N. S. Reps. 140.

3. Non-fulfilment of obligations — Parties both in default.—In order that

the rescission of a contract may, by virtue of Art. 1065 of the Civil Code, be adjudged against a party who has not fulfilled the obligations of it, it is necessary that such rescission should put the parties as they were before the contract, and it will not be adjudged if its effect will be to enrich one party at the expense of the other.—2. If one party has failed to fulfil his obligations as much as the other, he cannot demand against the other the rescission of the contract. *Dupuis v. Dupuis*, Q. R. 19 S. C. 500.

VIII. STATUTE OF FRAUDS.

1. Absence of writing — Novation.—M., who had agreed with the defendants and a number of other lumber manufacturers to drive down their logs for them, the defendants' contract being an oral one, arranged with the plaintiff to act for him; the obligation to drive the defendants' logs to continue to a named date, for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive, and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, an oral agreement was entered into between M. and the defendants, whereby, in consideration of M. assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms:—*Held*, by ROBERTSON, J. that there was a new contract founded on new and substantial consideration, so that the Statute of Frauds did not apply. On appeal to a Divisional Court the judgment was affirmed, on the grounds (1) of novation, or (2) even if M.'s indebtedness still continued, the moneys coming to him having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a binding obligation to pay him, and that in either view the Statute of Frauds did not apply. *Bailey v. Gillies*, 22 Occ. N. 289, 4 O. L. R. 182.

2. Master and servant — Employment for an indefinite term — Damages.—A sub-contract to employ a person as a salesman so long as the employer's contract with third persons might remain in force, that contract being terminable at any time, is not within the Statute of

Frauds, for the sub-contract may or may not continue for a year. Such a sub-contract does not come within s. 5 of the Master and Servant Act, R. S. O. 1897 c. 157. The employers' contract came to an end by the voluntary dissolution of their firm:—*Held*, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract, and that, although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages. *Glenn v. Rudd*, 22 Occ. N. 113, 3 O. L. R. 422.

CONTRAINTE PAR CORPS.

See ARREST, IV. 2, 3.

CONTRIBUTION.

See PARTIES, III. 2, 3.

CONTRIBUTORY.

See BANKS AND BANKING, 6—COMPANY, IV. 7, V. 17.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, II.—NEGLIGENCE — RAILWAY, VI. — STREET RAILWAYS, 2—WAY, II.

CONVERSION.

See DETINUE—PLEADING, VII. 3.

CONVICTION.

See CANADA TEMPERANCE ACT—CERTIORARI—CRIMINAL LAW — JUSTICE OF THE PEACE—LIQUOR LICENSE ACT—MALICIOUS PROCEDURE.

COPYRIGHT.

1. *Operatic composition—Proof of proprietorship—Infringement—Identity—“Place of dramatic entertainment”—Liability of performers and committee—Registration—Damages—Costs.*—*Held*,

that the proprietorship of the plaintiff in the operatic composition in question was established by the evidence; and that the evidence also established that the opera performed by the defendants was the identical composition of which the plaintiff had the sole right of representation. *Boosey v. Davidson*, 13 Q. B. 257, and *Lucas v. Williams*, [1892] 2 Q. B. 117, considered.—2. The town hall, where the defendants performed the opera, was a “place of dramatic entertainment” within the meaning of the statute, tickets for admission of the public having been sold. *Russell v. Smith*, 12 Q. B. 217, and *Duck v. Bates*, 13 Q. B. D. 846, followed.—3. All the defendants who took part in the performance or in the work of the committee of the society in relation to the performance were liable to the plaintiff.—4. It was not necessary for the plaintiff to prove registration under the Copyright Act, R. S. C. c. 62; the Imperial Act 5 & 6 V. c. 45 applying to Canada by express enactment; and the Dominion Act having no provision relating to the right of dramatic representation. *Smiles v. Belford*, 25 Gr. 590, 1 A. R. 436, followed.—5. As to the question of damages and costs, the Imperial Act 51 & 52 V. c. 17 applies, and the damages should be of such amount as the Court considers reasonable, and the costs in the discretion of the Court. *Carte v. Dennis*, 21 Occ. N. 68, 267, 5 Terr. L. R. 30.

2. *Pleading—Notice of objections—Imperial Copyright Act, 1842.*—Section 16 of the Imperial Copyright Act, 1842 (5 & 6 V. c. 45) provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. Section 26 allows the pleading of the general issue:—*Held*, that s. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. *Dicks v. Yates*, 18 Ch. D. 76, followed. *Carte v. Dennis*, 21 Occ. N. 68, 5 Terr. L. R. 30.

3. *Works of fine art—Imperial statute.*—The Imperial Act 25 & 26 V. c. 68, an Act for amending the law relating to copyright in works of Fine Arts, does not extend to Canada. Judgment of a Divisional Court, 1 O. L. R. 309, 21 Occ. N. 232, affirming that of *ROSE, J.*, 32 O. R. 266, 20 Occ. N. 456, affirmed. *Graves v. Gorrie*, 22 Occ. N. 172, 3 O. L. R. 697.

See EVIDENCE, III. 1—DISCOVERY, I. 3.

CORPORATION.

See COMPANY—WILL, II. 2.

CORROBORATION.

See EVIDENCE, II.

CORRUPT PRACTICES.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

COSTS.

- I. GENERALLY—RIGHT TO COSTS.
- II. COUNSEL FEES.
- III. INTERLOCUTORY COSTS.
- IV. LIABILITY FOR COSTS.
- V. SCALE OF COSTS.
- VI. SECURITY FOR COSTS GENERALLY—WHEN ORDERED.
- VII. SECURITY FOR COSTS—PRACTICE AS TO.
- VIII. TAXATION.
- IX. WITNESS FEES.

See ACTION, 5—APPEAL, I. 6, IV. 11, VI. 2, IX. 4—ARREST, I. 2, II.—ATTACHMENT OF DEBTS, II. 7, 10—BAILIFF, 1—BANKRUPTCY AND INSOLVENCY, I. 1, 4, 5, IV. 7—BANKS AND BANKING, 2—CANADA TEMPERANCE ACT, 1—COMPANY, II. 8, V. 12, 13—COPYRIGHT, 1—COURTS, III.—CRIMINAL LAW, I. 1—DEFAMATION, I. 5—DISCOVERY, III. 1—EXECUTION, I. II. 2, III. 2, 5, VI. 1—EXECUTORS AND ADMINISTRATORS, 2—EXHIBITS, 2—FIRE—HUSBAND AND WIFE, I. 2, 6—INSURANCE, IV. 12—JUDGMENT, IV. 1, 3—LANDLORD AND TENANT, II. 2, III. 1—LUNATIC, 2—MISTAKE—MORTGAGE, 1, 9—MUNICIPAL CORPORATIONS, V. 4, X. 6—MUNICIPAL ELECTIONS, 12—NOTARY, 2—PARTICULARS, 1—PARTIES, IV. 3, 5—PARTITION, 3—PARTNERSHIP, 3—PEREMPTION, 3—PLEADING, VII. 4, 5, 6, XI. 2—RAILWAY, IV. 2, VII. 2—REVIVOR, 1—SET-OFF, 2—SHIP, III. 1—SOLICITOR—TRIAL, IV. 1—TRUSTS AND TRUSTEES, 2, 6—VENDOR AND PURCHASER, 2, 5—WATER AND WATERCOURSES, 2—WILL, II. 2—WRIT OF SUMMONS, I. 1, 2, II. 11.

I. GENERALLY—RIGHT TO COSTS.

1. Appeal—Offer of settlement.]—Where the amount of a judgment is reduced on appeal, and pending the disposition of the appeal the respondent offers to accept in settlement an amount smaller than the original judgment but greater than the reduced judgment, the appellant will be allowed the costs of the

appeal. *Dallin v. Weaver*, 8 Brit. Col. L. R. 241.

2. Conviction—Discharge of prisoner—Order for payment by informant.]—The defendant was convicted for stealing the property of B., and was sentenced to be imprisoned in the city prison of the city of Halifax. An order made by the Judge of a county court, under N. S. Acts of 1897 c. 32, s. 2, for the defendant's discharge, under a writ of *habeas corpus*, directed that the informant B. pay to the defendant his costs of the application and order for his discharge. There was nothing to shew that B. was the informant, except a statement to that effect in the affidavit of the defendant, upon which the application for the order was made, which was not borne out by either the conviction or the commitment:—*Held*, that the order was wrong, and must be set aside. *Per MEAGHER, J.*, that B. was not bound to appear in answer to the summons for the writ of *habeas corpus*, and that the fact of his not appearing was not to be regarded as conduct or acquiescence justifying the imposition of costs. *Quare*, also, whether the Judge had jurisdiction to make the order. *Regina v. Bowers*, 34 N. S. Reps. 550.

3. Conviction—Motion to quash.]—In a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under Provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate. *Rex v. Bennett*, 22 Occ. N. 290, 4 O. L. R. 205.

4. Criminal libel—Depositions not used at trial—Abortive trial.]—The prosecution was for criminal libel, and the defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken for use at the trial. The order granting the commission provided that the costs of the commission be reserved to be dealt with by the trial Judge. The evidence was used at the first trial, and the jury disagreed. At the second trial the jury again disagreed. At the third trial the defendant was acquitted, but the evidence was not used, owing to the private prosecutor giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner:—*Held*, that, as the commission evidence was not put in by the defendant as part of his case, the defendant should not have the costs of it. *Held*, also, that the defendant was not entitled to the costs of the abortive trial. *Rex v. Nichol*, 22 Occ. N. 75, 8 Brit. Col. L. R. 276.

5. Declaration of garnishee — Striking out—Option.]—A garnishee having made default in the completion of his declaration, the attaching creditor made a motion to strike out such declaration or to give the garnishee the option of continuing and completing it:—*Held*, that the costs of such motion should be paid by the garnishee. *Garbach v. Silverman*, 4 Q. P. R. 439.

6. Lien—Creditors' action to preserve fund.]—Costs incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred, are a first lien upon the fund recovered, and are allowed as between solicitor and client. *Hood v. Tyson, In re Judgments Acts*, 9 Brit. Col. L. R. 233.

7. Lien—Salvage — Partition—Property made insaisissable.]—The defendant and his mother owned certain immovables in undivided shares. The defendant's undivided portion had been devised to him by his father *à titre d'aliments* and with a clause making it *insaisissable*, and burdened with a substitution. R., the mother's advocate, brought an action of partition of these immovables against the defendant and the curator of the substitution. By the judgment in that action the lands were divided, and three-fourths of the costs were to be paid by the defendant. R. to recover his costs against the defendant, had caused to be seized an undivided third of the immovables which by the partition fell to the lot of the defendant. The plaintiffs, the advocates of the defendant, had made opposition to R.'s seizure, alleging that he had been paid and invoking the *insaisissabilité* clause. R. pleaded that he had not been paid, and that the clause did not apply to his debt, his services having preserved the property to the opposants. The opposition was dismissed, and the undivided third was sold. R. had his costs of the opposition taxed at \$125.57, but upon revision the amount was reduced to \$54.57. The plaintiffs now sued the defendant for their costs of the opposition which they had made for him and their costs of the motion for the revision of R.'s costs, and obtained judgment for \$147.80, under which they caused to be seized the remaining two-thirds of the defendant's portion of the immovables. He made an opposition, invoking the *insaisissabilité* clause. The plaintiffs pleaded to the opposition that their debt was for costs which they had incurred in good faith to protect the first third from R.'s seizure, which made it an alimentary debt; that it mattered not that the opposition to R.'s seizure had been dismissed; and that their debt was a first charge upon all the alimentary property of the defendant:—*Held*, that, as R.

did not contest the *insaisissabilité* clause, but only said that it did not apply to his debt, the opposition to R.'s seizure was of no utility as regards the property seized in this action, any more than as regards that seized by R.; that there was no relation between the claim of the plaintiffs for their costs and the property seized in this action; and, therefore, the claim of the plaintiffs was not alimentary nor was it a charge upon property which was *insaisissable*. *Pouliot v. Michand*, Q. B. 20 S. C. 432.

8. Offer to suffer judgment by default—Time of offer.]—The plaintiff, notwithstanding that she had received notice of an offer to suffer judgment by default within the ten days allowed to her by the statute for its acceptance, carried the cause down to trial and obtained a verdict therein for a sum exactly equal to the amount mentioned in the offer. On a motion to review the taxation of the plaintiff's costs:—*Held*, that the making of the offer in no way operated as a stay of proceedings, and the taking of the cause down to trial by the plaintiff was not equivalent to a rejection thereof; and that she was, therefore, entitled to have the costs of the trial allowed to her on taxation. *Quære*, (*per Tuck C.J.*):—If the verdict had been for a less amount than that for which the offer to suffer judgment was made, could the plaintiff after verdict have accepted the offer and signed judgment for the larger sum? *Sharp v. Woodstock School Trustees*, 21 Occ. N. 56, 35 N. B. Reps. 243.

9. Opposite party — Liability of client—Corporation solicitor—Change in by-law.]—By arrangement between the defendants and their solicitor he was to receive a salary of \$1,800 a year, for all services, including the costs of any litigation in which the defendants should be engaged. The present action against the defendants was dismissed with costs on the 14th September, 1901, and the defendants brought in their bill for taxation:—*Held*, following *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280, and *Stevenson v. City of Kingston*, 31 C. P. 333, in preference to *Galloway v. Corporation of London*, L. R. 4 Eq. 90, and *Henderson v. Merthyr Tydfil Urban District Council*, [1900] 1 Q. B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiffs:—*Held*, also, that the rights of the defendants must be governed by the circumstances which existed on the 14th September, 1901; and a by-law of the defendants subsequently passed could not affect those rights. *Ottawa Gas Co. v. City of Ottawa*, 22 Occ. N. 408, 4 O. L. R. 656.

10. Summons for Summary judgment.—Summons for judgment under Order XIV. The right to judgment was not disputed, but it was contended on behalf of the defendants that the plaintiffs were not entitled to any more costs than they could have got by taking judgment in default of defence, as the time for filing the defence had expired before the summons was issued:—*Held*, that the plaintiffs were entitled to the costs of the summons. *Diamond Glass Co. v. Okell Morris Co.*, 22 Occ. N. 190, 9 Brit. Col. L. R. 48.

11. Unnecessary action—*Setting aside hypothec.*—An action to set aside a hypothec resulting from a life rent will be maintained, but without costs, the law giving a means of obtaining such relief without action. *Lafontaine v. Lafontaine*, 4 Q. P. R. 170.

II. COUNSEL FEES.

Foreign Commission.—Where a rogatory commission is issued to another Province, or to a foreign country, and the parties do not annex interrogatories and cross-interrogatories thereto, but consent that the commission shall be an open one, and that the witnesses shall be examined directly before the commission, such consent does not justify the taxation against the losing party of counsel fees, for attendance before the commission, the tariff not making any provision for such case. *Young v. Accident Insurance Co. of N. A.*, M. L. R. 5 S. C. 222. approved. *Magann v. Grand Trunk R. W. Co.*, Q. R. 21 S. C. 72, 4 Q. P. R. 348.

See VIII. 5.

III. INTERLOCUTORY COSTS.

1. Appeal—“*No order as to costs*”—*Meaning of.*—From an interlocutory order made in the action an appeal was taken. Before the hearing of the appeal, the plaintiff lost his interest in the case by allowing the mineral claim in question to lapse, and so the full Court “struck out the appeal—no order as to costs.” Subsequently the plaintiff’s action was dismissed with costs, and the defendants claimed the costs of the appeal, which the Registrar disallowed on taxation:—*Held*, following *In re Hodgkinson*, [1895] W. N. 85, that the statement “no order as to costs” means that each party must pay his own costs. So also where the Court refuses to make any order as to costs. *McCune v. Botsford*, 22 Occ. N. 340, 9 Brit. Col. L. R. 129.

2. Appeal—Practice.—In interlocutory appeals, when a party is allowed costs, they are payable forthwith. *Star Mining and Milling Co. v. Byron A. White Co.*, 22 Occ. N. 104, 9 Brit. Col. L. R. 9.

IV. LIABILITY FOR COSTS.

Partnership action—*Joint and several liability of defendants*—*Commercial case*—*Pleading*—*Conclusions.*—The plaintiff sued the defendants, a commercial partnership having a collective name, *en reddition de compte*. The undertaking of the defendants which was the subject of the action was an absolutely commercial affair. Thus the action was itself of a commercial nature, and it necessarily followed that the liability of the defendants was a joint and several one. Nevertheless, the plaintiff did not claim upon a joint and several liability, and judgment was rendered for the plaintiff without any mention of that liability. Some time afterward the plaintiff’s attorney issued in his own name as advocate an execution against the defendants for his costs of the action, and, the defendant partnership having no property of its own, he caused to be seized property of two of the defendants for the total amount of his costs, that is to say, without dividing his costs. Each of these two defendants made opposition to the seizure, contending that there was no joint and several liability as to costs, inasmuch as the plaintiff had not alleged such liability, and that it did not exist as regards costs:—*Held*, that in order that there may be joint and several liability among several defendants ordered to pay costs, even in commercial cases, where such liability plainly exists, and in spite of the fact that costs are as a general rule the accessory of the action, the plaintiff should have alleged a joint and several liability; in default of an allegation and claim to this effect, even in commercial affairs, there is no joint and several liability as to costs between several defendants condemned to payment of such costs by the judgment in the action. *Beaubien v. Rioux*, Q. R. 21 S. C. 232, 4 Q. P. R. 214.

V. SCALE OF COSTS.

1. Appeal under Public Instruction Act.—In an appeal under Art. 482 of the Public Instruction Act, the costs of the advocates must be taxed pursuant to Art. 105 of the tariff of the Superior Court as regards the general fee, and as in an action of the fourth class in the Superior Court as regards the other costs. *Guay v. St. Jerome and St. Monica School Commissioners*, 5 Q. P. R. 124.

2. Attachment of debts—*Saisie-ar-rêt*.—Amount claimed.]—A *saisie-ar-rêt* is a new cause or proceeding, and the costs of a judgment maintaining the disavowal of the advocate who has issued the *saisie-ar-rêt*, are to be determined according to the amount for which the writ of *saisie-ar-rêt* has been issued. *Lafrance v. Parent*, Q. R. 21 S. C. 415.

3. Contestation in garnishment—Amount in controversy.]—The fees upon a contestation of the declaration of a garnishee, where it is sought by the garnishment proceedings to avoid a gift of immovables of the value of \$800, and to condemn the garnishees each to pay \$122, are the fees of an action of the second class. *Brunet v. Bergeson*, 4 Q. P. R. 419.

4. Motion for particulars—Prothonotary.]—A motion for particulars is an ordinary motion.—2. If an action is discontinued after such a motion, the costs of the defendant's advocate will be those of appearance and motion and not those under Art. 7 of the tariff.—3. The fee of the prothonotary is also that of a motion, and not of an exception. *Gingras v. Finley*, 5 Q. P. R. 118.

5. Petition—Contestation—Counsel fees.]—The fees of an advocate upon a petition under Art. 876, C. P., upon which there has been contestation by writing, inscription, examination, and hearing, are the fees of an advocate in an action of the second class but there can be no fee at the hearing. *Morcan v. Gélinas*, 4 Q. P. R. 380.

6. Petition to appoint sequestrator.]—All the fees on a contested petition to appoint a sequestrator are governed by s. 102 of the tariff, not by s. 12 or 28, and the attorney is entitled to all the fees of a third-class action. *Chalmers v. Shoe Wire Grip Co.*, 5 Q. P. R. 73.

7. Supreme Court—County Court.]—The costs of an action in the Supreme Court, which might have been brought in the County Court, are not necessarily taxable on the County Court scale. *Royal Bank of Canada v. Harris*, 8 Brit. Col. L. R. 368.

8. Withdrawal of part of claim—Taxation of costs—Witness fees—Foreign witnesses.]—The fact that the plaintiff, in an action against the defendants to recover \$1,165.28, being \$776.85 for the value of goods which had been intrusted to the defendants to be carried, but had not been delivered by them, and \$388.46 damages caused by the default to deliver, has filed a *retraxit* in the course of the suit for \$388.73, because the goods have been

delivered to him after the commencement of the action, does not take away the right to have his costs taxed as in an action of the first class.—2. The taxation of witnesses subpoenaed out of the jurisdiction may be revised even when no objection has been made when such costs were being taxed, if the total amount of the costs, as taxed, exceeds the costs of a commission to examine such witnesses. *Rothchild v. Canadian Pacific R. W. Co.*, Q. R. 21 S. C. 318, 5 Q. P. R. 39.

See BANKS AND BANKING, 2.

VI. SECURITY FOR COSTS GENERALLY—WHEN ORDERED.

1. Plaintiff out of Jurisdiction—Delay in applying.]—The action was begun on the 12th February, 1901; statement of claim delivered on the 10th June, 1901; statement of defence on the 20th June, 1901; and the action was set down for trial at a sittings beginning on the 16th September, 1901. The trial was, by consent, adjourned until the winter sittings, the defendants desiring to examine one C. who was present when the plaintiff was injured. On the 25th September, 1901, the plaintiff came from Pittsburgh to Toronto and submitted himself to examination by the defendants for discovery. He then stated that he was living at Pittsburgh, Pennsylvania, that his family were there, and that he did not intend to return. After the injury on account of which the action was brought, the plaintiff was brought to Toronto, in August, 1900, where he lived until August, 1901, when he went to Pittsburgh. After the examination for discovery in September the defendants issued a commission to Montreal to examine C. as a witness, and he was examined thereunder early in December. In the same month the plaintiff examined the defendants for discovery, and gave notice of trial for a sittings beginning on the 6th January, 1902. The defendants launched a motion for security for costs on the 19th December, 1901:—*Held*, that the delay in moving after the information obtained in September, 1901, was not sufficiently explained by the allegation that the defendants were waiting until after the examination of C., in order that they might be able to swear to a defence on the merits. *Bertudato v. Fauquier*, 22 Occ. N. 34.

2. Plaintiff out of Jurisdiction—Return—Ordinary residence.]—The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the

time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1190, on *præcipe*, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario:—*Held*, that the plaintiff actually resided out of Ontario when the *præcipe* order was made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain, a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain:—*Held*, also, that if the *præcipe* order were set aside, an order under Rule 1198 (b) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made. *Nesbit v. Galna*, 22 Occ. N. 150, 3 O. L. R. 429.

3. Plaintiff out of Jurisdiction—Trust moneys—Assets in hands of defendants—Administrator.—Security for costs was ordered, where the plaintiff resided out of the jurisdiction, in a suit against an administrator for the payment of a sum of money alleged by the bill to have been received by the intestate as guardian of the plaintiff, it appearing that the intestate's estate was insolvent, and there also being no satisfactory evidence of the alleged indebtedness. *Aiton v. McDonald*, 22 Occ. N. 37, 2 N. B. Eq. Reps. 324.

4. Municipality—Action against—Deposit.—In an action for damages against a municipality for injuries from an accident upon a street pavement, by reason of the neglect of the municipality to keep it in repair, the plaintiff, if he is not a ratepayer of the municipality, must deposit in the hands of the clerk of the Court a sum of \$10 at the time of the issue of a writ of summons as security for costs. *Lalonde v. Corporation of St. Vincent de Paul*, 5 Q. P. R. 26.

5. Public officers—Policemen—Action against—Trespass—Warrant.—The defendants, police officers, having a warrant to arrest a man, by mistake entered the house of his neighbour, the plaintiff,

to execute the warrant, but did not actually arrest the plaintiff, and withdrew on finding their mistake. The plaintiff sued for trespass and assault:—*Held*, that, as the defendants were acting in good faith under a warrant, and had complied with the requirements of s. 2 of R. S. O. 1897 c. 89, they were entitled under that Act to an order for security for costs. *Lewis v. Dalby*, 22 Occ. N. 112, 3 O. L. R. 301.

VII. SECURITY FOR COSTS—PRACTICE AS TO.

1. Affidavit—Information.—An affidavit in support of a motion for security for costs, in which the deponent does not say that he personally knows that the plaintiff no longer has his domicile in the Province of Quebec, but simply that some one has told him so, is insufficient. *Bourassa v. Confederation Life Assn.* 4 Q. P. R. 284.

2. Affidavit of merits—Discretion—Cross-examination.—The practice under R. 520 of the J. O. (C. O. 1898 c. 21) as to security for costs, differs from the English practice in making it obligatory upon the defendant to file the affidavit of himself or his agent alleging he has a good defence on the merits. *Quere*, whether it is necessary to set out the grounds of defence. This Rule leaves the granting of the security to the discretion of the Judge under the circumstances of each case. The Judge may order the deponent to be cross-examined upon his affidavit as to the nature of the alleged defence before deciding the motion. Under the circumstances of this case the Judge was *held* to have exercised a proper discretion in refusing security. *Clark v. Hamilton*, 21 Occ. N. 323, 5 Terr. L. R. 110.

3. Appeal to King's Bench—Application of security to further appeal.—The bond given by a surety for the effective prosecution of an appeal to the Court of King's Bench, and the undertaking therein to pay the amount of the condemnation which may be ordered if the judgment appealed from be confirmed, applies to a confirmation by the court to which the appeal is made. The obligation of the surety in such case becomes extinct if the judgment be reversed by the Court of King's Bench, and does not revive if the judgment of the Court of King's Bench be subsequently set aside by a higher Court. Judgment in Q. R. 19 S. C. 571 affirmed. *Guertin v. Mollay*, Q. R. 21 S. C. 261.

4. Dilatory exception—Deposit—Certificate—Notice—Amendment.]—A motion for security for costs is a dilatory exception, and cannot be granted unless notice of the prothonotary's certificate attesting that the deposit required by law has been duly made, has been given to the opposite party.—2. The Court cannot remedy such omission by permitting the party moving for security to give notice of the deposit and certificate. *Wistar v. Dunham*, 4 Q. P. R. 195.

5. Motion—Notice—Certificate.]—Upon a motion for security for costs, it is not necessary to give notice of the certificate of the prothonotary that the deposit required has been made. *Wilder v. Wilder*, 4 Q. P. R. 433.

6. Motion—Notice—Certificate—Deposit.]—Where, in the notice of the presentation of a motion for security for costs, no notice is given of the certificate of the prothonotary that the deposit required by law has been made, the motion will be rejected with costs. *Robertson v. Cobban Mfg. Co.*, 4 Q. P. R. 345. But see *Tougain v. Canadian Pacific R. W. Co.*, ib. 284, 303.

7. Motion—Notice—Certificate—Deposit.]—Upon a motion for security for costs, it is not necessary to give notice of the certificate of the prothonotary that the necessary deposit has been made. *Tougain v. Canadian Pacific R. W. Co.*, 4 Q. P. R. 303.

8. Motion—Time—One plaintiff out of jurisdiction—Costs of contested motion.]—A motion for security for costs and production of power of attorney, notice of which has been given for the 1st September, may be presented on the 10th September, that being the first day of the sittings of the Court.—2. A plaintiff out of the jurisdiction is subject to the obligation of furnishing security and producing a power of attorney. *Nemble*, that in such circumstances a plaintiff who contests the demand of security and power of attorney will be adjudged to pay costs. *Slater Shoe Co. v. Trudeau*, 5 Q. P. R. 120.

9. Increase in amount—Præcipe order.]—Under Rule 1208, the fact of the defendant having obtained a *præcipe* order for security for costs by which a definite amount of security is provided for, binds him to no greater extent than if he had in the first instance made a special application for security; in either case the defendant must shew facts disclosing a proper case for increased security; and no reservation in the first order of leave to apply again is necessary. Where the

defendants had before the trial incurred large costs by reason of examinations for discovery, interlocutory motions and appeals, and a commission to take evidence abroad, the original security, \$200 paid into Court in compliance with a *præcipe* order, was ordered to be increased by a bond for \$600 or payment into Court of an additional sum of \$300. *Standard Trading Co. v. Seybold*, 22 Occ. N. 414.

10. Inscription on faux—Amount of deposit—Increase or reduction.]—The Court, after having fixed the amount of a deposit to be made by a party who inscribes *en faux*, cannot increase or reduce such amount, especially when the cause is before the Court upon such inscription. *Lecaille v. Kauntz*, 5 Q. P. R. 101.

11. Order for—Time for furnishing—Default—Dismissal of action—Extension of time.]—If an order granting a motion for security for costs does not fix the time within which such security is to be furnished, a second motion for the dismissal of the action on the ground of the default of the plaintiff to obey the order, will not be granted, but the Court will allow further time to the plaintiff to furnish the security required by the first order. *Grenier v. Jacques Cartier Pulp and Paper Co.*, 5 Q. P. R. 84.

12. Power of attorney—Stay of proceedings—Dilatory exception—Certificate—Deposit—Vacation.]—Although the defendant may apply to a Judge or the prothonotary, out of term, for a stay of proceedings until security be given, he can only invoke the absence of a power of attorney to obtain a stay of proceedings until its production, by means of a dilatory exception, which can only be urged by a motion presented to the Court.—2. Such dilatory exception cannot be presented unless accompanied by a certificate from the prothonotary establishing the deposit in his office of the sum fixed by the rule of practice, and the defendant cannot afterwards apply orally to make such deposit, the making of such deposit not having the effect of making a motion addressed to the Judge or prothonotary a dilatory exception.—3. The Court has no jurisdiction to entertain a motion for security for costs and power of attorney between the 30th June and 1st September. *Mitchell v. Meldon*, 5 Q. P. R. 86.

13. Time—Notice—Surety—Attorney for.]—If a party required to give security for costs does not furnish it on the day fixed, such party cannot afterwards give it except after a new notice of one clear day to the opposite party.—2. A judicial surety cannot be represented by an attorney for the purpose of giving security. *Delisle v. McCreca*, Q. R. 21 S. C. 419.

14. Trust company's bond.]—A trust company cannot force a party to accept as security for costs a bond executed by the company for a specific amount, nor force the prothonotary to accept such security. *Ashworth v. Montreal and Atlantic R. W. Co.*, 5 Q. P. R. 29.

See APPEAL, I. 3, 8, III. 2, IV. 3, 11, IX. 5—CERTIORARI, 4—COMPANY, V. 11, 18—CRIMINAL LAW, V. 2—EXECUTION, I. 3—MUNICIPAL ELECTIONS, 4, 5—PARLIAMENTARY ELECTIONS, III. 10—PLEADING, IV., VI.—REAL PROPERTY ACT, MANITOBA, 1—WAY, II. 4.

VIII. TAXATION.

1. Abandoned appeal—Order.]—The production of the notice of the abandonment of an appeal will be sufficient authority for the taxing officer to tax the respondent's costs of the appeal, and an order is not necessary. *Fry v. Botsford*, 9 Brit. Col. L. R. 165.

2. Criminal libel—Action—Stay—Criminal Code, ss. 833-5.]—N., after his acquittal (at the third trial) on a charge of criminal libel, proceeded to tax his costs as provided by the Criminal Code, and moved before the trial Judge for the costs of some commission evidence used at the first trial. The motion was dismissed (22 Occ. N. 275, 8 Brit. Col. L. R. 276, *Rea v. Nichol*), and it was decided that the prosecutors were not liable for the costs of the two abortive trials. As there was no appeal from that order, N. abandoned the taxation, and commenced this action for his costs. The defendants applied for a stay of proceedings.—*Held*, that the plaintiff should not be allowed to pursue both remedies at once, but, as in the other proceeding there was no appeal, this action should be allowed to proceed, provided that the plaintiff would undertake to abide by such order as might be made at the trial with regard to the costs of the taxation proceedings thrown away, and in the event of the plaintiff giving such undertaking the taxation proceedings should be stayed. *Nichol v. Pooley*, 22 Occ. N. 127, 9 Brit. Col. L. R. 21.

3. Distribution of costs—Several causes of action—Judgment.]—The judgment in an action for slander provided "that the plaintiff do recover against the defendant in respect of the matters set forth in the 3rd and 5th paragraphs of the statement of claim the sum of \$1 and costs to be taxed," and "that the defendant recover from the plaintiff in respect of the matters set forth in the 4th and

6th paragraphs of the statement of claim his costs to be taxed:—"*Held*, affirming the decision of MEREDITH, C.J., that the taxing officer rightly taxed under the judgment to the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the defendant only the costs of the issues upon which he succeeded, the latter being set off. *Sparrow v. Hill*, 7 Q. B. D. 362, 8 Q. B. D. 479, followed. *Davis v. Hord*, 22 Occ. N. 285, 292, 4 O. L. R. 466.

4. Notice—Quantum of costs—Intervention—Insolvent estate—Curator.]—If a party, who has received notice that a bill of costs will be taxed, does not attend upon the day fixed in the notice, but merely urges his reasons against the taxation in a letter addressed to the prothonotary, the party who has given the notice, and who has not had his bill taxed at the time fixed, may have it taxed later, at his pleasure, in the absence of his opponent.—**2.** Upon an intervention made by the curator of the insolvent estate of the defendants upon a *saisie conservatoire*, and where such curator contests, not the claim of the plaintiff, but only his right to the effects seized, the bill of costs of the curator, whose intervention has been maintained, will be taxed pursuant to Art. 60 of the tariff, and not merely as if it was for costs of a petition to set aside the seizure. *Semble*, that costs incurred by a curator in litigating a proceeding in the name of an insolvent are payable by the unsuccessful party in such proceeding, and not out of the insolvent estate, except in case of default of the unsuccessful party to pay them. *Auger v. Montambault*, 5 Q. P. R. 21.

5. Review—Abandoned appeal—Briefs—Counsel fee.]—On the 20th May the plaintiffs gave notice of appeal, to come on at the November sitting of the full Court, from an order requiring them to give security for the costs of the action. On the 3rd June the appeal was abandoned:—*Held*, on a review of taxation, that the respondents were entitled to tax briefs and a counsel fee. Counsel fee under the circumstances fixed at \$10. A taxation may be reviewed under Rule 583, as well as under Rule 790. *Fry v. Botsford*, 22 Occ. N. 378, 9 Brit. Col. L. R. 207.

6. Supreme Court of Canada—Staying taxation.]—At the trial the plaintiffs' action was dismissed, but the full Court allowed an appeal by the plaintiffs. On appeal the Supreme Court of Canada allowed the appeal of a defendant, W., and ordered the plaintiffs to pay him the costs of that appeal and also all costs in the Court below, except in so far as he was

be regarded as the representative of the mortgagor in an action to realize a mortgage security, which costs were reserved till final decree. By the same judgment the action was dismissed as against W., except in so far as it was considered to be in the nature of a mortgage action for the purpose of enforcing a security:—*Held*, reversing an order staying the taxation of W.'s costs of appeal to the full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a Judge of the Supreme Court of Canada instead. *Merchants Bank of Halifax v. Houston*, 22 Occ. N. 330, 9 Brit. Col. L. R. 158.

See V. 8, IX.

See, also, APPEAL, VIII. 6—EXECUTION, III. 5.

IX. WITNESS FEES.

1. Taxation of—Effect of—Action for.—The taxation of a witness fee in a cause is equivalent to a judgment in favour of the witness, and such judgment may be enforced against the party who has subpoenaed the witness. A fresh action does not lie to recover the amount; the witness has simply to issue an execution. *Paradis v. Labbé*, 4 Q. P. R. 415.

2. Taxation of—Execution for—Action by witness.—A witness, whose witness fees have been taxed in an action, has, according to Art. 336, C. P., the right to an execution for the amount taxed against the party who subpoenaed him, but he has not the right to bring an action for such amount. *Paradis v. Labbé*, Q. R. 21 S. C. 211.

3. Taxation of—Motion to revise.—The taxation of a witness being, under Art. 336, C. C. P., equivalent to a judgment on which he is entitled to sue out execution, the Court has no authority to revise or reduce such taxation. *Lessard v. Meunier*, Q. R. 20 S. C. 337.

4. Taxation of—Motion to revise—Time.—The taxation of the fees of a witness who is heard in open Court, takes place in the presence of the Court, and constitutes a judgment which may be executed in the manner and after the delay prescribed by the Court (Art. 335, 336, 370, C. C. P.) And even if such taxation were considered a judgment by the prothonotary, and not by the Court, in this case the application to revise was made too late, the time for objection being while the taxation was being effected. *Campeau v. Ottawa Fire Ins. Co.*, Q. R. 20 S. C. 259, 4 Q. P. R. 197.

5. Taxation of—Revision.]—The taxation of a witness constitutes a judgment in his favour which entitles him to execution against either of the parties; it is copied in the bill of costs, but not taxed with it, and cannot be revised on a motion for the taxation of the bill without notice to the witness. *Campeau v. Ottawa Fire Ins. Co.*, 4 Q. P. R. 197, followed. *Magann v. Grand Trunk R. W. Co.*, 4 Q. P. R. 348, Q. R. 21 S. C. 72.

See V. 8.

COUNCILLORS.

See MUNICIPAL CORPORATIONS, VIII.

COUNSEL FEES.

See COSTS, II., V. 5.

COUNTERCLAIM.

See ACTION, 1—MASTER AND SERVANT, III. 2—PLEADING, II.

COUNTY COURTS.

See APPEAL, V. 1—ATTACHMENT OF DEBTS, II. 3, III. 2—COURTS, I., III., IV.—STATUTES, 1.

COUNTY COURT JUDGE.

See APPEAL, V. 3—ASSESSMENT AND TAXES, II.—MANDAMUS, 1—PARLIAMENTARY ELECTIONS, 7—SCHOOLS, I. 5.

COURT OF REVISION.

See ASSESSMENT AND TAXES, III. 4, IV. 4.

COURTS.

- I. BRITISH COLUMBIA — COUNTY COURTS.
- II. BRITISH COLUMBIA — SUPREME COURTS.
- III. MANITOBA—COUNTY COURTS.
- IV. ONTARIO—COUNTY COURTS.
- V. ONTARIO—DIVISION COURTS.
- VI. ONTARIO—HIGH COURT OF JUSTICE.
- VII. ONTARIO—SURROGATE COURTS.
- VIII. QUEBEC—CIRCUIT COURTS.
- IX. QUEBEC—SUPERIOR COURT.

I. BRITISH COLUMBIA—COUNTY COURTS.

1. Equitable jurisdiction — Action for rent—Void lease.]—It is part of the equitable jurisdiction of the Court to enforce payment of rent when the lease is void, and when the value of such lease, if valid, would exceed \$2,500 a County Court has no jurisdiction. *British Columbia Board of Trade Building Assn. v. Tupper*, 8 Brit. Col. L. R. 291.

2. Jurisdiction — Discovery — Oral examination.]—A County Court Judge has no jurisdiction to grant an order for an oral examination for discovery, except in the case of a failure to answer interrogatories as provided in s. 126 of the County Courts Act. *Roberts v. Fraser*, 22 Occ. N. 438.

3. Right of Crown to choose forum.]—It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open by reason of the defendant not residing or the cause of action not residing within the territory of such Court. *Rex v. Campbell*, 8 Brit. Col. L. R. 208.

See ATTACHMENT OF DEBTS, II. 3, III. 2—COSTS, V. 7—JUDGMENT, III. 1.

II. BRITISH COLUMBIA—SUPREME COURT.

1. Full Court—Motion for judgment—Reference by trial Judge.]—At the conclusion of the trial of an action for damages for personal injuries, the trial Judge did not see fit to enter any judgment on the findings of the jury, but left the parties to move the full Court as they might be advised. Both parties accordingly moved the full Court for judgment, the arguments being confined to the question of the liability of the defendant company:—*Held, per WALKER, DRAKE, and IRVING, JJ.*, that the full Court is an appellate Court and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge. *Per MARTIN, J.* (dissenting), that, as the question of jurisdiction was not raised by counsel nor by the Court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company. *McKelvey v. Le Roi Mining Co.*, 22 Occ. N. 42, 8 Brit. Col. L. R. 268.

2. Full Court—Place of sitting.]—*Held, DRAKE, J.*, dissenting, that special sittings of the full Court may be held either at Victoria or Vancouver to hear appeals in actions, irrespectively of where

the writs of summons were issued. *Yale Hotel Co. v. Vancouver, Victoria, and Eastern R. W. and Navigation Co., Grand Forks and Kettle River R. W. Co. v. Vancouver, Victoria, and Eastern R. W. and Navigation Co.*, 9 Brit. Col. L. R. 66.

See COSTS, V. 7.

III. MANITOBA—COUNTY COURTS.

Jurisdiction—Title to land — Gravel on highway — Municipal corporations — Costs.]—1. A claim of a municipality for damages for the taking by a railway company of sand and gravel from alleged highways and allowances for roads in the municipality, not in its actual possession or occupation, if disputed, raises a question of the title to a corporeal hereditament within the meaning of s. 59 of the County Courts Act, R. S. M. c. 33, and the jurisdiction of the County Court to adjudicate on such claim is ousted when such a question of title is *bona fide* raised, notwithstanding the provisions of ss. 615 and 644 of the Municipal Act, R. S. M. c. 100, giving the right of possession of such roads to the municipality and power to pass by-laws for preserving or selling timber, trees, stone, or gravel on any of such roads.—2. Under the enactment substituted for s. 315 of the County Courts Act by 59 V. c. 3, s. 2, an appeal to this Court lies from the decision of a County Court Judge on the question of jurisdiction as well as from all other decisions in actions in which the amount in question is \$20 or more. *Fair v. McCrow*, 31 U. C. R. 599, and *Portman v. Patterson*, 21 U. C. R. 237, followed.—3. Although the action in the County Court failed for want of jurisdiction, the plaintiff should be ordered to pay the costs of it under s. 1 of c. 5 of 1 Edw. VII. and also the costs of the appeal. *Municipality of Louise v. Canadian Pacific R. W. Co.*, 22 Occ. N. 124, 14 Man. L. R. 124.

See JUDGMENT, IV. 5—STATUTES, 1.

IV. ONTARIO—COUNTY COURTS.

Jurisdiction — Equitable relief — Amount in controversy — Judgment creditor — Setting aside chattel mortgage — Prohibition.]—Where the plaintiff, having recovered judgment for \$92.05 and costs against the defendant in a Division Court, brought an action in a County Court to set aside as fraudulent as against him a chattel mortgage for \$520 made by the defendant:—*Held*, on motion for prohibition, that the subject-matter involved was the amount due on the judgment—

not being alleged or proved that there were any other debts of the defendant than that due to the plaintiff; and the County Court had jurisdiction by virtue of s. 22 (13) of R. S. O. 1897 c. 55. *Forrest v. Laycock*, 18 Gr. 611, followed. *Dominion Bank v. Heffernan*, 11 P. R. 504, and *Re Lyons*, 10 P. R. 150, distinguished. *In re Thomson v. Stone*, 22 Occ. N. 327, 42, 4 O. L. R. 333, 585.

See APPEAL, V. I.

V. ONTARIO—DIVISION COURTS.

1. Jurisdiction — Ascertainment of amount over \$100—Proof of breach of undertaking.—The defendant gave two notes for \$75 and \$62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security that the notes might be treated as due. The plaintiffs demanded further security, and, not receiving any, brought an action on the notes before the time mentioned in them for their maturity had expired:—*Held*, that, notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes, the Division Court had jurisdiction to entertain the action. *Petrie v. Machan*, 28 O. R. 642, followed in preference to *Kreutziger v. Bros.*, 32 O. R. 418. *McCormick Harvesting Machine Co. v. Warnica*, 22 Occ. N. 158, 3 O. L. R. 427.

2. Jurisdiction — Splitting cause of action — Mortgage—Interest post diem—Damages — Prohibition.—The plaintiffs on the 2nd November, 1901, brought an action in a Division Court for one year's interest due the 1st February, 1901, and for interest on that interest, amounting together to \$81.50, due on a mortgage, principal of which was overdue:—*Held*, that the interest sued for, being interest post diem, was not due the plaintiff *qua* interest, but was recoverable only by way of damages, and the case did not come within the provisions of s. 79, s.s. 2, of the Division Courts Act, R. S. O. c. 60:—*Held*, also, that the plaintiffs, if entitled to recover interest from the 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were then entitled would be about \$140, which sum was divided for the purpose of suing in the Division Court, and that is forbidden by s. 79: and prohibition was granted. *In re Phillips v. Hanna*, 22 Occ. N. 209, 3 O. L. R. 558.

3. Motion for immediate judgment — Service with summons — Time—Holidays — Enlargement — Waiver.—A

special summons issued out of a Division Court was served on Friday the 8th November, returnable on the following Tuesday, the 12th, and with it was served a notice of motion for immediate judgment, also returnable on the 12th:—*Held*, that the notice was properly served, for there is nothing in s. 116 of the Division Courts Act, R. S. O. 1897 c. 60, which requires that, before such notice is given, the time for the filing of a dispute notice should have first expired. *Held*, also, that there was two clear days' notice of the motion, for the King's birthday and Sunday, which intervened, would not be excluded. Con. Rule 343, whereby, where the time is less than six days, Sundays and holidays must be excepted, does not apply to Division Courts, and no similar provision is contained in the Division Courts Act or Rules; but, in any event, the objection was cured by an enlargement procured by the defendants on the return day until the next day, which had the effect of giving the defendants two clear days irrespective of such holidays. *Quære*, whether an order made upon a motion of which two clear days' notice had not been given, would be valid. *In re McKay v. Talbot*, 22 Occ. N. 115, 3 O. L. R. 256.

4. Territorial jurisdiction—Cause of action—Flooding land—Erection of dam—Prohibition.—In a Division Court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the Court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such Court:—*Held*, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the Division Court in which the action was brought; and prohibition was ordered. *In re Doolittle v. Electrical Maintenance and Construction Co.*, 22 Occ. N. 136, 3 O. L. R. 460.

See ATTACHMENT OF DEBTS, III. 1—BANKRUPTCY AND INSOLVENCY, IV. 8—PROHIBITION, 1.

VI. ONTARIO—HIGH COURT OF JUSTICE.

Proper forum.—Application for mandamus *so justice of the peace—Judge in Court—Divisional Court.*—The order absolute which may be granted by the High Court under s. 6 of the Act to

protect Justices of the Peace and others from Vexatious Actions, R. S. O. 1897 c. 88, is not final, but is appealable, and the application for such order is therefore to be heard before a single Judge, sitting as the High Court, and not before a Divisional Court. *In re Rea v. Meehan*, 22 Occ. N. 133, 3 O. L. R. 361.

VII. ONTARIO—SURROGATE COURTS.

Grant of administration—Applications in different Courts.]—Where applications for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the person nearest in the order in which administration is usually granted; and in this case jurisdiction to proceed was conferred on the Surrogate Court in which application was made by the mother of the intestate, against that on behalf of creditors, in another county. *In re Tougher*, 22 Occ. N. 98, 3 O. L. R. 144.

See APPEAL, V. 2—EXECUTORS AND ADMINISTRATORS, 9.

VIII. QUEBEC—CIRCUIT COURTS.

1. Jurisdiction—Action to cancel lease—Remission to Circuit Court.]—An action in which a tenant demands the cancellation of a lease at a rent of \$108, and \$85 for damages, is of the competence of the Circuit Court, and will be removed to that Court from the Superior Court upon a declinatory exception. *Grosbois v. Bienville*, 4 Q. P. R. 409.

2. Removal of cause from—Benefit society—Future rights of member.]—An action for the recovery of benefits from a charitable association by one of its members may be removed to the Superior Court, such action having an effect on the future rights and interests of the plaintiff, and deciding for the future his status as a member of the association. *Gagné v. Victoriaville Society of St. John Baptist*, 4 Q. P. R. 382.

3. Removal of cause from—Amount in controversy—Future rights.]—An action to recover an alimentary pension of \$2.25 a week, for 47 weeks, may be removed from the Circuit Court to the Superior Court, the judgment to be rendered in such action being one which will affect the future rights of the parties. *Itouch v. Duggan*, 4 Q. P. R. 289.

4. Removal of cause from—Jurisdiction of Court—Rescission of

lease—Future rights.]—There may be evocation when a Circuit Court is competent. If it was not competent, there would be no ground for evocation, but for declination.—2. An action by which the plaintiff claims the rescission of a lease, and \$99 for damages and rent due, is within the competence of the Circuit Court.—3. Where the lease is of a flour mill and a saw mill, and the rent is to be paid half out of products of the mills, and the lease has still three years to run, and it appears in the action that the half of the products which belongs to the defendant for the three years yet to run represents the value of more than \$100, the defendant has the right to have the case removed to the Superior Court, inasmuch as his future rights in question are of greater value than \$100. *Morasse v. Verret*, Q. R. 20 S. C. 399.

5. Territorial jurisdiction—Place of sale of goods.]—A sale of goods in genere is made at the place where the goods have been weighed, counted, or measured, and an action based on a sale may be begun at the place where such operation has taken place. *Gravel v. Durocher*, 4 Q. P. R. 435.

See IX.

See, also, MUNICIPAL CORPORATIONS, VII. 3.

IX. QUEBEC—SUPERIOR COURT.

1. Case reserved—Verdict of jury.]—Held, by LEMIEUX, J., that the Superior Court in Review has absolute and unrestricted power to judge of the merits of a cause which has been reserved, without regard to the verdict of the jury: *Art. 496, C. P. C. Ferguson v. Grand Trunk R. W. Co.*, Q. R. 20 S. C. 54.

2. Jurisdiction over foreign defendant—Property in district—Writ of summons—Absence of allegation of such property—Waiver by plea—Examination of defendant—Questions as to property.]—A non-resident defendant may be sued in a district where he owns shares of stock, and against residents of which he has claims, such claims and stocks constituting property in that district within the meaning of Art. 94, C. P., s. 4.—2. Although the plaintiff should regularly, in order to make the jurisdiction of the Court, by reason of the defendant having property in the district, appear on the face of his action as instituted, have set forth in the writ or declaration that the defendant had property in the district, yet if the defendant, by his exception, tenders an issue to the plaintiff as to the existence of such property, by alleging that

he does not come under any of the provisions of Art. 94 which would justify the institution of the action before the Court seized therewith, and moreover meets the allegation of the plaintiff's answer, in which it is formally stated that the defendant has property in the district, not by any objection thereto as being made in the answer, but by a denial of its truth, he must be held to have waived any objection based upon the absence of allegation of said fact in the writ or declaration.—3. The defendant has no right to object to cross-interrogatories on a commission *rogatoire* tending to elicit evidence of property of his in the district. *McCurry v. Reid*, 4 Q. P. R. 261.

3. Order of Judge—Place of making.]—Held, per BLANCHET, J., that a notice given to the opposite party of the presentation of a petition to a Judge, elsewhere than at the chief place of the district, and an order made upon such petition, are illegal and void. *Connolly v. Standbridge*, 4 Q. P. R. 186.

4. Removal of cause into—Action for fine—Practising as advocate.]—A defendant, sued in the Circuit Court by the Bar of Montreal for the recovery of a fine of less than \$100 for the illegal exercise of the functions of an advocate, who pleads that he is a member of an association of licensed accountants, and that such association has a tariff for legal collections, may have the cause removed to the Superior Court. *Bar of Montreal v. Duff*, 5 Q. P. R. 125.

5. Removal of cause into—Validity of removal—Decision on—Judgment—Inscription.]—A party may proceed to judgment by way of inscription or motion in causes removed into the Superior Court; but if the party wishes to have a decision upon the validity of the removal, it is always necessary to mention it in the inscription or the notice of motion. *Roach v. Duggan*, 5 Q. P. R. 43.

6. Territorial jurisdiction—Right of réméré—Situation of land.]—An action by which a creditor claims, among other things, to exercise the right of *réméré*, which his debtor, now deceased, had reserved to himself, may be begun in the district in which the immovable which is subject to the right of *réméré*, is situated. *Boisclair v. Proteau*, 5 Q. P. R. 81.

See VIII.

See, also, CONTRACT, I. 1; VI. 2—DEFAMATION, I. 4—JUSTICE OF THE PEACE, 2—MUNICIPAL CORPORATIONS, VII. 3, X. 11—PATENT FOR INVENTION, 1.

COVENANT.

See CONTRACT, IV. 1—CROWN, II. 3—DEED, 2—LANDLORD AND TENANT, I. 2, 4, III. 2—LIQUOR LICENSE ACT, III. 1—MORTGAGE, 7—VENDOR AND PURCHASER.

CREDITORS' CLAIMS.

See COMPANY, V.

CREDITORS' RELIEF ACT.

See EXECUTION, II. 2.

CRIMINAL JUSTICE.

See CONSTITUTIONAL LAW, 2—MUNICIPAL CORPORATIONS, X. 4.

CRIMINAL LAW.

I. EVIDENCE.

II. OFFENCES—THEFT.

III. OTHER OFFENCES.

IV. PROCEDURE.

V. SUMMARY CONVICTION.

VI. SUMMARY TRIAL.

See APPEAL, X. 1—CANADA TEMPERANCE ACT—CONSTITUTIONAL LAW, 7—COSTS, VIII. 2—EXTRADITION—GAMING—JUSTICE OF THE PEACE—LIQUOR LICENSE ACT—MALICIOUS PROCEDURE—MUNICIPAL CORPORATIONS, X. 4.

I. EVIDENCE.

1. By-law—Copy—Costs—Time for payment—Justice of the peace.]—A by-law of a town council which is not authenticated in accordance with the provisions of Art. 4380, R. S. Q., cannot be admitted in evidence, and a copy which does not import that the original has been signed by the president and the secretary-treasurer cannot be made the basis of a prosecution.—2. A conviction by a justice of the peace which gives only eight days to a party to pay the costs which he is adjudged to pay, in contravention of Art. 4598, R. S. Q., will be quashed upon appeal to the Superior Court. *Tassé v. Beaubien*, 4 Q. P. R. 372.

2. Depositions taken at preliminary inquiry—Incomplete cross-examination—Waiver.]—At a preliminary inquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, the prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. Meanwhile, after consulting the county Crown attorney, the magistrate determined to send the case to Sarnia, and so telegraphed to the prisoner's counsel, asking a reply whether he would come up or not. Counsel replied that if the magistrate intended to send the prisoner to trial at any rate, it would be no use his coming, and accordingly he did not further attend the proceedings. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the inquiry at his own office, the prisoner being present, but not the witness, and on the evidence already taken the prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, and her depositions taken as above were tendered by the Crown and admitted:—*Held*, that, in view of s. 687 of the Criminal Code, the depositions were improperly received in evidence, the prisoner's counsel not ever having had a full opportunity of cross-examining the witness, and not having waived that right, as contended by the Crown. *Re v. Trevannc*, 22 Occ. N. 385, 4 O. L. R. 475.

3. Foreign language—Translation—Documents—Extracts from registers—Evidence of bad character.]—A conviction for murder will not be set aside because the evidence of witnesses for the prosecution, given in a language of which the defendant was ignorant, was not translated to him, where he was defended by counsel speaking and thoroughly acquainted with the language of the witnesses, and where neither the defendant nor his counsel asked that the evidence be translated.—2. Section 19 of the Canada Evidence Act, 1893, which requires that ten days' notice shall be given to the prisoner before the trial, of the intention to produce certain documents, does not apply to certified extracts from the registers of acts of civil status, which were produced merely to explain the *alias* of the person killed. Such extracts are admissible without notice.—3. Evidence of bad character or of misconduct of the prisoner, not relevant to the issue before the Court, can only be introduced by the Crown in reply or rebuttal. The admission of such evidence as part of the case

for the prosecution, before any evidence of good character has been adduced for the defence, is improper, irregular, and illegal, and constitutes sufficient ground for setting aside the conviction. The illegality is not covered by the failure of the prisoner or his counsel to object to the evidence at the time, or by the fact that his counsel cross-examined the witnesses on their statements.—4. Even after evidence of the prisoner's good character has been made by the cross-examination of Crown witnesses, the prosecution is only entitled to prove his general reputation and not particular acts of misconduct. *Re v. Long*, Q. R. 11 K. B. 328.

4. Testimony of accused—Cross-examination—Previous convictions.]—An accused person, who on his trial for an indictable offence is examined as a witness on his own behalf, is, except so far as he may be shielded by some statutory protection, in the same situation as any other witness as regards liability to and extent of cross-examination, and may be cross-examined as to previous convictions. *Re v. D'Aoust*, 22 Occ. N. 228, 3 O. L. R. 653.

See II. 3, 4, 5, III. 17.

II. OFFENCES—THEFT.

1. Alternative offences—Summary trial—Jurisdiction—Place of imprisonment.]—On application to discharge the defendants upon a writ of *habeas corpus*, it appeared that he was tried before the stipendiary magistrate for the city of Halifax, under the provisions of the Code relating to summary trials, and was convicted of the offence of stealing a quantity of whisky, of the value of \$9, "in and from a certain railway building, to wit, a certain building," and was adjudged, for his said offence, to be imprisoned in the city prison, in the said city of Halifax, for the space of nine months. Under the Code, s. 351, every one is guilty of an indictable offence, and liable to 14 years' imprisonment, who steals anything in or from any railway station, or building, &c.:—*Held*, that there was but one crime charged, and that the place of detention was a proper place within the meaning of the law: *WEATHERBE, J.*, and *GRAHAM, E.J.*, dissenting. *Re v. White*, 21 Occ. N. 310, 34 N. S. Reps. 436.

2. Charging crime—Sufficiency of charge—"Unlawfully did steal."]—The prisoner was summarily tried on the charge that he on a certain day "unlawfully did steal one piece of Oregon pine wood, of the value of \$5.40, the property

of His Majesty the King." The prisoner having been convicted, a case was reserved as to whether the charge on which he was tried was bad by reason of the omission to charge the offence as having been committed "fraudulently and without colour of right."—*Held*, WEATHERBE, J., dissenting, that the words "unlawfully did steal," in the charge, meant and included everything necessary to constitute the offence of theft or stealing as defined by s. 305 of the Code, and that the conviction, so far as this question was concerned, was right. *Rea v. George*, 35 N. S. Reps. 42.

3. Evidence — Answers tending to criminate—Claiming privilege.]—The prisoner, being a manager of a branch store for the sale of goods supplied by a factory of his employers, arranged with the checker at the factory to load certain goods on a wagon going to the branch store, without keeping the usual check on them which his employers' system demanded, and had the goods delivered to a customer of his branch:—*Held*, that he was properly convicted of theft as defined by the Criminal Code. If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case provided for by s. 5 of the Canada Evidence Act, 1893, as amended by 61 V. c. 53) in any criminal proceedings against him thereafter, but if he does object he is protected. *Rea v. Clark*, 22 Occ. N. 90, 3 O. L. R. 176.

4. Evidence — Possession of stolen goods—Crown case reserved.]—A Crown case was reserved to determine the question whether, when stolen goods are found in the possession of a prisoner, and he gives to those who find him a reasonable account of how he came by the goods, it is incumbent upon the prosecution at the trial to shew that the prisoner's account is untrue:—*Held*, that, in the absence of any evidence to shew that such account was in fact given, the Court was not in a position to determine the question reserved. *Regina v. McKay*, 34 N. S. Reps. 540.

5. Ownership — Evidence — Depositions of witness at preliminary inquiry.]—*Held*, ROULEAU, J., dissenting, upon a Crown case reserved after a conviction for theft, that the production of a steer's hide with the prosecutor's brand and earmarks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, were sufficient to justify the trial Judge in finding that the steer in question was the property of the prosecutor. (See 63 & 64 V. c. 46, s. 707

A, and 1 Edw. VII. c. 42, s. 707 A.):—*Held*, per CURIAM, that evidence that a witness at the preliminary inquiry was a corporal in the N. W. M. Police, that he had been sworn in as a member of Strathcona's Horse, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary inquiry; and that the question was one to be decided by the trial Judge. *Regina v. Forsythe*, 4 Terr. L. R. 398.

See MALICIOUS PROCEDURE, 2.

III. OTHER OFFENCES.

1. Disturbing public meeting — Municipal election — Criminal Code.]—Article 173 of the Criminal Code, which declares it an offence to disturb, interrupt, or disquiet any assemblage of persons met for religious worship, or for any moral, social, or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, does not apply to a meeting of electors called by one of the candidates during a municipal election. Articles 2946 to 2964, R. S. Q., sufficiently provide for the preservation of order at public meetings other than those mentioned in Art. 173, Criminal Code. *Rea v. Lavoie*, Q. R. 21 S. C. 128.

2. False pretences—Obtaining execution of "valuable security"—Lien note.]—An ordinary "lien note" is a "valuable security" within the meaning of s. 360 of the Criminal Code. *Rea v. Wagner*, 5 Terr. L. R. 119.

3. Fraudulent packing—Conviction for—Fruit Marks Act—"Faced or shewn surface."]—The mere having in possession for sale packages of fruit fraudulently packed within the meaning of s. 7 of the Fruit Marks Act, 1901, 1 Edw. VII. c. 27 (D.), is an offence thereunder, though no one is imposed on thereby nor any fraud intended. *Semble*, that the "faced or shewn surface," within the meaning of the section, is not limited to the branded end of the package. *Rea v. James*, 22 Occ. N. 369, 4 O. L. R. 537.

4. Fraudulent removal and concealment of goods—Indictment—Date of offence—Evidence of similar acts—Judge's charge.]—The accused were convicted by the jury at the trial on a count

for concealing certain household goods for the purpose of defrauding the insurance company by which they had been insured, by representing that they had been destroyed by fire, and collecting the insurance money upon them; also on a count which alleged a removal of the goods on or about the 11th September, 1900, for a like fraudulent purpose. Both counts were framed under s. 354 of the Criminal Code, 1892. Evidence was given at the trial shewing the removal of some of the goods in question on the 13th August, 1900, and of others on the 11th September, and in his charge to the jury the trial Judge did not distinguish between the goods removed on 13th August and those removed on 11th September, but left the case to them in such a way that they could convict on both counts or on either of them as to both sets of goods. In stating a case, the Judge certified that, in his opinion, the evidence of the removal of goods on the 13th August materially influenced the verdict of the jury:—*Held*, that the conviction of the accused on the count for concealment was right and should be affirmed, but that, although the evidence of the removal in August was probably admissible for the purpose of shewing a criminal intent in the September removal, yet the conviction for the removal should be set aside, on the ground of misdirection by the Judge in telling the jury that they could convict for the removal in August, as the trial might not have been a fair one. *Res v. Hurst*, 22 Occ. N. 68, 13 Man. L. R. 584.

5. Illegal voting—Municipal elections—Indictable offence—Information—Police magistrate—Mandamus.—Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII. c. 26, s. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial jurisdiction, to compel him to consider and deal with an application for an information for such an offence. *In re Res v. Meehan*, 22 Occ. N. 179, 3 O. L. R. 567.

6. Keeping bawdy house—Criminal Code.—A female cannot be convicted of unlawfully keeping a bawdy house, under s. 198 or s. 783 of the Criminal Code, unless it is shewn that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution. *Singleton v. Ellison*, [1895] 1 Q. B. 607, followed. *Res v. Young*, 22 Occ. N. 211, 14 Man. L. R. 58.

7. Keeping bawdy house—Offence—Duplicity—Continuity.—The defendant was convicted by the stipendiary magistrate for the city of Halifax of the offence of "keeping a disorderly house, that is to say, a common bawdy house,

on the 21st April, 1901, and on divers other days and times during the month of April, 1901," and was fined the sum of \$54, and in default of payment of the fine, was adjudged to be imprisoned with hard labour for the term of four months:—*Held*, dismissing application for a *habeas corpus*, that the offence as charged did not constitute more than one offence; and that the word "keeping" implied a continuous offence. *Res v. Keeping*, 34 N. S. Reps. 442. (See also *S. C.*, 21 Occ. N. 508, 34 N. S. Reps. 443n.)

8. Keeping disorderly or common betting house—Race track of incorporated association—Betting at.—The defendant was tried before a police magistrate upon a charge of keeping a disorderly or common betting house, found guilty, and convicted. A case was stated by the magistrate after leave granted, in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper; that the accused appeared, and he found him to be the keeper; that the house was owned by a joint stock company, of which the accused was president, and was situated on the race track of an incorporated association; that there were about thirty persons betting with the accused and his assistants, some on races then in progress in the State of New York, with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association:—*Held*, that the offence was the keeping of a house for the purposes intended in s. 197 of the Code, and that the facts proved brought the accused within its danger, and he was rightly convicted. *Held*, also, that s. 2 of s. 204 of the Code stands by itself, and that the exception contained in it is expressly limited to the first part of that section, and it should not be read into s. 197. *Res v. Hanrahan*, 22 Occ. N. 228, 3 O. L. R. 659.

9. Lottery—Disposing of property by chance—Device—Verdict.—Upon a case reserved for the opinion of the Court as to whether the interposition of a condition that the winner of a prize in a lottery should shoot a turkey at fifty yards in five shots, or, if a lady, that she could choose a substitute to shoot for her, would prevent a conviction under s. 245 of the Criminal Code, 1892, it was stated that the evidence shewed that any person could easily shoot a turkey under the circumstances:—*Held*, that it was a question for the jury whether the making of that condition was intended as requiring a real contest of skill, or merely as a device for covering up a scheme for disposing of the property by lot; that the ver-

dict of guilty involved a finding that it was merely a device; that the evidence set out in the case justified that finding; and that the conviction should be affirmed. *Rea v. Johnson*, 22 Occ. N. 125, 14 Man. L. R. 27.

10. Malicious neglect to provide necessities — Child's death—Want of medical aid—Aiding and abetting.]—The prisoner, an elder of the sect "Catholic Christians in Zion" or "Zionites," was indicted for aiding and abetting and counselling in his actions one who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. The prisoner knew that the children had diphtheria, and knew that it was a dangerous and contagious disease; that the ordinary remedies would have prolonged their lives, and in all probability would have resulted in their complete recovery:—*Held*, that medical attendance and remedies are necessities within the meaning of ss. 209 and 210 of the Criminal Code, and anyone legally liable to provide such is criminally responsible for neglect to do so. So also at common law. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. *Rea v. Brooks*, 22 Occ. N. 105, 9 Brit. Col. L. R. 13.

11. Maliciously killing cattle — Rebutting implied malice — Mens rea — Verdict—Refusal of Judge to receive.]—On a charge of unlawfully and maliciously killing cattle (under R. S. C. c. 43), it appeared that the animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it:—*Held*, that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a *mens rea* on the part of the prisoners being disproved. Power of trial Judge to refuse a particular verdict considered. *Regina v. Menzel*, 1 Terr. L. R. 487.

12. Manslaughter—Master and servant—Negligence.]—The deceased, a lad of about 15, was engaged by the prisoner as a farm-hand, on the terms of receiving for his work his board, lodging, and clothing. He died on the 14th February, after having been in the prisoner's employment about nine months. Death was caused by the gangrenous condition of many parts of his body resulting from frost bites. He was in the habit of wetting his bed, and on this account was made to sleep in the stable, and had slept there for two or three months up to the 10th February. From the 1st to the 10th February the weather was excessively cold. The lad's

fingers had been badly frozen at least three weeks before his death, and it was found that the prisoner must be taken to have known it for that length of time; nevertheless, he paid no attention to it till the 10th February. During the night of 9th-10th February, the deceased's feet were frozen solid to the ankles; this was discovered by the prisoner, who then took him to the house. It was found that the lad became so frozen, by reason of the earlier frost-bites rendering him unable to attend to himself properly, and his being left without assistance in the stable in excessively cold weather. The prisoner, on bringing the lad to the house, attended to him personally, asked a neighbor for a remedy for frost-bites, drove to a physician, got from him a prescription for frost-bites, but did not disclose to him the serious condition the lad was in. On and after the 10th February, the lad was helpless, and died on the 14th February. The prisoner had means to procure medical attendance:—*Held*, that, in view of the age of the deceased, the circumstances of the country, the fact of there being no provision for maintaining poor people, it was the duty of the prisoner, as master, towards the deceased as his servant, to have taken care of him, and that by his omission to do so he was guilty of gross negligence, to which the lad's death was attributable, and that, therefore, the prisoner was guilty of manslaughter. *Regina v. Brown*, 1 Terr. L. R. 475.

13. Murder — Constructive offence—Unlawful purpose—Common design—Evidence—Judge's charge—Finding of jury—Verdict — Mistrial.]—The prisoner and two other men were in lawful custody in a cab, when loaded pistols were thrown in by an unknown person, and all three endeavoured to escape by using the pistols. In the struggle which ensued one of the constables in charge of the three men was shot and killed by one of the prisoners. The trial Judge told the jury that there was no evidence of common design up to the moment the pistols were thrown in, yet if at that moment, before the shot was fired that killed the constable, the three men resolved to escape from lawful custody, each was responsible for the acts of the other. The jury after some consideration asked the Judge to repeat his charge as to the resolution to escape, and he did so in different words. The jury did not agree as to whether the prisoner actually fired the shot which killed the constable, but found the prisoner guilty on what their foreman called the second "count," and their verdict was recorded, with their consent, as one of "guilty," with a clause added as to their inability to agree as to whether the prisoner fired the shot:—*Held*, having regard to the evi-

dence and s. 61 (2) of the Criminal Code, that the offence, being murder in the actual perpetrator, was murder in the prisoner, even if he were not the actual perpetrator.—2. That there was nothing in the charge nor in the subsequent instructions to the jury, both of which must be read together, of which the prisoner could properly complain.—3. That the finding of the jury was a proper one, and there was no mistrial. The foreman in speaking of "counts" was referring to the two branches of the case; but the verdict was that recorded and acknowledged. *Re v. Rice*, 22 Occ. N. 225, 4 O. L. R. 223.

See *ante* I. 3.

See also INSURANCE, IV. 3.

14. Perjury—Attempt to incite—Bail—Recognition—Jurisdiction of justice of the peace—Criminal Code.]—A defendant charged with offering money to a person to swear that A., B., or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizances taken by one justice of the peace:—*Held*, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that s. 601 of the Code did not apply. The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. *Re v. Cole*, 22 Occ. N. 132, 3 O. L. R. 389.

15. Perjury—Competency of tribunal in which false swearing took place.]—D. charged R. with having committed a trespass by forcible entry on his land. The charge was apparently laid under the Agricultural Act, which restricts the hearing of such cases to a magistrate residing in the county where the offence was committed. The case was tried before the Recorder of Valleyfield, who was not a resident of the county in which the offence was committed, but was vested *ex officio* with the power of two magistrates throughout the whole district in which the county is situated. D. being convicted in the Criminal Court, of perjury, for false statements made in his deposition as a witness, the question was reserved whether the technical objection to the competency of the Recorder to sit in the case of trespass prevented the commission of the legal

offence of perjury:—*Held*, that under s. 145 of the Criminal Code of Canada, the technical objection to the jurisdiction of the magistrate did not prevent the commission of perjury by false swearing before a *de facto* legal tribunal,—more particularly in a proceeding instituted by D. before a court of his own selection. *Drew v. The King*, Q. R. 11 K. B. 477.

16. Public slander.]—Slandering a person in a public restaurant is not an offence under s. 207 of the Criminal Code. *Mercier v. Plamondon*, Q. R. 20 S. C. 288.

17. Rape—Evidence—Complaint—Particulars of—Interval—Civil action—Relations with accused after offence.]—1. On a trial for rape, the fact that the injured person made a complaint, and the particulars or details of the complaint, are admissible as evidence in chief for the prosecution to confirm the testimony of the injured person and disprove consent on her part; and among the particulars the name of the person whom she accused of the offence may be stated.—2. While the injured person should make her complaint as soon as possible after the commission of the offence, yet no specific time for such complaint being fixed by law, evidence may be admitted of a complaint made by her to her mother seven days after the offence; but the jury may and should weigh the interval which elapsed before complaint was made, when considering the probability of its truth.—3. Evidence that civil suits for damages, based on the alleged commission of rape, have been instituted by the tutor of the injured person (a minor) on her behalf, and also by her mother, may be excluded as irrelevant on the trial for rape, unless it be first proved that the injured person and her mother had stated, or let it be inferred, that the accused was innocent of the offence charged, and that they had appeared to be desirous of extorting money from him. In such case, the fact that civil actions had been instituted would be corroborative evidence. Judgment in Q. R. 9 Q. B. 147 affirmed.—4. Evidence that the accused and the injured person were on friendly terms after the commission of the alleged offence, and that she angrily resented the interference of her mother when the latter wished to put an end to such intimacy, should have been admitted, such evidence being important to enable the jury to judge whether or not there was consent on the part of the person injured. Judgment in Q. R. 9 Q. B. 147 reversed. *Re v. Riendeau*, Q. R. 10 K. B. 584.

18. Seduction—"Under promise of marriage"—Direction to jury—Mistrial—New trial.]—The words "under promise of marriage" in 50 & 51 V. c. 48, s. 2,

substituting a new section for R. S. C. c. 157, s. 4 (Criminal Code, s. 182), signify "by means of a promise of marriage." Where therefore the trial Judge directed the jury that the intention of the section was to impose a punishment for the seducing of young women under 21 by men over 21 to whom they were engaged, and the jury rendered a special verdict as follows: "The verdict is that the prisoner promised to marry F. S. in June, 1892, with the intention of carrying out his promise, but in November of the same year he seduced her, at the same time renewing his promise of marriage, and in our opinion no other man had connection with her:"—*Held*, that there had been a misdirection and therefore a mistrial; and a new trial was ordered. *Regina v. Walker*, 1 Terr. L. R. 482.

19. Unlawful assembly — Street meeting—Conviction — Proof of obstruction—Vagrancy.—The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction.—2. Article 207 of the Criminal Code does not apply to persons of general good character, but is intended to apply to loose, idle, and disorderly persons ("aux vagabonds, aux désœuvrés, ou aux débauchés.") *Rea v. Anceland*, Q. R. 11 K. B. 85.

IV. PROCEDURE.

1. Grand jury—Indorsing names of witnesses on indictment—Abortion—Form of indictment.—The provisions of s. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate the indictment. An indictment under s. 273 of the Code charging accused "with unlawfully using on her own person . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient. *Rea v. Holmes*, 22 Occ. N. 437.

2. Jury—Polling — Separating — Refreshments.—In a prosecution for felony it is discretionary with the trial Judge to permit or refuse to allow the jury to be polled. The prisoner being convicted of felony, the circumstances that two of the jurors had, during the trial, but before the Judge's charge, been allowed to separate for a short time from the other jurors in the custody of one of the constables who had been placed in charge of the jury, and during such separation to hold a short

conversation, not referring to the cause, with a stranger to the proceedings, and to partake, at their own expense, of intoxicating liquor, insufficient in quantity to cause intoxication, were held not to constitute sufficient ground for discharging the prisoner, or for a new trial. *Regina v. Ayclung*, 1 Terr. L. R. 379.

3. Trial—Offence other than that for which prisoner committed.—*Held*, that, notwithstanding the provisions of s. 773 of the Criminal Code, 1892, a Judge should not, against the wish of a prisoner, give his consent, at the trial before him without a jury which the prisoner has elected to take, to any charge being preferred in the indictment unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial. *Rea v. Carriere*, 22 Occ. N. 187, 14 Man. L. R. 52.

V. SUMMARY CONVICTION.

1. Appeal—Notice of—Parties to be served.—A notice of appeal from a summary conviction (Provincial) served upon the convicting magistrate is not invalid because it is not also addressed to and served upon the respondent. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody. *Quare*, whether service of notice of appeal on the respondent's solicitor would not be sufficient in any event. *Rea v. Jordan*, 22 Occ. N. 219, 9 Brit. Col. L. R. 33.

2. Appeal—Payment of fine—Security—Money deposit — Return to appellate Court.—A person by paying his fine on a summary conviction loses any right of appeal he might otherwise have had under s. 880 of the Criminal Code. Where on an appeal from a summary conviction an appellant makes a money deposit in lieu of recognizance, the deposit, which includes both the fine and the security for costs of appeal, should be returned by the justice into the appellate Court, and in default the appeal cannot be heard. *Rea v. Neuberger*, 9 Brit. Col. L. R. 272.

3. Appeal—Recognizance—Sureties—Statutory requirements.—On an appeal, under s. 879, Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellant, and the appeal will be quashed if the recognizance be given with only one surety.—2. An appeal not being of common law right, the conditions precedent imposed by the statute must be strictly complied with.—3. The

giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing, and the conviction may be prosecuted as if no notice had been given. *Regina v. Joseph*, Q. R. 21 S. C. 211.

4. Complaint—Description of offence—Uncertainty—Certiorari.]—A conviction obtained upon a complaint which does not give a clear and precise description of the alleged offence or contravention of a statute or by-law will be quashed upon certiorari. *Carriere v. City of Montreal*, 5 Q. P. R. 44.

5. Fine—Payment to clerk—Illegality—Quashing.]—A conviction by the Recorder's Court of Montreal requiring payment of a fine to the clerk of the Court, and not to the city, is illegal, and will be quashed upon certiorari. *Widcock v. City of Montreal*, 5 Q. P. R. 128.

6. Ontario Summary Convictions Act—Criminal Code, s. 841—Time for laying information.]—The Ontario Summary Convictions Act, R. S. O. c. 90, s. 2, has the effect of incorporating s. 841 of the Criminal Code, and therefore, in the case of any offence punishable on summary conviction, if no time is especially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from the time the matter of complaint or information arose. *Rea v. McKinnon*, 22 Occ. N. 161, 3 O. L. R. 508.

See CANADA TEMPERANCE ACT—COSTS, I. 2, 3, 4—REVENUE, 3—WAY, III. 1.

VI. SUMMARY TRIAL.

Obstructing peace officer—Consent.]—A person charged with obstructing a peace officer in the execution of his duty may, without his own consent, be tried summarily by the magistrate. *Rea v. Jack*, 9 Brit. Col. L. R. 19.

See II. 1.

See also APPEAL, VIII. 2.

CROSSINGS.

See RAILWAY, III.

CROWN.

- I. CROWN LANDS.
- II. EXPROPRIATION.
- III. PUBLIC WORKS.
- IV. OTHER CASES.

See ASSESSMENT AND TAXES, III. 5, IV. 1, 2, 4, V. 2—ATTACHMENT OF DEBTS, I. 5—CERTIORARI, 1—CONSTITUTIONAL LAW, 1, 3—COURTS, I. 3—FIXTURES, 1—GIFT, 1—PENALTIES AND PENAL ACTIONS, 1—FINES—WAY, I. 3, III. 1.

I. CROWN LANDS.

1. Military reserve—Provincial or Federal domain—Recitals in private Acts.]—The statement in the Vancouver Incorporation Acts, which are private in their nature, that certain land is a "Government Military Reserve," is not conclusive on the Crown in right of the Province:—*Held*, on the facts, that it was not shewn that Deadman's Island was a military reserve called into existence by properly constituted authority, and, therefore, that it belongs to the Province and not to the Dominion. Remarks as to the powers of the Governor of British Columbia in 1858, and as to what constituted a "reserve." *Attorney-General for British Columbia v. Ludgate*, 8 Brit. Col. L. R. 242.

2. Patent—Revocation—Powers of Commissioner of Crown Lands—Scire facias.]—See *Rea v. Adams*, Q. R. 18 S. C. 520, Q. R. 11 K. B. 56, 21 Occ. N. 323, 31 S. C. R. 220.

3. Right of way over—Easement—Prescription—Possession—Predecessors in title.]—The provisions of C. S. U. C. c. 88, ss. 37, 40, and 44, were in force at the time of Confederation, and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada.—2. Under such provisions, where one enjoys an easement as against the Crown and over Crown property within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority in Ontario, for a period of twenty years, he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation.—3. To establish the easement by prescription it is not necessary to shew that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription. *McGee v. The King*, 22 Occ. N. 87, 7 Ex. C. R. 309.

4. Timber licenses—Prior grant of land—Retroactivity.]—Lots granted or located prior to the date of a license to cut timber under Art. 1309, R. S. Q., are

exempt from the rights conferred by such license.—2. Licenses to cut timber on Crown lands are not retroactive as against prior grantees of said lands. *Price v. Delisle*, Q. R. 21 S. C. 411.

5. Timber licenses — Sales by local agent—Location ticket—Suspensive condition—Title to lands.]—During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown lands agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation therefor under the provisions of Arts. 1269 *et seq.*, R. S. Q., respecting the sale of Crown lands. Subsequently the timber license was renewed, but at the time the renewal license was issued there had not been any express approval by the commissioner of Crown lands of the sales so made by the local agent, as provided in Art. 1269, R. S. Q.:—*Held*, affirming the judgment appealed from, TASCHEREAU and DAVIES, JJ., dissenting, that the approval required by Art. 1269, R. S. Q., was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown, for which the timber license had been validly issued. *Leblanc v. Robitaille*, 22 Occ. N. 78, 31 S. C. R. 582.

II. EXPROPRIATION.

1. Compensation—Damages for injury to adjoining lands—Amount of judgment of Exchequer Court—Appeal to Supreme Court.]—Information in the Exchequer Court for a declaration that certain lands taken for the Trent Canal were vested in Her Majesty, and that the sum of \$6,860 tendered to the defendant was sufficient compensation for the lands taken and for damages to adjoining lands. The amount tendered was made up of \$3,860 for the lands taken and \$3,000 for damages. The valuator on whose report the tender was made put the value of the land at \$200 per acre. This was accepted by the Judge of the Exchequer Court, but, upon conflicting evidence, he increased the amount for damages to \$10,250. The Crown appealed on the ground that the damages were excessive:—*Held*, GWYNNE and GIBOUARD, JJ., dissenting, that, as it did not appear from the evidence that there was error in the judgment appealed from, the Supreme Court would not interfere. *Regina v. Armour*, 31 S. C. R. 499.

2. Damages—Valuation—Evidence.]—The Crown expropriated land of L. and

had it appraised by valuator, who assessed it at \$11,400, which sum was tendered to L. but refused. L. brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him \$17,000. On appeal by the Crown:—*Held*, GIBOUARD, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuator was a very generous compensation to L. for the loss of his land, and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuator should not be given in this case, expressly stated that the same course would not necessarily be followed in future cases of the kind. *Rea v. Likely*, 22 Occ. N. 191, 32 S. C. R. 47.

3. Lessor and lessee—Covenant to build on demised premises.]—Where a lessee is under covenant to build upon the demised premises, and a part of the premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the Court in fixing the amount of compensation to be paid to the lessee. *Rea v. Young*, 22 Occ. N. 84, 7 Ex. C. R. 282.

4. Possession by officers of the Crown of lands not expropriated—Taking of highway—Rifle range—Damages.]—The defendants complained that possession of certain lands not covered by the plan and description filed by the Crown in an expropriation proceeding had been taken by the officers of the Crown, and claimed compensation:—*Held*, that the right to recover compensation must be limited to lands mentioned in the plan and description filed, and to the injurious affection of other lands held therewith.—2. The defendants' predecessor in title, in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown closed up the roadway, and from the land taken from the defendants opened another in lieu thereof:—*Held*, that the defendants were not entitled to compensation in respect of the taking of the roadway.—3. Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner

of such adjacent property, he is entitled to compensation for damages arising from the use of such rifle range. *Rea v. Harris*, 22 Occ. N. 83, 7 Ex. C. R. 277.

5. Public work—Compulsory taking—Compensation—Value.]—It is the value of the land at the time of the expropriation that the Court has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation and the time of the expropriation by the Crown, the former has to bear the loss.—2. Where the property is occupied by the owner as his home, and he has no need or wish to sell, the compensation ought to be assessed upon a liberal basis. *Rea v. Sedger*, 22 Occ. N. 84, 7 Ex. C. R. 274.

III. PUBLIC WORKS.

1. Contract—Breach—Contractor's duty—Repetition of claims—Extra work—Loss of profits—Damages.]—By cl. 26 of the suppliants' contract with the Crown for the construction of a public work, it was, in substance, stipulated that, if the contractors had any claims which they considered were not included in the progress certificates, it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by cl. 27 it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reason why, in their opinion, they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions:—*Held*, that a petition of right for moneys claimed to be so due to contractors could not be sustained.—2. By one of the clauses of the contract it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract:—*Held*, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have required the contractor to do, should be given to the contractor; and where this is not done by the engineer, and such outside work is given to others, the contractor is not entitled to the profit that he would have made on

the performance of such work.—3. Where, by a change in the plan of the works, certain works are abandoned and others substituted therefor, and the contractor is paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works. *Gilbert Blasting and Dredging Co. v. The King*, 22 Occ. N. 82, 7 Ex. C. R. 221.

2. Contract for improvement of Government canal—Change in works—Breach of contract—Spoiled grounds—Cost of—Allowance for.]—The suppliants were contractors for certain works of improvement on the Rapide Plat division of the Williamsburg canal. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them:—*Held*, that the Crown was not bound to indemnify them for money expended in obtaining the said spoiled grounds.—2. In order to carry on the works in the way contemplated by the contract and specification, the contractors changed certain dump-scows into deck-scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck-scows into dump-scows:—*Held*, that the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because, the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work, under the circumstances in which it was done, as compared with the cost of doing it in the way contemplated by the contract. *Weddell v. The King*, 22 Occ. N. 85, 7 Ex. C. R. 323.

3. Injurious affection of property—Deprivation of access—Street—Damages.]—By the construction of a public work a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property, which fronted on the highway. In the first expropriation for the public work of land in the neighbourhood no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing up of the street or highway should be taken into account as one of the elements of damage:—*Held*, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and

secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway, which was proximate and not remote. *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243, *Caledonian Railway Co. v. Walker's Trustees*, 7 App. Cas. 259, and *Barry v. The Queen*, 2 Ex. C. R. 333, referred to. *McQuade v. The King*, 22 Occ. N. 87, 7 Ex. C. R. 318.

See II. 5.

IV. OTHER CASES.

1. Insolvent bank—Winding-up Act—*Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel.*—Where funds belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General, as unadministered assets, in the case of the insolvency of a bank, in proceedings under the Winding-up Act, R. S. C. c. 129, and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund:—*Held*, that, if it was clear that the matter had been really determined, effect should be given to the estoppel, but that where to give effect to it would work injustice, the Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel. A reference to the Registrar was directed to ascertain what proportion of the fund in the hands of the Minister properly belonged to the suppliants. The rule as to estoppel stated by KING, J., in *Farwell v. The Queen*, 22 S. C. R. 558, referred to.—2. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General:—*Held*, that the suppliants were not entitled to such indemnity. *Hogaboom v. The King*, 22 Occ. N. 88, 7 Ex. C. R. 292.

2. Payment for services as commissioner—Servant—Public office.—A person appointed under the provisions of R. S. C. c. 115 as a commissioner to investigate and report upon improper con-

duct in office of an officer or servant of the Crown, cannot recover against the Crown payment for his services as such commissioner, there being no provision for such payment in that enactment or elsewhere. 2. The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute.—3. The appointment partakes more of the character of a public office, than of a mere employment to render a service under contract, express or implied. *Tucker v. The King*, 22 Occ. N. 201, 7 Ex. C. R. 351.

3. Postmaster's salary—Allowances—Interest—Civil Service Act.—By the Civil Service Act, R. S. C. c. 17, sched. B, a city postmaster's salary, where the postage collections in his office amount to \$20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor-in-Council or in the Postmaster-General to make the salary more or less than the amount provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute:—*Held*, that he was entitled to recover the difference.—2. That the provisions in s. 6 of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by vote of Parliament for that purpose" was no bar to the suppliant's claim, even if it could be shewn that if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the Treasury who are intrusted with the safe keeping and payment of the public money, and not to the Courts of law. *Collins v. United States*, 15 Ct. of Clms. 35, referred to.—3. The suppliant was not entitled to interest on his claim.—4. The provision in s. 12 of the Civil Service Amendment Act, 1888, to the effect that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy-head, officer, or employee in the civil service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration, and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back. *Hargrave v. The King*, 22 Occ. N. 427.

CURATOR.

See **BANKRUPTCY AND INSOLVENCY**, I. 10, 12, 11. — **EXECUTION**, VI. 3 — **HUSBAND AND WIFE**, VI. 5 — **INFANT**, 4 — **INTERDICT** — **PARTITION**, 3 — **REVIVOR**, 1.

CUSTOM.

See **CONTRACT**, IV. 4 — **INSURANCE**, V. I.

CUSTOMS DUTIES.

See **CONSTITUTIONAL LAW**, 1 — **REVENUE**.

DAM.

See **COURTS**, V. 4 — **DEED**, 3 — **WATER AND WATERCOURSES**, 2.

DAMAGES.

1. Lord Campbell's Act—Death of relative — Reasonable expectation of pecuniary benefit.] — The parents and sisters of a man who was killed by an electric shock whilst working in the defendants' works, and in consequence, as it was alleged, of defects in the appliances supplied by the defendants at the works, sued for damages for his death. The deceased, who was the only son of the rector of a small parish near Montreal, with an income of about \$600 a year, had been given a college education and had returned home when about 21 years old. For a time he remained at home, earning nothing. Then he spent some time in the insurance business in Vermont. Then, on account of his father's illness, he went home, but soon left for Manitoba in search of occupation. There, after working at several things for about three years, he was employed by the defendants to manage their electric works at a salary of \$115 a month, out of which he had to pay \$45 a month to an engineer and sometimes to hire other assistance. He had been thus employed about three months when he met his death. The parents were getting old and were in failing health and it was not shewn whether they had or had not any means beyond the income of \$600 a year. The deceased contributed nothing to the support of the family during all the time he was in Manitoba; but, according to the father's evidence, he had been a great help to him when at home, and had assisted him in many ways in his parish work and in matters of business and was "a noble, faithful son," efficient in every way, steady and indus-

trious, and "an affectionate son and brother."—*Held*, that there was nothing in all this to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased and that the verdict of the jury in favour of the plaintiffs should be set aside. *Sykes v. North Eastern R. W. Co.*, 44 L. J. C. P. 191, and *Mason v. Bertram*, 18 O. R. 1, followed. *Davidson v. Stuart*, 22 O. C. N. 266, 14 Man. L. R. 74.

2. Lord Campbell's Act—Pecuniary loss from death of son—Negligence—Evidence—Judge's charge—Excessive damages—New trial.]—In an action under Lord Campbell's Act for the benefit of the father of a man who lost his life as alleged by the negligence of the defendants, evidence was given to shew that the father, who was about 70 years old, was unable to earn his own living; that the son who was 26, had always lived with his father, and for many years had paid for his board and lodging; that for the 15 months previous to his death, he had paid nothing, because, having gone into business for himself, his father wished him to keep the money to put into the business; that when the son went into business, the father advanced him \$700; that the sale of the son's business realized \$1,100, of which the father got \$400 on account of his advance. The trial Judge left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son; and the jury found a verdict for \$3,500.—*Held*, that the amount of the verdict shewed either that the charge was too general in its terms, or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of the damages did not entitle their opinion on the question of negligence to much weight, there must be a new trial on this point as well.—**2.** That as a claim for \$300, the balance due the father upon his advance, had not been mentioned in the particulars delivered under the Act, and was not referred to either in the plaintiff's opening, the Judge's charge, or in any other part of the case, it was impossible to say that the jury in assessing the damages had included this item; therefore, even admitting this claim to be a proper element of damage in cases under the Act, it must be submitted to the consideration of another jury.—**3.** That, outside of the debt, there was sufficient evidence to go to the jury of a pecuniary loss to the father by the son's death.

Runciman v. Star Line S. S. Co., 35 N. B. Reps. 123.

See ARREST, IV. 3—ATTACHMENT OF DEBTS, II. 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—CONTRACT, VIII. 2—COPYRIGHT, 1—DEED, 3—DEFAMATION, I. 4, II. 2, 4, 6—INFANT, 1, 3—JUDGMENT, I. 2, IV. 1—LIEN, 1—MALICIOUS PROCEDURE, 2, 6—MASTER AND SERVANT, I. 1, II. 4, 5, 9, 13—MINES AND MINERALS, 14—MORTGAGE, 11—MUNICIPAL CORPORATIONS, V. 3—NUISANCE, 1, 2—PARLIAMENTARY ELECTIONS, VI. 1—PARTICULARS, 5—PARTY WALL—PLEADING, VII. 1—PLEDGE, 1—PRINCIPAL AND AGENT, 3, 8—RAILWAY, II., IV. 2, X. 3—SET-OFF, 1—SHIP, II. 4—SPECIFIC PERFORMANCE, 2—TRESPASS, 1—WATER AND WATERCOURSES, 2—WAY, II. 5.

DEBENTURES.

Company's mortgage bonds — Interest—Action for—Evidence.]—An action for interest upon a company's mortgage bonds may succeed upon production of the coupons, without the bonds from which they have been detached. *Connolly v. Montreal Park and Island R. W. Co.*, Q. R. 20 S. C. 1.

See COMPANY, V. 9—MUNICIPAL CORPORATIONS, III. 4, 5, X. 3—PARTICULARS, 3—REVENUE, 6.

DECEIT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 8.

DECLARATION.

See PLEADING, III.

DEDICATION.

See WAY, I.

DEED.

1. Description — Falsa demonstratio — Water rights.]—By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises."

The "present wheel" was forty inches in diameter:—*Held*, that the governing words were "not exceeding forty-four inches in diameter," and that the subsequent words "being the size of the present wheel upon the premises," should be rejected as *falsa demonstratio*. *Brantford Electric and Operating Co. v. Brantford Starch Works*, 22 Occ. N. 13, 3 O. L. R. 118.

2. Lost deed—Inference as to—Maintenance of dyke—Liability for—Covenant running with land.]—In 1847 T. R. purchased from R. a portion of a large tract of marsh land of which R. was owner. From the time of the purchase down to the time of his death, in 1886, T. R. contributed, either by the performance of work or in cash, in the proportion of one-seventh of the whole amount, towards the maintenance and repair of a dyke and aboiteau erected, prior to the time of the purchase, for the protection of the land against the sea. In an action brought by the plaintiffs, claiming under R., against defendant, claiming under T. R., to recover a proportion of the cost of rebuilding the aboiteau, it appeared that the dyke in question had never been brought under the operation of the Act, R. S. c. 42, "Of Commissioners of Sewers and Dyked and Marsh Lands," but that the provisions of the Act had been followed in relation to the calling of meetings of proprietors, the summoning of proprietors to perform work, and the apportionment of the cost of such work among the proprietors according to their acreage. There was some evidence of the existence of an agreement signed T. R., having reference to his liability to contribute towards the keeping up of the dyke and aboiteau, but, at the time of the commencement of the action, the agreement had been lost, and there was no evidence to shew the exact contents of the agreement:—*Held*, that, after the lapse of time, in view of the position of the parties, and the necessity of the work for their protection, the requirements of the Act, and the facts shewn in relation to payments made and work done, there was evidence from which to infer the existence of an agreement touching the keeping up and repair of the dyke and aboiteau, constituting a covenant running with the land by which the defendant was bound:—*Held*, also, the Judge of the County Court having found that the amount which the defendant was required to pay was not excessive, that such finding was supported by the evidence, and should be affirmed. *Roach v. Ripley*, 34 N. S. Reps. 352.

3. Riparian rights—Building dams — Penning back waters—Warranty—Improvement of watercourses — Condition

precedent—*New grounds taken on appeal*—*Assessment of damages*—*Interference by appellate Court.*]—A deed of sale of lands bordering on a stream, with the privilege of constructing dams, &c., therein, provided that, in case of damages being caused through the construction of any such works, the seller or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators, and the purchasers should pay the amount awarded:—*Held*, that, under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of Art. 5535, R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused. *Held*, also, that an objection as to arbitration and award being a condition precedent to an action for such damages, which have been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Superior Court. On a cross-appeal, the Supreme Court refused to interfere with the amount awarded for damages in the Court below upon its appreciation of contradictory evidence. *Hamelin v. Bannerman*, 22 Occ. N. 7, 31 S. C. R. 534.

See COMPANY, IV. 8—EASEMENT, 2, 3, 4—ESTOPPEL—EXECUTION, II. 4—HUSBAND AND WIFE, IV. 3—NOTARY, 2—TRUSTS AND TRUSTEES, 3—VENDOR AND PURCHASER, 8, 16.

DEFAMATION.

I. LIBEL.

II. SLANDER.

See COSTS, I. 4, VIII. 2—CRIMINAL LAW, III. 16—HUSBAND AND WIFE, I. 6—INJUNCTION, 2—PLEADING, VII. 14—TRIAL, III. 1.

I. LIBEL.

1. Defamatory words in pleading—*Action pending original action.*]—A party who complains of a libel contained in a pleading is not bound to postpone his action for such libel until the case in which the pleading was filed is decided, and such action, if taken, will not be dismissed as premature. *Wilkins v. Major*, 4 Q. P. R. 172.

2. Malice—Privilege—Evidence—Meaning of words—New trial.]—The defendant, the general manager of a life insurance company, wrote a letter to F., a

policy-holder in the company, in which he stated that the plaintiff had been "removed" from his office as local agent of the company, and assigned as the reason for such removal that they had tried for a considerable time past to get the plaintiff to attend properly to their business, and that it was only because it was clearly necessary that the change was made. He stated, further, that, to give the plaintiff the opportunity of getting the benefit of commissions on outstanding business, certain matters had been left in his hands, but that he, the defendant, now found that the plaintiff had collected money which, up to the present time, they "had been unable to get him to report." This letter was handed by F. to the plaintiff, who, in addition to acting as the local agent of the company, was a solicitor, and acted as F.'s legal adviser:—*Held*, in libel, that the trial Judge correctly directed the jury that if the statements made by the defendant in the letter in question, as to the reasons for dismissing the plaintiff, were made by him, knowing them to be false, there was malice, and his privilege was wholly gone. *Held*, also, that the reception of evidence of F., as to the meaning which she attached to the words of the letter, was not, under O. 37, r. 6, "a substantial wrong or miscarriage in the trial," and was not therefore ground for a new trial. *Müller v. Green*, 35 N. S. Reps. 117.

3. Pleading—Defence—Fair comment—Absence of justification—Striking out defences.]—In an action for alleged libel contained in an article in the defendant's newspaper, the defendants pleaded fair comment, but did not attempt in any way either to set up the facts upon which it was alleged the article was fair comment, or allege that the statements of fact in the article complained of were true:—*Held*, that the defence was bad, and should be struck out. It is clear upon the authorities that a man may not invent his facts and then comment on them, and succeed upon the ground that, the facts being assumed to be true, the comment is fair. *Crow's Nest Pass Coal Co. v. Bell*, 22 Occ. N. 407, 4 O. L. R. 660.

4. Publication—Place where damages arise—Superior Court—District.]—An action based upon a libel, and claiming damages incurred in a certain district other than that in which the defendant has his domicile and in which the newspaper containing the alleged libel is printed, may be begun in such district. *Gosselin v. Belley*, 4 Q. P. R. 233.

5. Verdict for \$1—Costs.]—Action for libel in which the jury brought in a verdict in favour of the plaintiffs for \$1.

The plaintiffs' counsel applied for full costs of suit, which was opposed. By Rule 926, where any action is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge or the Court otherwise orders:—*Held*, that the verdict of \$1 recovered should not carry costs, but no costs should be allowed to defendants. *Manitoba Farmers' Hedge and Wire Fence Co. v. Stovel Co.*, 22 Occ. N. 186, 14 Man. L. R. 55.

II. SLANDER.

1. Particulars.]—The plaintiff in an action to recover damages for defamatory words uttered in the presence of two persons specified and named, and also before "a large number of other persons," will be ordered, upon motion, to give the names of these persons, the dates upon which the words were spoken, and the places at which they were spoken. *Lefebvre v. Lefebvre*, 4 Q. P. R. 366.

2. Pleading—Defence—Mitigation of damages.]—In an action for damages for slander the defendant may allege certain facts which, if they are proved, will go, if not to justify the alleged defamation, at least to mitigate the damages. *Dion v. Fafard*, 4 Q. P. R. 351.

3. Pleading—Justifying words not charged—Striking out—Demurrer.]—To an action for damages for slander the defendant may not plead facts tending to justify other words than those mentioned in the declaration. The elimination of allegations in a plea not amounting to justification, should be sought by demurrer, and not by a motion to strike them out. *Phillips v. Laviolette*, 4 Q. P. R. 396.

4. Pleading—Privilege—Discovery—Examination of plaintiff—Relevancy of questions—Mitigation of damages—Rule 488.]—In an action for slander, the defence, besides a denial of the material allegations of the statement of claim, was that the words were spoken without malice, in the belief that they were true, and under such circumstances as to make them a privileged communication. There was no justification. The words were: "He perjured himself and stole the money from the township;" and the innuendo was that the plaintiff had committed wilful and corrupt perjury for the purpose of procuring a reward of \$5 from a municipal corporation, and had secured the reward by perjury:—*Held*, that certain questions put to the plaintiff upon his examination for discovery relating to

the reward and directed to eliciting information as to the payment of it to the plaintiff; another question as to statements made by the plaintiff at meetings of the municipal council; another question as to the fact of the council having offered a reward to be paid to any one who killed a dog found worrying sheep; another question apparently intended to elicit information as to the particular times or occasions when the words were spoken; and other questions which might elicit information relevant to the defence of privilege—were all questions relevant to the issues raised on the pleadings, and should be answered by the plaintiff. Though a defendant may not be able to prove all that is necessary to be shewn to establish a defence of privilege, he is entitled to the benefit of what he does shew, in mitigation of damages, if it goes to that—subject, perhaps, to his having given the notice required by rule 488. *McKenzie v. McLaughlin*, 22 Occ. N. 92.

5. Privilege—Master and servant—Malice.]—A master is not necessarily liable in damages because, in the presence of fellow servants or even of casual bystanders, he accuses his servant of theft. Such an accusation is *prima facie* privileged, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like. *Guldner v. Busse*, 22 Occ. N. 137, 3 O. L. R. 561.

6. Proof of defamatory words—Verdict—New trial—Aggravation of damages—Evidence—Pleading.]—Motion for a new trial in an action of slander upon the ground that the verdict was perverse. The defamatory words were proved, but the jury, nevertheless, found a verdict for the defendant, instead of giving nominal damages to the plaintiff:—*Held*, that a new trial should not be granted in order that the damages which the jury ought to have assessed should be assessed to the plaintiff. Another ground of the motion was that the Judge had refused to admit evidence offered by the plaintiff and directed to aggravate the damages:—*Held*, that, inasmuch as there was no allegation in the plaintiff's pleading to entitle him to give evidence of the acts of the defendant on which he wanted to rely to aggravate the damages, a new trial should not be allowed on this ground. It would be a highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of, without having set them forth in his pleading, and which might, if unanswered, seriously affect the

damages. *Mülligan v. Jamieson*, 22 Occ. N. 409, 4 O. L. R. 650.

7. Solicitor—Innuendo—Amendment—Justification—Evidence—Privilege—Interest.]—In an action for slander of the plaintiff as a solicitor, the evidence at the trial shewed that the defendant asked L. who his solicitor was, and upon L. mentioning the plaintiff, defendant said that if he had an honourable man like M. he might win his case. L. said that he would not change until he found some fault—that the plaintiff always did honourably with him, whereupon the defendant said that the plaintiff was “a dirty man.” The words proved were different from those set out in the statement of claim, and the innuendo in the statement of claim was inapplicable. Leave was given to the plaintiff on the trial to amend, but no amendment was made:—*Held*, setting aside the verdict for the plaintiff, that, in the absence of evidence to shew how the words proved were spoken and understood, the Court could not frame an innuendo to conform to the evidence. On the trial the defendant called the plaintiff as a witness, and the plaintiff admitted that he had collected a sum of money for a client which he failed to pay over, and that he had given a note for the amount collected which he had also failed to pay, and that a judgment had been obtained against him for the amount, which was unpaid at the time of the trial:—*Held*, that this evidence shewed conduct which was dishonourable to plaintiff as a solicitor and justified the language used by the defendant. If the words proved were spoken and understood in the sense that the plaintiff was not an honourable solicitor the defendant had substantiated a good defence. *Held*, also, that the communication was a privileged one, L. being a person who had an interest in knowing of it. *Tobin v. Gan-non*, 34 N. S. Reps. 9.

DEFEASANCE.

See **BILLS OF SALE AND CHATTEL MORTGAGES**, 1.

DEMURRER.

See **ACCOUNT**, 2—**DEFAMATION**, II. 3—**PLEADING**, I., IX. 2, 3.

DEPOSITIONS.

See **CRIMINAL LAW**, I. 2, II. 5—**EVIDENCE**, I. 1, 2, 3, 4.

DEPUTY RETURNING OFFICER.

See **PARLIAMENTARY ELECTIONS**, IV. 5, VI. 1.

DESISTMENT.

See **JUDGMENT**, IV. 4.

DETINUE.

Action for—Necessity for demand before action.]—Action to recover from the defendant goods, the property of the plaintiffs, which they alleged the defendant had unjustly detained and at the date of the issue of the writ unjustly detained. The defendant pleaded only a denial of the detention:—*Held*, that the ownership of the goods, not being disputed by defendant, was, by Rule 114 (N. W. T.), admitted, and the detention was the only matter to be considered. *Held*, on the evidence, that no demand for the property was made upon the defendant before the issue of the writ, and therefore detinue would not lie. *Clements v. Flight*, 16 M. & W. 48, followed. *Gray v. Guernsey*, 22 Occ. N. 402.

See **SALE OF GOODS**, III. 1.

DEVISE.

See **SPECIFIC PERFORMANCE**, 2—**VENDOR AND PURCHASER**, 13—**WILL**.

DEVOLUTION OF ESTATES ACT.

Real representative—Caution—Sale of land—Lapse of year—Injunction.]—Letters of administration to the real estate of an intestate who died 18th October, 1900, were issued to the defendant on the 14th October, 1901. Prior to such issue the defendant advertised the lands of the deceased to be sold on the 22nd October, 1901, more than a year after the death of the intestate. No caution had been filed within the year under the Devolution of Estates Act; and it appeared that there were no debts:—*Held*, that the plaintiff was entitled to an injunction restraining the defendant from selling the plaintiff's interest in the lands, under the above circumstances. Clearly the defendant had no right to sell the lands at the time he proposed doing so, as, by the operation of the Devolution of Estates Act, the property had become vested in

the heirs of the deceased. *Byer v. Groves*, 22 Occ. N. 28, 2 O. L. R. 754.

See DOWER, 2—HUSBAND AND WIFE, VII. 1—VENDOR AND PURCHASER, 8.

DIRECTORS.

See COMPANY, 1.

DISAVOWAL.

See CONSEIL JUDICIAIRE.

DISCHARGE.

See EXTRADITION, 4—MANDAMUS, 1—PRINCIPAL AND SURETY, 1, 2, 3, 4.

DISCIPLINE.

See CHURCH, 1.

DISCLOSURE.

See MANDAMUS, 1.

DISCONTINUANCE.

See ACTION, 1, 2.

DISCOVERY.

I. EXAMINATION OF PARTIES.

II. INTERROGATORIES.

III. PRODUCTION OF DOCUMENTS.

See BANKRUPTCY AND INSOLVENCY, I. 2. III.—COMPANY, V. 16—MINES AND MINERALS, 14—PARTICULARS—PLEADING, X. 2.

I. EXAMINATION OF PARTIES.

1. Appointment for—Attendance on—Oath—Refusal to answer—Subpoena.]—Where a plaintiff, who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn:—*Held*, that she was precluded

from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpoena. *Regina v. Flavelle*, 14 Q. B. D. 364, followed. *Cooke v. Wilson*, 22 Occ. N. 168, 3 O. L. R. 299.

2. Burden of Proof—Right to examine defendant before plaintiff.]—In a case in which the burden of proof is upon the plaintiff, he may object to be examined for discovery by the defendant before he has himself examined the defendant. *De Martigny v. Bienvenu*, Q. R. 21 S. C. 317, 4 Q. P. R. 352.

3. Corporation—Miners' union—Pleading—Dual capacity—Subpoena—Conduct money—Objection.]—A miners' union entered an appearance in an action, and by statement of defence raised the objection that it was not shewn that the defendant was a legal entity capable of being sued:—*Held*, that defendant by so pleading must be deemed, before the trial of the action, to be a corporation for the purposes of the litigation, and so compellable to make discovery. Where it is sought to examine for discovery in his dual capacity, one of the defendants in an action, who is also secretary of another defendant, two subpoenas are not necessary. On an examination for discovery, if the witness has an objection, such as the payment of insufficient conduct money, he should take the objection before the examiner, and he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer. *Centre Star Mining Co. v. Rossland Miners' Union*, 9 Brit. Col. L. R. 190.

4. Officer of railway company—Engine-driver.]—The driver of the engine attached to a train of which the plaintiff's husband was the conductor in charge at the time of an accident, is an officer of the railway company examinable for discovery under Rule 439, in an action against the company to recover damages for the death of the husband by negligence causing such accident. *Knight v. Grand Trunk R. W. Co.*, 13 P. R. 386, overruled. *Leitch v. Grand Trunk R. W. Co.*, 12 P. R. 541, 671, 13 P. R. 369, *Dawson v. London Street R. W. Co.*, 18 P. R. 223, *Casselman v. Ottawa, Arnprior, and Parry Sound R. W. Co.*, ib. 261, and *Odell v. City of Ottawa*, 12 P. R. 446, followed. *Morrison v. Grand Trunk R. W. Co.*, 22 Occ. N. 149, 162, 4 O. L. R. 43.

5. Patent of invention—Agents—Production of documents.]—In an action for damages for the infringement of a patent of invention the defendants pleaded

among other defences that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced and after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent:—*Held*, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented invention was manufactured in Canada under the patent; and the plaintiff, having refused upon his examination for discovery to answer questions relating to these matters, was ordered to attend for re-examination at his own expense. The plaintiff was also ordered to make and file another affidavit on production, and to produce for inspection statements received by him from such agents. *Parramore v. Boston Manufacturing Co.*, 22 Occ. N. 415, 4 O. L. R. 627.

6. Questions on examination—Assignment of chose in action—Interest of assignor—Nominal plaintiff.—In an action to recover a money demand assigned to the plaintiff, the defence alleged that the plaintiff was only a nominal plaintiff and that no consideration had been given for the assignment, and the plaintiff on his examination for discovery objected to answer questions relating to the consideration and to the interest of the assignors:—*Held*, that the question should be answered. *Boggs v. Bennett Lake and Klondike Navigation Co.*, 8 Brit. Col. L. R. 353.

7. Time for—Day before trial.—The preliminary examination of a party may take place the day before that fixed for examination and hearing. *Ward v. Jamin*, 5 Q. P. R. 130.

See III. 1.

See, also, BANKRUPTCY AND INSOLVENCY, III. 1—COURTS, I. 2, IX. 2—DEFAMATION, II. 4—EVIDENCE, I. 3, 4—EXECUTION, III. 6—PARLIAMENTARY ELECTIONS, III. 5—PARTIES, IV. 3.

II. INTERROGATORIES.

1. Absence of defendant—Delay—Foreign commission.—In case of absence of the defendant, the attorney upon whom service of interrogatories *sur faits et articles* has been made may demand a delay in order that his client may appear and reply, or ask that the plaintiff shall interrogate the defendant upon a commission rogatory, in default of which the *faits et articles* will be taken *pro confesso*. *Hall v. Fenton*, 4 Q. P. R. 344.

2. Default—Pleading.—A defendant in default for a reply to interrogatories *sur faits et articles* cannot obtain permission to plead until he has been relieved from his default. *Hall v. Fenton*, 4 Q. P. R. 356.

See COURTS, I. 2—PARLIAMENTARY ELECTIONS, III. 6—SERVICE OF PAPERS, I.

III. PRODUCTION OF DOCUMENTS.

1. Affidavit—Materiality—Examination of parties—Scope of—Contents of document—Costs of examination.—The plaintiff alleged a contract of partnership with the defendant J. for the promotion of a company to buy plant and carry on a manufacturing business, and that the defendants R. and C. had maliciously caused a breach of the partnership contract; he claimed an account and damages. The defendant R., on examination for discovery, said that he had obtained agreements to sell from various companies, which were afterwards assigned to a newly incorporated company, not a party to this action. The plaintiff alleged that these agreements were, in fraud of him, substituted with variations, for agreements previously entered into between the same companies and J.; also that R. and C. paid \$20,000 to J. to induce him to act with them; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of J., which was paid:—*Held*, that the agreements and the cheque and a memorandum prepared by R. were material to the plaintiff's case, and should be produced and accounted for in the defendants' affidavits of documents.—**2.** That R. and C. ought not, as a matter of discretion, to be ordered to disclose facts which would become material only when the plaintiff should have established his right to damages.—**3.** That the plaintiff was entitled to know from R. and C. whether they paid money to J.; whether it was their own money, or, if not, whose it was; and for what it was paid:—**4.** That the plaintiff was entitled to know the amount paid by R. and C. to the M. company for

their business, it being alleged by the plaintiff that he and J. had obtained a prior option upon it.—5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them:—*Semble*, that where an examination is unnecessarily long, the costs of it should be entirely disallowed. Decision of MEREDITH, C.J., 22 Occ. N. 117, varied. *Evans v. Jaffray*, 22 Occ. N. 133, 3 O. L. R. 327.

2. Affidavit — Privilege — Confidential communications — Solicitor and client.—There has been a progressive development of the particularity required in the description of correspondence between a solicitor and his client in order that it may be protected from discovery by reason of privilege. As the affidavit on production cannot be contradicted, the grounds upon which the privilege is claimed must be set forth explicitly and fully, so that the Court may judge as to whether the documents so described are properly withheld from production. The affidavit must not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged. Where the solicitors were acting as agents for the sale of defendant's land in question in this action, shortly before the first of the letters for which the defendant claimed privilege was written:—*Held*, that the defendant, in order to protect the correspondence, should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action." *Gardner v. Irwin*, 4 Ex. D. 49, *O'Shea v. Wood*, [1891] P. 286, and *Ainsworth v. Widing*, [1900] 2 Ch. 315, followed. *Clergue v. McKay*, 22 Occ. N. 148, 162, 3 O. L. R. 478.

3. Letters between solicitor and client—Privilege.—Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, which had passed into the possession of the defendant from the executor of the writer, after his decease, are not privileged from production. *Platt v. Buck*, 22 Occ. N. 374, 4 O. L. R. 421.

4. Letters between solicitor and client—Real estate agents—Privilege.]

—Where certain letters had passed between a party to a suit and a firm of solicitors, who had also been acting as his real estate agents:—*Held*, that an affidavit on production, in which privilege was claimed for the letters, must set forth and distinguish what communications took place between him and his real estate agents and what between him and his solicitors, as the former were not privileged. *Mosley v. Victoria Rubber Co.*, 55 L. T. N. S. 482, followed. *Clergue v. McKay*, 22 Occ. N. 64, 3 O. L. R. 63.

5. Motion — Necessity for.—A defendant cannot demand, by motion, the production of the documents invoked by the plaintiff in support of his claim, the plaintiff not being in a position to proceed with his action until such documents have been produced. *Lemay v. Labelle*, 4 Q. P. R. 189.

6. Railway company — Accident — Reports of servants—Privilege.—A company sued in damages on account of an accident may be compelled to produce at the trial all reports of the accident made by its employees in the ordinary course of their business, or of their duty, but not its reports made at the request or instance of its solicitor, in answer to inquiries made by the latter, with a view to and in contemplation of anticipated litigation. *Stocker v. Canadian Pacific R. W. Co.*, 5 Q. P. R. 117.

7. Time for — Particulars.—If a plaintiff, at the time of the return of his action, does not file the documents invoked in support of his demand, the defendant may make a motion for their production and for particulars. *Thibault v. Poulin*, Q. R. 21 S. C. 126.

See I. 5.

See, also, EXHIBITS, 2—PLEADING, VII. 4, 5, 6—PRINCIPAL AND AGENT, 4.

DISMISSAL OF ACTION.

See ACTION, 2, 3, 4, 5.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT, I.

DISQUALIFICATION.

See JUSTICE OF THE PEACE, 4—MUNICIPAL CORPORATIONS, VIII.

DISTRESS.

See ASSESSMENT AND TAXES, I.—LANDLORD AND TENANT, II.—REPLEVIN.

DISTRIBUTION.

Report on—Collocation—Contestation—Evidence—Proceedings in action.]—Upon a contestation of a collocation of a report on distribution, the Court will consider all the proceedings in the action subsequent to the writ of summons. *Pelletier v. Michaud*, Q. R. 20 S. C. 413.

See EXECUTION, II. 2, VI. 2—WILL, I.

DISTURBING PUBLIC MEETING.

See CRIMINAL LAW, III. 1.

DITCHES.

See WATER AND WATERCOURSES, 6.

DIVIDENDS.

See COMPANY, IV. 3.

DIVISION COURTS.

See ATTACHMENT OF DEBTS, III. 1—BANKRUPTCY AND INSOLVENCY, IV. 8—COURTS, V.—LIMITATION OF ACTIONS, II. 3—PROHIBITION, 1.

DIVISIONAL COURTS.

See APPEAL, V. 1, 2—COURTS, VI.

DOCUMENTS.

See CRIMINAL LAW, I.—DISCOVERY—EVIDENCE, III.

DOMICIL.

Origin—Charge—Intention—Proof of residence—Permanency of.]—Judgment of FALCONBRIDGE, C.J., 21 Occ. N. 498, holding upon the evidence that a deceased person had not effected a charge of domicile, affirmed on appeal. *Coyne v. Ryan*, 22 Occ. N. 12.

See HUSBAND AND WIFE, VI. 7—PARLIAMENTARY ELECTIONS, III. 9—SERVICE OF PAPERS, 1—WRIT OF SUMMONS, II. 12

DOMINION LANDS ACT.

See CONTRACT, IV. 1—MINES AND MINERALS, 7—RAILWAY, X. 1.

DONATIO MORTIS CAUSA.

See GIFT, 2.

DOWER.

1. Election—Gross sum—Proceeds of sale of testator's land.]—The owner of land died intestate leaving a widow and an infant child. The widow administered, and, with the consent of the official guardian, sold and conveyed the land in March, 1899, barring her dower in the deed of grant, and the whole of the purchase money was paid into Court to the joint credit of herself and of the official guardian, she reserving her right to elect between receiving the value of her dower or a distributive share of the estate, one of which it was clearly understood she would be entitled to be paid out of the fund in Court. In September, 1900, the widow executed a document wherein she elected to take the value of her dower in lieu of "any other interest she might have in her husband's undisposed of real estate." She died in April, 1901:—*Held*, that the administrator of the widow's estate was entitled to receive out of the moneys in Court the value of the widow's dower, computed according to the annuity tables. *In re Pettit*, 22 Occ. N. 300, 4 O. L. R. 506.

2. Lease made by deceased husband—Priorities—Assignment of dower—Rights of executor and devisee—Devolution of Estates Act.]—A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in priority to persons claiming under leases created by her husband, without her assent, during the coverture. *Stoughton v. Leigh*, 1 Taunt. 402, followed. Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for

her dower, the executor not assenting thereto:—*Held*, that the conveyance was of no avail; for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act, R. S. O. 1897 c. 127, the whole inheritance of the testator vested. *Allan v. Revcr*, 22 Occ. N. 294, & O. L. R. 309.

See BANKRUPTCY AND INSOLVENCY, I. 10—EXECUTION, II. 1—HUSBAND AND WIFE, IV. 4—VENDOR AND PURCHASER, 3—WILL, II. 8.

DRAINAGE.

See MUNICIPAL CORPORATIONS, V.

DRAINAGE REFEREE.

See REFEREES AND REFERENCES, 2.

DUTIES.

See CONSTITUTIONAL LAW, 1—REVENUE

EASEMENT.

1. Ancient lights — *Prescription* — *Unity of possession*—*Evidence* — *Onus* — *Presumption*—*Commencement of statute*.] —A right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time, during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend. In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to shew uninterrupted use for twenty years, and then the burden is shifted to the defendant to shew such facts as negative the presumption of ancient lights. Remarks as to the time from which the twenty years' prescription began to run. *Feigenbaum v. Jackson*, 8 Brit. Col. L. R. 417.

2. Deed — *Registration* — *Renewal* — *Road*—*Discontinuous, but apparent servitude*—*Aggravation*.] — Default to renew the registration of the instrument creating a servitude does not effect the extinction of such servitude, unless a real, discontinuous, and non-apparent servitude is in question.—2. In the present case the servitude, while discontinuous, was apparent; it was indicated by a road, and the Act 44 & 45 V. c. 6, ss. 5, 6, 7, does not apply to servitudes discontinuous but apparent,

and consequently it was not necessary to renew the registration of the instrument which constituted it.—3. It cannot be said that there is aggravation of the servitude by the fact that the place where it is sought to be maintained changes little by little by reason of the fact that the water of a river breaks the land and makes more distant, little by little, the place where the gravel is found which is to be taken out according to the terms of the instrument creating such servitude. *Perry v. Simard*, Q. R. 21 S. C. 322.

3. Non-apparent continuous servitudes — *Building restrictions* — *Necessity for renewal of registration* — *Party wall*—*Deed*—“*Fastened*.”]—Clauses in a deed of sale, prohibiting building in certain materials, or for certain purposes, do not create servitudes.—2. The words “*établissements qui pourraient être de nature à incommoder les voisins et devenir un sujet de plainte*,” imply some substantial inconvenience exceeding ordinary grievances such as neighbours living together are obliged to endure.—3. A proprietor has a right, under Art. 520, C. C., to occupy nine inches of his neighbour's land, for a foundation wall eighteen inches in thickness. He has also the right to erect upon his line, a building which cannot serve as a *mitoyen* wall, such as a wooden brick-encased wall, but subject to the obligation of demolishing such wall at his own cost, in the event of his neighbour constructing a *mitoyen* wall between their respective properties; and even where the previously existing wall was quite sufficient for his purposes, he will still be obliged to contribute one-half of the cost of the *mitoyen* wall if he use it.—4. The word “*fastened*” (*scellé*) in Art. 534, C. C., is sufficiently complied with by a window fixed to the wall with nails or screws, and these covered by a moulding of plaster which is, itself, fastened in such a way as not to be removable without being broken.—5. The deed creating a servitude must sufficiently indicate the dominant property without extrinsic aid. Judgment in Q. R. 19 S. C. 292 affirmed. *Sicotte v. Martin*, Q. R. 20 S. C. 36.

4. Projecting eaves — *Descending water and snow*—*Common owner* — *Conveyances by*—*Grant and reservation of rights*.] — The plaintiff's predecessor in title, owning a lot of land, built two houses thereon, with a passageway between them, and the eavestrough and part of the eaves of the defendant's house projecting over the passageway. He then conveyed to the defendant's predecessor in title the westerly house, “with the privilege and use of the projection of the roof . . . as at present constructed,” and

covenanted for the quiet and undisturbed enjoyment of the projection, and that, on any sale or conveyance of the house to the east, he would "save and reserve the right . . . to such projection." Subsequently he conveyed the easterly house, with the land between the two houses, to the plaintiff, "subject to the right . . . to the use of the projection . . . as at present constructed."—*Held*, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the grantor could not insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming down, and the plaintiff stood in no higher position than the grantor; that the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below; and the action was dismissed with costs. *Hall v. Alexander*, 22 Occ. N. 178, 3 O. L. R. 482.

See CROWN, I. 3.

ECCLESIASTICAL LAW.

See CHURCH—MARRIAGE, 1, 2.

EJECTMENT.

See EXECUTION, II. 4—PARTICULARS, 2—SPECIFIC PERFORMANCE, 1.

ELECTION.

See DOWER, 1—LIMITATION OF ACTIONS, I. 2—PARTIES, IV. 5—PLEADING, VII. 7, 12, 16, X. 2—VENDOR AND PURCHASER, 3, 13—WILL, II. 8.

ELECTIONS.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS—SCHOOLS, I. 5.

ELECTRIC COMPANIES AND ELECTRICITY.

See ASSESSMENT AND TAXES, III. 3, VII. 2—CONSTITUTIONAL LAW, 5—CONTRACT, VII. 1—MUNICIPAL CORPORATIONS, IV. 1, 2—NEGLIGENCE, 3—NUISANCE.

EMPLOYERS' LIABILITY ACT, B.C.

See MASTER AND SERVANT, II. 9, 12, 13.

EQUALIZATION OF ASSESSMENTS.

See ASSESSMENT AND TAXES, II.

EQUITABLE ASSIGNMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 16—CHOSE IN ACTION, ASSIGNMENT OF.

EQUITABLE EXECUTION.

See EXECUTION, II. 1—RECEIVER.

EQUITY OF REDEMPTION.

See EXECUTION, II. 1.

ESTATE.

See EXECUTORS AND ADMINISTRATORS—TRUSTS AND TRUSTEES, 9—WILL, I. II.

ESTOPPEL.

Deed—Privies in estate—Reservation—Mines and minerals—Action.—A person who had acquired title by possession to certain lands, nevertheless, afterwards, took a conveyance from the owner by paper title, for an expressed consideration of \$900, reserving to the grantor the mines and minerals, and gave a mortgage back for \$300, "saving and excepting the mines, which said mortgagor has no claim to."—*Held*, that this did not revert the mines in the grantor, nor was a subsequent owner estopped, by the exception in the mortgage, from claiming the mines as against one deriving title from the grantor, the action not being based on the mortgage, but being wholly collateral to it. *Dodge v. Smith*, 22 Occ. N. 52, 3 O. L. R. 306.

See CROWN, IV. 1—INSURANCE, II. 1, IV. 5—LANDLORD AND TENANT, I. 4—LIEN, 2—MECHANICS' LIENS, I. 3, III. 2—MINES AND MINERALS, 1—MISTAKE—SALE OF LAND—TRUSTS AND TRUSTEES, 3.

EVICTION.

See **VENDOR AND PURCHASER**, 16, 17.

EVIDENCE.**I. ADMISSIBILITY.****II. CORROBORATION.****III. SECONDARY EVIDENCE.****IV. OTHER CASES.**

See **APPEAL**, I. 7, II. 2, VIII. 4—**ASSESSMENT AND TAXES**, VII. 1—**ATTACHMENT OF GOODS**—**BANKS AND BANKING**, I. 4—**BASTARD**—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 11—**BOUNDARIES**—**CANADA TEMPERANCE ACT**—**CHOSE IN ACTION, ASSIGNMENT OF**, 6—**CONTRACT**, VII. 2—**COSTS**, II.—**CRIMINAL LAW**, I.—**DAMAGES**, 2—**DEBENTURES**—**DEFAMATION**, I. 2, II. 6, 7—**DISCOVERY**—**DISTRIBUTION**—**EASEMENT**, 1—**EXECUTION**, II. 4—**EXTRADITION**, 1—**FALSE ARREST**, 2—**HUSBAND AND WIFE**, VI. 4—**INSURANCE**, V. 2—**JUSTICE OF THE PEACE**, 3—**LANDLORD AND TENANT**, I. 5—**LIQUOR LICENSE ACT**, II. 2—**MASTER AND SERVANT**, II. 1—**MINES AND MINERALS**, 5, 8, 11—**NUISANCE**, 2—**RAILWAY**, IV. 2—**SALE OF GOODS**, II. 3, V., VI.—**SHIP**, II. 1, 2—**TENANTS IN COMMON**—**TITLE TO LAND**—**TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN**, 6—**TRIAL**, II. 13, 14—**WATER AND WATERCOURSES**, 3—**WILL**, III.—**WITNESSES**—**WRIT OF SUMMONS**, II. 6.

I. ADMISSIBILITY.

1. Cross-examination of party on affidavit.—Where a party has been cross-examined on an affidavit made by him, the opposite party can use such examination at the trial as evidence in rebuttal of the evidence of the same party. *Livingstone v. Colpitts*, 21 Occ. N. 102, 4 Terr. L. R. 441.

2. Depositions—Special examiner—Wrong person—Suppression.—An order appointed "E. K. A. of Neihart, Montana. U. S. A., a justice of the peace," a special examiner to take the depositions of certain witnesses; the depositions were in fact taken by one G. P. M., a justice of the peace, it appearing that E. K. A. had ceased to hold office, and that G. P. M. was his successor in office. An agent for each party appeared on the taking of the depositions, and it did not appear that any objection was made to G. P. M. taking the depositions:—*Held*, that the depositions were taken by G. P. M. without authority

and, therefore, could not be used in evidence. *Held*, also, that the depositions being taken without authority and being not merely irregular, a substantive motion to suppress was not necessary, and that the objection could be taken upon their being tendered in evidence. *Claverie v. Gory, Pagnac v. Claverie*, 4 Terr. L. R. 470.

3. Depositions on discovery—*Officer of company.*—On an examination for discovery of the plaintiffs' manager the plaintiffs took no part:—*Held*, that the deposition was admissible at the trial. *Royal Bank of Canada v. Harris*, 8 Brit. Col. L. R. 368.

4. Depositions on discovery—Parties.—The depositions of the defendant B. taken at the instance of the plaintiff for the purposes of discovery before the trial, under Rule 201 of the Judicature Ordinance, N. W. T., and offered and received in evidence at the trial under Rule 224, were held admissible as evidence, not only as against the defendant B., but also as against his co-defendants, all the defendants being members of the committee of management of an unincorporated association, and all being represented on the examination of the defendant B. by the same counsel, who had the opportunity of cross-examining B. if he wished to do so, and did in fact cross-examine him. *Allen v. Allen*, [1894] P. 246, followed. *Saitmarsh v. Hardy*, 42 L. J. Ch. 422, distinguished. *Carte v. Dennis*, 21 Occ. N. 267, 5 Terr. L. R. 30.

5. Evidence taken in another cause—Adjudication.—Articles 291 and 292, C. P., relate only to the trial of causes pending and tried at the same time; therefore, evidence taken in a cause already adjudicated upon cannot serve as evidence in a pending cause. *Quebec Central R. W. Co. v. Dionne*, 4 Q. P. R. 424.

6. Knowledge of trial Judge of facts in another action.—Where it was evident from the conduct of counsel on both sides that they took it for granted that the trial Judge had knowledge of certain facts established in another action which had been tried before him with a jury, and out of which this action arose, and that for that reason no evidence was given of such facts:—*Held*, that the trial Judge might properly make use of his knowledge. *Pease v. Town of Moosomin*, 5 Terr. L. R. 207.

7. Parol evidence—Cheque—Deposit of, as security—Commercial matters.—Bills of exchange, promissory notes, and cheques are commercial terms

by themselves, and with respect to all persons and all contracts or transactions relating thereto are commercial matters. Therefore, one who alleges that he has given a cheque to another as security for an obligation which he has assumed to the holder of the cheque to attempt to collect the amount of the latter's deposit in a bank in liquidation, may prove his allegation by oral testimony. *Town of Maison-neuve v. Chartier*, Q. R. 20 S. C. 518.

8. Parol evidence—Trust.—Among other claims in this action, the plaintiff asked to have it declared that the purchase made by the defendant of a lot of land was made to him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust:—*Held*, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust. The authorities are conflicting. *Bartlett v. Pickersgill*, 1 Cox 15, 1 Eden 515, 4 East 577, *Heard v. Piley*, L. R. 4 Ch. 548, *James v. Smith*, [1891] 1 Ch. at p. 387, and *Rochevaucauld v. Bousted*, [1897] 1 Ch. 196, discussed. *Held*, however, that the evidence in this case failed to prove the trust. *Hull v. Allen*, 22 Occ. N. 138.

II. CORROBORATION.

1. Action against representative of deceased—*Cestui que trust*.—The material corroborative evidence required by R. S. O. 1897 c. 73, s. 10, in a proceeding by or against the executor of the will, or the administrator of the estate, of a deceased person, may be given by one who is interested as *cestui que trust* in the matter of the claim in question in the action. The interest of such a witness in the result may well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration. *Baxold v. Upper*, 22 Occ. N. 257, 4 O. L. R. 116.

2. Action against representative of deceased—Promissory note — Comparison of handwriting.—In an action on a promissory note against the personal representatives of the maker, tried by a Judge without a jury, a duplicate registered mortgage purporting to be executed by the maker of the note, with the registrar's certificate of registration upon it, was produced in evidence to prove by comparison the signature of the note:—*Held*, that the Judge was entitled to compare the signatures, and act on his own conclusion as to their identity, and having

found them identical, the corroboration was sufficient to satisfy R. S. O. 1897 c. 73, s. 10. *Thompson v. Thompson*, 4 O. L. R. 442.

See EXECUTORS AND ADMINISTRATORS, 3, 5.

III. SECONDARY EVIDENCE.

1. Books and documents — Objections — Resemblance or identity of performances — Copyright.—Objections to secondary evidence of the contents of a written document must be distinctly stated when it is offered; and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case. Each programme of an entertainment is an original document, not a mere copy. The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case (an action for infringement of a copyright by the performance of an opera). What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture, and facial expression. Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed. *Carte v. Dennis*, 5 Terr. L. R. 30.

2. Notice to produce—Object of.—The only object of a notice to produce is to enable the party giving it to put in secondary evidence of the contents of a writing, if the original, being in the possession of the party to whom the notice is given, is not produced by him. If the party chooses to produce the original without notice, or if the party desiring to put in the original gets possession of it and puts it in, it is no objection that a notice to produce was not given. *Carte v. Dennis*, 21 Occ. N. 267, 5 Terr. L. R. 30.

3. Proof in writing—Necessity for — Loss by unforeseen accident — Oral testimony.—Where the original of a notarial minute has disappeared without the fault of the parties, by some inevitable circumstance, the case comes within Art. 1233, para. 6, C. C., which provides that proof may be made by testimony "in cases in which the proof in writing has been lost by unforeseen accident." *Filast-rault v. Feeny*, Q. R. 20 S. C. 11.

4. Voluntary destruction of document.—A plaintiff who has voluntarily

destroyed an instrument under seal evidencing an agreement with the defendant cannot be allowed to prove orally the contents of such instrument. *Coté v. Cantin*, Q. R. 21 S. C. 432.

IV. OTHER CASES.

1. Affidavits—Interlocutory application—Information and belief—Grounds for.]—An affidavit leading to an order for an *ex juris* writ containing allegations of fact which must necessarily have been founded on information and belief only, must state the source of information. *Tate v. Hennessey*, 8 Brit. Col. L. R. 220.

2. Application to let in fresh evidence—Knowledge of party.]—A petition to open up judgment in order to prove an allegation in the declaration (which the plaintiff forgot at the hearing) will not be granted unless it appears that the facts which it is desired to prove did not come to the knowledge of the plaintiff until after the close of the examination of witnesses. *Canadian Breweries (Limited) v. Allard*, 4 Q. P. R. 365.

3. Entries—Proof of debt—Sufficiency.]—Where regular entries of sales of goods were made, and invoices were rendered and demands for payment frequently made, and the debtor only questioned one small item of 50 cents, and, promising to pay, asked for delay:—*Held*, that the indebtedness was sufficiently established. *Laporte v. Duplessis*, Q. R. 20 S. C. 244.

4. Examination of witness de bene esse—Rule 638.]—Summons to examine a witness *de bene esse*. The witness lived at Telegraph Creek, in Cassiar District, but at the time of the hearing of the summons he was in Victoria temporarily, and the application was for the purpose of getting his evidence before he went back to Telegraph Creek:—*Held*, that Rule 368 was applicable, and order made as asked. *Hyland v. Canadian Development Co.*, 22 Occ. N. 170, 9 Brit. Col. L. R. 32.

5. Foreign commission—Examination of absent plaintiff.]—Action of replevin. After the commencement of the action one of the plaintiffs left the jurisdiction. Application was made on behalf of the plaintiffs to examine the absent plaintiff under a commission, the plaintiffs' solicitor stating that the absent plaintiff was joined by mistake:—*Held*, that the plaintiffs ought to have leave to issue a commission. The delay was satisfactorily accounted for, and, even if the absentee

was a real plaintiff, the law permits a commission to be issued to take the evidence of a party. The fact that it is on the part of the plaintiff makes no difference. *Willis v. Behie*, 22 Occ. N. 430.

6. Notes of, taken at trial.]—The notes of evidence taken at the trial are conclusive as to what took place thereat. *McDougall v. McLean*, 1 Terr. L. R. 450.

7. Opinion evidence.]—See *Wright v. Shattuck*, 5 Terr. L. R. 264.

EXAMINATION.

See BANKRUPTCY AND INSOLVENCY, III.
—COMPANY, V. 16—DISCOVERY, I.—
EVIDENCE, IV. 4—JUDGMENT DEBTOR.

EXCEPTIONS.

See PLEADING, IV.

EXCHANGE OF LANDS.

See MORTGAGE, 12 — PRINCIPAL AND
AGENT, 1.

EXCHEQUER COURT OF CANADA.

See CROWN, II. 1—PATENT FOR INVENTION, 1—TRADE NAME, TRADE MARK,
AND INDUSTRIAL DESIGN.

EXECUTION.

- I. FOR COSTS.
- II. SALE UNDER.
- III. SEIZURE—OPPOSITION TO.
- IV. SEIZURE—WHAT MAY BE SEIZED.
- V. STAY OF EXECUTION.
- VI. OTHER CASES.

See APPEAL, IV. 9—BANKRUPTCY AND
INSOLVENCY, I. 6, 12—CHOSE IN ACTION,
ASSIGNMENT OF, 7—COSTS, IX. 2—EXECUTORS
AND ADMINISTRATORS, 2—LAND
TITLES ACT, N.W.T., 1, 2—LIQUOR
LICENSE ACT, III. 1—MINES AND MINERALS,
6—MUNICIPAL CORPORATIONS, IX. 2—PARTITION,
3—PRINCIPAL AND AGENT, 2—REAL PROPERTY
ACT, N. W. T.—SHERIFF—SOLICITOR, 6—SUCCESSION,
3—TRADE NAME, TRADE MARK, AND INDUSTRIAL
DESIGN, 1.

I. FOR COSTS.

1. Judge's order—Direction for set-off—Service of allocatur—Issue of execution—Production of order.]—Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set off *pro tanto*, the deduction should be made before execution issues on the Judge's order. It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable. When execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody of the book in which the order is entered. *People's Building and Loan Assn. v. Stanley*, 22 Occ. N. 410, 4 O. L. R. 644.

2. Motion for leave to appeal—Court of Appeal—High Court.]—An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same, were taxed and a certificate thereof issued, which, with the order of dismissal, was filed in the High Court, and a *fi. fa.* to levy the amount of such costs placed in the sheriff's hands for execution:—*Held*, that the order directing payment of costs was properly made under ss. 77 and 119 of the O. J. Act; and that execution was properly issued out of the High Court, under Rule 3, by analogy to the procedure under Rule 818. *People's Building and Loan Association v. Stanley*, 22 Occ. N. 300, 371, 4 O. L. R. 247, 377.

3. Pending appeal to Privy Council—Security.]—In a case in which, by special leave, an appeal has been allowed to the Judicial Committee of the Privy Council, execution may issue, pending such appeal, for the costs incurred in the Courts appealed from, without, for that purpose, sending the record back to the Court of first instance, when no security for the costs incurred in the Courts below has been given with the appeal to the Judicial Committee. *Consolidated Car Heating Co. v. Came*, 5 Q. P. R. 48.

II. SALE UNDER.

1. Equity of redemption—Unassigned dower in—Share in—Equitable execution.]—A right of dower in an equity of redemption before assignment is not

exigible under a writ of *fi. fa.*, nor is the share of one of several tenants in common of an equity of redemption. Where a person dies possessed of lands mortgaged by him, his widow, before assignment of dower, though entitled to redeem, has no estate in the land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption" within s. 29 of the Execution Act, R. S. O. 1897 c. 77, and her interest does not come within s. 30 of that Act, and therefore is not saleable under it nor under s. 33. In such a case an execution creditor seeking equitable execution should proceed under Rules 1016-1018, and not by *relator*. *Canadian Bank of Commerce v. Rolston*, 22 Occ. N. 232, 4 O. L. R. 106.

2. Lands—Advertisement—Distribution—Costs of execution creditor—Creditors' Relief Act.]—Where two writs of execution against lands were placed in the sheriff's hands on the same day, and, no further steps being taken by the first execution creditor, the second execution creditor directed the sheriff to advertise and sell the lands, which he did under the second execution creditor's writ:—*Held*, that the advertisement was in law the seizure of the lands under the second execution creditor's writ; and, there being no seizure or sale under that of the first, the second was entitled, under s. 26 of the Creditors' Relief Act, R. S. O. 1897 c. 78, to payment in full of his taxed costs and the costs of his execution, which exceeded the amount of the residue of the proceeds of the sale after payment of the sheriff's fees. *McGuinness v. McGuinness*, 22 Occ. N. 54, 3 O. L. R. 78.

3. Lands—Diligence—Creditors—Priorities.]—In order that a first seizure of an immovable shall prevent a second one, it is necessary that at the moment when it is desired to proceed with the second, there shall be nothing to hinder the sale of the immovable under the first seizure. Therefore, if the creditor making the first seizure has suspended the sale of the immovables, he cannot oppose a seizure made by another creditor. *Garsand v. Roussin*, Q. R. 19 S. C. 566.

4. Lands—Ejectment—Defence—Adverse possession—Evidence—Admission of death—Deed—Certified copy—Affidavit—Judgment—Registry of—Statute of Limitations.]—In an action brought by the plaintiffs, trustees under the will of D., to recover possession of land bought by them at a sheriff's sale under execution on a judgment recovered by D. against M., the defendant relied upon his adverse possession of the land at the time of the sale:—*Held*, that the defence was not applicable to the case of a sheriff selling under execution. The objection was also taken

that at the trial the plaintiffs failed to give evidence of the death of D.:—*Held*, that the objection was one which under Order 21, Rule 5, must be specifically taken; and the reception in evidence, without objection, of a certified copy of the will of D. was an implied admission of his death. At the trial the plaintiffs put in evidence a certified copy of the deed to M., the judgment debtor, without shewing that the original was not in the plaintiffs' possession:—*Held*, that this was a matter as to which the plaintiffs should be permitted to amend by filing the usual statutory affidavit. *Per* McDONALD, C.J., that the registry of the judgment obtained by D. had the same effect, so far as his title was concerned, as if he held a mortgage. *Held*, also, the judgment being registered, and securing the title, that the Statute of Limitations would not begin to run until after the date of the recovery of the judgment. *Doull v. Keefe*, 34 N. S. Reps. 15.

5. Movables — Revendication—Pleading.]—A plaintiff who revendicates movable property may set forth, in answer to a defence alleging that the defendant bought the property at a judicial sale in virtue of a writ of execution prior to that upon which the goods were sold, that the second sale was simulated and only effected by the defendant forcing the locks of the house where the goods were deposited. *Balfrey v. Frank*, 4 Q. P. R. 337.

III. SEIZURE—OPPOSITION TO.

1. Amendment — Affidavit — Provisions of Statute.]—Article 647, C. P., does not prevent the amendment of an opposition to a seizure, but merely requires that such amendment shall be accompanied by a deposition on oath affirming that the facts alleged therein are true.—2. An affidavit is not required in support of an amendment which merely alleges a provision of a public statute, of which the courts are bound to take notice without its being pleaded—in this case, the charter of the city of Montreal. *Larocque v. City of Montreal*, 5 Q. P. R. 34.

2. Amendment—Title—Costs.]—On motion to reject an opposition, and on motion by the opposant to amend:—*Held*, that a delay will be granted to the opposant to amend her opposition by setting up her title and the date thereof, upon her paying costs of both motions *au préalable*, and that in default by her of so doing within such delay, the opposition will stand dismissed. *Senecal v. Chappell*, 5 Q. P. R. 72.

3. Bailiff's return — Exemptions — Controverting return—Res judicata.]—A defendant can, without inscribing *en faux* against the report of a bailiff seizing the defendant's goods, declaring that he has left to such defendant all the goods which he had the right to keep, prove that the bailiff has not left them.—2. A judgment declaring a *saisie-gagerie* good and valid, and ordering the sale of the property seized, constitutes *res judicata* upon an opposition *à fin d'annuler* founded upon defects or irregularities in the seizure. *Adams v. Mulligan*, Q. R. 20 S. C. 251.

4. Claim by transferee — Possession.]—An opposition to a sale of movable effects, made by a third person, who has lent money to the debtor and has had transferred to him the effects seized as security for the loan, but has left them in possession of the debtor, will be dismissed upon motion as frivolous. *Pharand v. Emond*, 5 Q. P. R. 29.

5. Costs—Taxation—Notice—Particulars—Several defendants—Contestation by one only—Apportionment of costs.]—Pursuant to Art. 554, C. P., costs incurred in the Circuit Court must be taxed upon notice to the opposite party before an execution issues.—2. Where, upon a bill of costs, taxed, but not on notice to the opposite party, execution issued for a larger amount than was really due, an opposition demanding the annulment of the seizure for the whole amount, without mentioning the items of the bill of costs objected to, will not be allowed; but the opposant will be permitted to prove his allegations of surcharge, notwithstanding that that is equivalent to a revision of the bill of costs; and if he succeeds in establishing that the amount of the writ of execution is larger than the amount due, the opposition will be allowed for the difference between these amounts, but without costs, seeing that both parties are in fault.—3. By virtue of item 37 of the Circuit Court tariff, or item 19 of the Superior Court tariff, when there are two defendants appearing by different attorneys, and one of the two files a plea, the attorney of the plaintiffs, if he succeeds in obtaining judgment upon every issue, will be entitled to the full amount of his costs against the defendant who contested the action, and to half the costs against the one who did not contest. *Descormiers v. Hyland*, 5 Q. P. R. 112.

6. Dismissal—Examination of opposant.]—The court may, upon a motion for the examination of the party opposing a seizure and for the dismissal of the opposition after such examination, order the examination of the opposant, saving the right to pronounce afterwards upon the

part of the motion relating to the dismissal of the opposition. It is not necessary for the applicant to allege in his notice of motion that the opposition is untenable on its face. *Dupuis v. Beaudry*, 4 Q. P. R. 416.

7. Joint opposition.]—Two or more persons each one of whom is sole owner of one of the articles seized, cannot, by a joint opposition, each claim the article which belongs to him, especially if their titles are not of the same nature. *Hill v. Howley*, Q. R. 20 S. C. 269, 4 Q. P. R. 176, 353.

8. Lessor of goods seized.]—A third party, the lessor of the goods seized, who has reserved to himself the right to re-take them if the lessee should not pay the instalments regularly, may exercise such right by way of opposition to the seizure of the goods by a creditor of the lessee. *Farand v. Emond*, 5 Q. P. R. 58.

9. Movables and immovables—Opposition as to movables—Sale of immovables—Sheriff—Return.]—The plaintiff having caused to be seized at the same time movables and immovables in the possession of the defendant, and a third party having by opposition claimed the movables as his, the plaintiff may afterwards proceed to a sale of the immovables without waiting for the result of the opposition, for he is not bound to go further with the contest as to the movables. —2. The sheriff, having, before making a return of the writ, his proceedings, and the opposition, taken a copy of the writ and of the *procès verbal* of the seizure of the immovables, may, without other authority, and without waiting for judgment upon the opposition as to the movables, proceed to advertise and sell the immovables. *Gaudeau v. Tetu*, Q. R. 20 S. C. 402.

10. Right of debtor to withdraw effects.]—An opposition to a seizure, based on the fact that some of the effects seized could have been withdrawn and selected by the debtor, must shew that he was not allowed to select and withdraw them; otherwise it will be dismissed on motion. *Beaubien Produce and Milling Co. v. Lecuyer*, 5 Q. P. R. 71.

11. Sufficiency.]—An opposition to a seizure alleging that the opposant is the owner of the animals seized, on account of having himself bought them and paid for them out of his own money, supported by an affidavit following the provisions of Art. 647, C. P., is sufficient in law, and will not be rejected on motion. *Perron v. Marquis*, 4 Q. P. R. 174.

See VI. 1.

IV. SEIZURE—WHAT MAY BE SEIZED.

1. Bank notes—Property passing.]—A superannuated civil servant had presented his superannuation certificate at the wicket of a bank, which paid superannuation allowances for the Dominion Government. The teller counted out the amount coming to him, and placed the money on the edge of the teller's wicket. Before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against the payee:—*Held*, that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it. *Hall v. Hatch, Bank of Montreal v. Hatch*, 22 Occ. N. 58, 3 O. E. R. 147.

2. License under Liquor License Act.]—See *Walsh v. Walper*, 22 Occ. N. 49, 3 O. L. R. 158.

3. Patent of invention—Erigible property.]—A patent of invention is seizable, and an opposition based upon its alleged *insaisissabilité* will be dismissed upon motion. *Farand v. Emond*, 5 Q. P. R. 63.

4. Property already under seizure—Duty of sheriff—Seizure upon seizure.]—A sheriff, having a judgment against the defendant, issued a *fi. fa.* addressed to the coroner (Arts. 35, 36, C. P.), and the latter seized the immovables of the defendant. The defendant having lodged an opposition, the coroner returned the writ, the opposition, and all his proceedings. Subsequently the plaintiffs, having a judgment against the defendant, issued a *fi. fa.* addressed to the sheriff, and he seized thereunder the same immovables:—*Held*, that the old maxim "seizure upon seizure is invalid" exists no longer except as modified by the Code of Procedure: that the sheriff had not to note this second writ upon that addressed to the coroner: that Art. 711, C. P., did not apply to this case; that the sheriff, upon receiving the second writ, had nothing to do but seize, since he had not then the first writ, and that writ had not been addressed to him. *Richer v. Michaud*, Q. R. 20 S. C. 442.

5. Property declared by will insaisissable—Seizure for debt of testator.]—P. M. devised his property to L. M., without reserve, constituting him his universal legatee from the day of his death, upon the express condition that L. M. was to dispose of the property in favour of his children, in equal or unequal parts as he should judge fit when making partition of his other property. L. M. accepted the devise. Then, by his will, he bequeathed his property (other than that which he had from P. M.) to his son

J. B. M., the present defendant, on the express condition that he should preserve the property for his children and divide it among them equally or unequally. And, moreover, L. M., desiring to discharge the trusts mentioned in the will of P. M., made choice of his said son J. B. M. to receive the property left by P. M., and he gave him all such property, and added that he (L. M.) wished and intended that the property belonging to the testamentary succession of P. M. should be preserved in the same manner as the property devised by L. M., and he concluded his will as follows: "I wish and intend that the enjoyment of the property above devised to my son J. B. M. shall be *insaisissable* and I declare that I give him this legacy *à titre d'aliments*." L. M. dying, J. B. M. accepted the will. The plaintiffs, having obtained judgment against J. B. M., as universal legatee, for a debt contracted by L. M., caused to be seized the immovables coming from P. M. J. B. M. lodged an opposition, setting up that the property was subject to a substitution in favour of his children, and invoking also the *insaisissabilité* clause:—*Held*, that the substitution provided by the will of L. M., as regards the property which came from P. M., in favour of the children of J. B. M., was valid, but that the decree did not purge the substitution; that the defendant, who was the *grevé*, could not set up the substitution by his opposition; that the *insaisissabilité* clause as regards the property coming from P. M., imposed by the will of L. M., was valid and within the powers of L. M., but it could not be invoked against the debts left by L. M., and the defendant, as his universal legatee, was bound to pay. *Richer v. Michaud*, Q. R. 20 S. C. 442.

6. Section of railway.]—A section of a railway may be seized and sold separately; it is not necessary that the seizure should apply to the whole line. *Dillon v. Atlantic and Lake Superior R. W. Co.*, Q. R. 19 S. C. 533, 5 Q. P. R. 68.

V. STAY OF EXECUTION.

1. Death of defendant—Delay before acceptance of succession.]—An heir-at-law has three months and forty days to make an inventory and deliberate upon the acceptance of the succession, and any execution against the property of the defendant issued after his decease may be suspended by means of a dilatory exception. *Garand v. Malo*, 4 Q. P. R. 228.

2. Garnishment proceedings.]—Where a creditor of the plaintiff, before execution against the defendant, causes a

writ of garnishment to be served on the defendant, such writ does not suspend the proceedings under the execution, unless the defendant deposits in Court the amount of the judgment, with interest and costs. *Montambault v. Niquette*, 4 Q. P. R. 411.

VI. OTHER CASES.

1. Disbursements—Scale of—Opposition—Costs—Scale of.]—When a writ of execution is issued from the Superior Court, the disbursements must be according to the amount for which the writ is issued, but if the amount is less than \$100, then it is the tariff of the 4th class of the Superior Court which must be applied; but when the execution of such writ is opposed by way of *opposition afin d'annuler*, alleging payment, which is sustained with costs, the fees of the attorney follow the amount claimed by the writ. *Morinville v. Baril*, Q. R. 20 S. C. 327.

2. Distribution — Motion—Fees of prothonotary.]—A motion demanding the distribution of the moneys made upon execution among a number of creditors indicated in the notice of motion will be dismissed; the result of the motion would be to deprive the prothonotary of his fees. *Evans v. Chaput*, 4 Q. P. R. 199.

3. Guardian of goods seized—Removal of goods—Obligation to return.]—Where the person appointed guardian of goods seized under execution removes them, he must, if the seizure is annulled, bring them back to the domicile of the execution debtor. *Adams v. Mulligan*, Q. R. 20 S. C. 203, 4 Q. P. R. 60.

4. Judgment for part of sum claimed—Appeal to increase amount.]—A plaintiff who has obtained judgment for less than the amount demanded, and appeals from that judgment to have the amount increased, cannot, in the meantime, obtain an execution in satisfaction of the judgment so rendered. *Migneron v. Yon*, 5 Q. P. R. 60.

5. Return by sheriff nullae terrae—Same writ sent to another sheriff.]—When a writ of execution *de terris* has been addressed to the sheriff of a district, and he has reported that he has found no property in his district to seize, the prothonotary may address the same writ to the sheriff of another district where the defendant has property. *Dillon v. Atlantic and Lake Superior R. W. Co.*, Q. R. 19 S. C. 533, 5 Q. P. R. 68.

6. Sufficiency of seizure — Sale—Adjournments—Notice—Expiry of writ.]

—The defendants contended that the bailiff executing a writ of *fi. fa.* did not make a seizure, as required by law, of certain buildings, or that, if he did legally seize, he abandoned the seizure; that he did not give due notice of the sale, or at any rate of the adjournments; that the buildings were sold for an inadequate price; and that the writ had expired before the sale. The bailiff found the buildings locked. He did not enter them, or put a man in possession, but put up written notices on the buildings stating that he had seized them, and mentioning the date when and the place where he intended to sell:—*Held*, reasonably sufficient to constitute a seizure as against defendants, whether it would, or would not, have held the property as against a subsequent *bona fide* purchaser from the owner for value, without notice. No notices of the several adjournments of the sale were made public by the sheriff, but the debtor must be presumed to have known of the day fixed for the sale, as a solicitor, at the sale, on the defendants' behalf, gave the bailiff a notice forbidding the sale. The seizure was made while the writ of execution was in force, and the sale then advertised was adjourned from time to time till the buildings were actually sold. The fact that the writ expired before the actual sale was, therefore, unimportant. *Dizon v. Mackay*, 22 Occ. N. 374.

EXECUTORS AND ADMINISTRATORS.

1. Action by old executors — Account—Contestation by one of several new executors.—Although several testamentary executors, appointed jointly and having the same powers, ought to act together, one of them may when they are sued by the executors whom they have replaced for acceptance of an account rendered by the old executors and a declaration that the latter have transferred the property of the succession to the new executors—contest such action alone with the object of opposing the approval of the account and the declaration that the new executors have received from the old executors all the property of the succession, but he may not demand the reformation of the account nor a judgment against the old executors for the benefit of the succession. *Desjardins v. Masson*, 1 Q. R. 11 S. C. 195.

2. Administrator — Renunciation after grant—Necessity for order—Execution issued by next of kin on judgment recovered by intestate—Costs.—Letters of administration to the estate of H. N. K. were granted to his widow S. K., and to

his two children, E. R. and R. K. S. K., by deed, assigned all her interest in the personal property to E. R. and R. K., and, by the same deed, purported to renounce all her right, authority, and power as administratrix of the estate. E. R. and R. K. obtained from the Judge of a County Court an order permitting them to issue execution on a judgment obtained by H. N. K. in his lifetime against defendant:—*Held*, following *Jost v. McNeil*, 20 N. S. Reps. 156, that S. K., having accepted letters of administration, could not renounce without the order of the Court of Probate, and that the order made on the application, and in the names of E. R. and R. K. only, was bad and must be set aside. The order was bad, further, for want of jurisdiction, because it permitted execution to issue on the judgment "for the benefit of the said E. R. and R. K.," instead of requiring any sum realized to be applied according to law under the direction of the Court of Probate. As the appellant had failed on the merits, a larger amount appearing to be due on the judgment than was claimed, there should be no costs to either party, either in this Court or in the Court below. *Kaulbach v. Mader*, 35 N. S. Reps. 219.

3. Corroborative evidence — Advance of money—Claim for interest—Promissory note—Action for consideration.—The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member of the firm, for \$1,000 lent by him, in the lifetime of the deceased, to the firm, for the purposes of the firm. He also claimed interest, alleging that this was spoken of at the time the money was borrowed, and that the deceased member of the firm had asked him what the interest would be, and he told her five per cent.; the surviving member of the firm denied all recollection of interest having been mentioned:—*Held*, that, inasmuch as there was corroboration as to the main fact, namely, the borrowing by the firm of \$1,000, this was sufficient to entitle the plaintiff to recover the interest claimed. When a promissory note is taken from a borrower as collateral security for money lent to him, and not in payment, an action can be brought for the money lent, notwithstanding that, owing to the form of the note, an action thereon could not be maintained. *Steele v. Gray*, 22 Occ. N. 27, 3 O. L. R. 34.

4. Letters of administration — Quebec will—Notarial form.—Where a will is in notarial form and in the custody of a notary in the Province of Quebec, letters of administration with a certified copy of the will annexed, will be granted on proof by affidavit of the death and

domicil of the testator, of the law of Quebec, and of the original will being executed in accordance therewith; that the original will is in the custody of a notary in that Province; and that the executors named in the will are acting thereunder. *In re Robertson*, 22 Occ. N. 211.

5. Passing accounts—Corroboration—*Payment of claims—Statutory declarations.*—[A Judge sitting on the Probate side of the Court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only when the claim comes to be contested in Court. *Semble*, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, and if he does so fairly and honestly, and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay. Remarks on the usual form of statutory declaration proving claims. *In re Blank Estate*, 5 Terr. L. R. 230.

6. Powers of executors—Time for exercising—Extension.—[An extension of the powers of an executor beyond a year and a day may result from previous wills, and from the combination of different testamentary dispositions relative to the appointment of the executor. *Brunet v. Marien*, 4 Q. P. R. 330.

7. Removal of executor—Action for—Personal capacity.—[An action for the removal of a legal mandatory, in this case an executor, on the ground of his mal-administration and of fraudulent acts of which he is accused, should be brought against him personally and not as executor. *Mercier v. Gosselin*, 5 Q. P. R. 80.

8. Removal of executors—Account—Pleading—Exception to form.—[A demand for the removal of testamentary executors and a demand for *reddition de compte* are not incompatible.—2. The fact that the defendants have already rendered an account, and therefore the plaintiff has only an action for reformation of the account, is not a ground for an exception to the form. *Donohue v. Donohue*, 4 Q. P. R. 300.

9. Surrogate Courts—Grant of administration—Nominces of next of kin in Ontario—Discretion—Revocation—Fraud.—[Only one of the next of kin, the sister, of an intestate resided in Ontario, and, upon the consent of the sister and her children, letters of administration

were granted by a Surrogate Court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario:—*Held*, that the Surrogate Court had before it all those who were required by s. 41 of the Surrogate Courts Act, R. S. O. 1897 c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendants. *Semble*, that, even if the discretion had been improperly exercised, the grant would not have been revoked. The practice of the Surrogate Courts in this Province is to apply the provisions of s. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act. *Held*, also, affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant. *Carr v. O'Rourke*, 22 Occ. N. 207, 3 O. L. R. 632.

10. Survival of action—Tort—Power to appoint administrator ad litem.—[R. S. O. 1897 c. 129, s. 11, providing that in case any deceased person has committed a wrong to another in respect to his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator *ad litem* merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts, and divide the estate. Therefore, for this reason, apart from others, the appointment of an administrator *ad litem* should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died pending the action, and whose widow and children refused to administer to the estate. *Hunter v. Boyd*, 22 Occ. N. 50, 3 O. L. R. 183.

11. Taking possession of estate—Debtor opposing claim for account—Period of year and a day—Commencement of—Cessation of executor's functions.—[The fact that a debtor of an estate re-

sists an action *en reddition de compte* brought against him by an executor, alleging that he is not accountable to the estate, does not prevent the executor from taking possession of the estate; nor is he prevented from doing so because the debtor, having been ordered to render an account to the executor, renders an account in which he brings himself out free of debt to the estate, so long as the executor contests such account.—2. In consequence, the period of a year and a day commences to run from the date of the death of the testator, the executor being presumed to have known the will from that date.—3. If the year and a day from the death have elapsed during the pendency of the contest as to the account, then there is plainly a cessation of the functions of the executor, and the proceeding is suspended until the legatee or heir takes up the conduct of it in place of the executor. *Francœur v. Paradis*, Q. R. 20 S. C. 246.

See ADMINISTRATOR AD LITEM—COSTS, VI. 3—COURTS, VII.—DOWER, 2—EVIDENCE, II. 1, 2—HUSBAND AND WIFE, VII. 1—REVIVOR, 2—VENDOR AND PURCHASER, 13—WILL.

EXEMPTIONS.

See ASSESSMENT AND TAXES, III., VII. 3—BANKRUPTCY AND INSOLVENCY, I. 5—EXECUTION, III. 3—FRAUDULENT CONVEYANCE—MUNICIPAL CORPORATIONS, X. 8—PLEADING, III. 5—REVENUE, 6—SALE OF GOODS, II. 2.

EXHIBITS.

1. **Production after return**—*Leave to inscribe ex parte*.—An inscription for hearing *ex parte* will be struck out with costs, where the plaintiff, who has filed his exhibits after the return of his action, has not obtained leave of the Judge to foreclose the defendant. *Macleane v. Meloche*, 4 Q. P. R. 204.

2. **Production after return**—*Leave to inscribe ex parte*.—*Notice—Costs*.—A plaintiff who has filed his exhibits after the return of his action, will be allowed, on motion, to obtain the foreclosure of the defendant from pleading, if a sufficient delay has elapsed since notice of the filing of the exhibits was given to the defendant, but such motion will be granted without costs. *Trenholme v. Provost*, 4 Q. P. R. 316.

EXPLOSIVES.

See MUNICIPAL CORPORATIONS, III. 6

EXPRESS COMPANY.

See CARRIERS, 1.

EXPROPRIATION.

See CROWN, II.—INJUNCTION, 1—MUNICIPAL CORPORATIONS, VI.—RAILWAY, IV.—WAY, III. 1.

EXTRADITION.

1. **Assault with intent to murder**—*Treaty—Evidence on inquiry*.—Where a fugitive offender from the United States is charged with an assault with intent to murder, in an information laid under the Extradition Act, R. S. C. c. 142, the evidence must sufficiently establish the existence of the intent. *In re Kelly*, 22 Occ. N. 262.

2. **Bail pending appeal**—*Habeas corpus—Powers of Judge of Court of Appeal*.—An application to a Judge of the Court of Appeal to admit to bail a person committed for extradition, pending an appeal to that Court from an order of a Judge of the High Court refusing, upon *habeas corpus*, to discharge the applicant, was refused on the grounds, (1) that it did not appear that the applicant was in actual custody, and (2) that it was doubtful whether a Judge of the Court of Appeal had power to make the order, a matter of bail not being incidental to the appeal (Jud. Act, s. 54.) *Quære*, as to the propriety of granting bail in extradition proceedings otherwise than *de die in diem*, pending the hearing of a motion for *habeas corpus* on an appeal. *In re Watts*, 22 Occ. N. 130, 3 O. L. R. 279.

3. **Child-stealing**—*Contempt of foreign Court—Parent stealing his own child—Foreign law—Criminal Code*.—The prisoner and his wife were absolutely divorced in the State of Illinois, where they were domiciled, by a decree which gave the custody of their child, five years old, to the wife, with permission to the prisoner to take it out with him in the day time, but to return it the same day. The prisoner, having thus obtained the child, brought it to Canada.—*Held*, following *In re Murphy*, 26 O. R. 163, 23 A. R. 386, that "child stealing" being mentioned in the existing Extradition Treaty between the United States and Great Britain, as one of the extradition crimes, the Court should, in the absence

of any evidence to the contrary, assume the crimes to be identical in the two countries, and the onus did not rest upon the prosecutor of proving what the foreign law was. The evidence taken before the extradition commissioner shewed a case of child stealing under s. 284 of the Criminal Code, and, in the absence of evidence of the foreign law, that was sufficient. Section 284 of the Criminal Code does not exclude the case of father and child. Though what was done was a contempt of Court, yet if a man has committed a crime it does not become the less a crime because it also happens to be a contempt. As to the prisoner's contention that he had acted in good faith because he had been advised that the decree of divorce having been obtained collusively, was a nullity, this was a matter which might properly be set up as a defence by the prisoner upon his trial, but could not be dealt with by the magistrate, who had before him the decree of the foreign Court and the oath of the wife that she did not collude. *In re Watts*, 22 Occ. N. 166, 3 O. L. R. 368.

4. Foreign Warrant — Proof of—Return—Discharge.]—A warrant under the Extradition Act, R. S. C. c. 142, s. 6, for the apprehension of a fugitive was issued upon duly authenticated copies (1) of an indictment found by a grand jury in a foreign country charging the accused with an extraditable offence, (2) of a bench warrant issued upon the said indictment, accompanied by a copy of a return thereto by the sheriff dated 10th April to the effect that he could not find the accused and believed that he was without the jurisdiction, and (3) of depositions of witnesses tending to shew that the accused was guilty of the offence charged. On the hearing, the proceedings above mentioned were put in as evidence subject to objection, and the sheriff gave evidence that the accused, whom he identified, had been in custody from about the 1st May until the sittings of the Court at which he was indicted, and that he was at that sittings discharged from his custody:—*Held*, that, in order to give jurisdiction to a Judge to issue such a warrant, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the Judge at or before the time of the issue of the warrant. That, in case of a foreign warrant, it must be shewn to be outstanding and in full force, and that the evidence failed to establish this. *Semble*, that in case of a foreign warrant, the original must be produced. The accused was therefore discharged. *In re Bongard*, 5 Terr. L. R. 10.

EXTRAS.

See CONTRACT, III. 3—CROWN, III. 1.

FACTOR.

See PENALTIES AND PENAL ACTIONS, 4—PRINCIPAL AND AGENT, 5.

FACTORIES ACT.

See MASTER AND SERVANT, II. 2.

FACTORY.

See NEGLIGENCE, 1.

FALSE ARREST.

1. Absence of malice — Arrest not justified — Aggravation by pleading—Liability for arrest.]—In this case, acting without malice, the defendant caused the arrest of the defendant for obtaining money by false pretences, without first demanding from the plaintiff the proof of his title to certain land which the plaintiff offered as security for the loan of \$300, and in an action for the arrest made allegations which he could not support:—*Held*, that he was liable in damages under Art. 1053, C. C. Under the circumstances he was ordered to pay \$25 damages and the costs of an action of the fourth class. *Laliberté v. Gingras*, Q. R. 21 S. C. 466.

2. Absence of malice — Probable cause—Burden of proof.]—In an action for damages for false arrest the onus is on the plaintiff to prove that there was not probable cause for the arrest and that the defendant was actuated by malice. Malice alone is not sufficient; there must be absence of probable cause. The theory of probable cause according to English law does not prevail in Quebec; the rule of the French law must be applied. *Giguère v. Jacob*, Q. R. 10 K. B. 501.

See MALICIOUS PROCEDURE.

FALSE PRETENCES.

See CRIMINAL LAW, III. 2.

FALSE REPRESENTATIONS.

See COMPANY, III.

FAMILY ARRANGEMENT.

See LIMITATION OF ACTIONS, I. 2.

FAMILY COUNCIL.

See INTERDICT, 2.

FARM CROSSING.

See RAILWAY, III.

FATAL ACCIDENTS ACT.

See DAMAGES, 1, 2.

FENCES.

See BOUNDARIES—RAILWAY, V. — WAY, III. 4.

FINES.

Imposition by Court—Remission by Municipal Council—Rights of Crown.]—The petitioner was convicted of the offence of personation at a municipal election in the city of Montreal, and was sentenced by the Recorder to an imprisonment of one month, and to the payment of a fine of \$500, and, in default of payment, to a further imprisonment of six months. After the expiration of his term of imprisonment, the city council remitted the fine, and the Recorder's Court having refused to issue the necessary order to the keeper of the common gaol for the petitioner's discharge from custody, he sought to obtain his liberation under a writ of *habeas corpus*:—*Held*, that, although by s. 517 of the charter of the city of Montreal, 62 V. c. 58, it is provided that all fines sued for and recovered in the Recorder's Court shall belong to the city, and by the same statute, s. 518, it is provided that to the council alone appertains the right to remit the whole or part of any fine belonging to the city, yet under 63 V. (Q.) c. 7, which provides that the Crown's right to fines is not affected by provisions of municipal charters, the fine in question did not belong to the city of Montreal but to the Crown (there being no private prosecutor), and therefore, even if s. 518 of 62 V. c. 58 were constitutional (a question which did not require to be decided in the present case), the city council had no right to remit the fine, and the petitioner was not entitled to be liberated. *Ex p. Armitage*, Q. R. 11 K. B. 163.

See CRIMINAL LAW, V. 2, 5.

FIRE.

Setting out—Adjoining owners—Escape of fire—Maintaining dangerous thing—Liability for—Negligence—Costs.]—Action for damages. The plaintiff and defendant were adjoining land owners, and a fire, started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's lands:—*Held*, applying the principle of *Rylands v. Fletcher*, L. R. 3 H. L. 330, that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it. Judgment for the plaintiff for \$300. Costs on County Court scale only allowed, as the action should have been brought in a County Court. *Crewe v. Mottershaw*, 22 Oct. N. 422, 9 Brit. Col. L. R. 246.

See LANDLORD AND TENANT, IV. 4—NUISANCE, 3—PLEADING, VII. 18—RAILWAY, VII.

FIRE INSURANCE.

See INSURANCE, II.

FISHERIES.

See MUNICIPAL CORPORATIONS, II. 2.

FIXTURES.

1. Buildings—Crown—Intention.]—The plaintiff sued for the delivery by the defendants of certain buildings erected by M. upon land the title to which was, at the time of such erection, and continued to be, in the Crown. The plaintiff claimed title through a sale made to her under an execution issued from the County Court of Selkirk on an alleged judgment recovered by the plaintiff's husband against the defendants, under which execution the bailiff purported to sell the buildings as chattels of M., who erected them about 19 years before action, and lived in them till about 1886; he did not actually reside in them at the time of the seizure under execution, but he took possession again before this action was brought. The buildings were not so affixed to the freehold as to require that anything should be broken or separated by force in order to remove them. M. did not own the land:—*Held*, that the presumption was that it was not intended that the buildings should become part of the freehold: the onus was on M. to shew that it was so intended. If the buildings became part of the freehold, they became

the property of the Crown, the owner of the freehold. But the evidence shewed that M. tried to sell the buildings to the Crown, his actions in so doing being those of an owner, and not of one seeking compensation for the buildings as a matter of grace. *Dizon v. Mackay*, 22 Occ. N. 394.

2. Vendor and purchaser — Shop fittings—Gas and electric light fittings.]

—Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood:—*Held*, that these articles became part of the land and passed by a conveyance of it to the defendants. *Bain v. Brand*, 1 App. Cas. 762, *Holland v. Hodgson*, L. R. 7 C. P. 328, *Hobson v. Gorringe*, [1897] 1 Ch. 182, *Haggert v. Town of Brampton*, 28 S. C. R. 174, and *Argles v. McMath*, 26 O. R. at p. 248, followed. *Stack v. T. Eaton Co.*, 22 Occ. N. 322, 4 O. L. R. 335.

FORCIBLE ENTRY.

See LANDLORD AND TENANT, III. 1.

FORECLOSURE.

See LIMITATION OF ACTIONS, I. 3—MORTGAGE, 4, 5, 6—RAILWAY, II—TRUSTS AND TRUSTEES, 4.

FOREIGN COMMISSION.

See EVIDENCE, IV. 5.

FOREIGN COMPANIES.

See COMPANY, II.—INSURANCE, IV. 12—WRIT OF SUMMONS, II. 2, 8.

FOREIGN JUDGMENT.

See JUDGMENT, I.—WRIT OF SUMMONS, III.

FOREIGN LANGUAGE.

See CRIMINAL LAW, I. 3.

FOREIGN LAW.

See EXTRADITION, 3—INSURANCE, IV. 2.

FOREIGN PARTNERS.

See PENALTIES AND PENAL ACTIONS, 4.

FOREIGN PATENT.

See PATENT FOR INVENTION, 4.

FOREIGNER.

See REVENUE, 4—WRIT OF SUMMONS, II. 9.

FORFEITURE.

See CONTRACT, V. — LANDLORD AND TENANT, I. 4—LIQUOR LICENSE ACT, I. 2—MINES AND MINERALS, 13—MORTGAGE, 5—PLEDGE, 1—VENDOR AND PURCHASER, 5.

FORGERY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 14.

FRANCHISE.

See ASSESSMENT AND TAXES, VII. 2—MUNICIPAL CORPORATIONS, X. 10.

FRANCHISE ACTS.

See PARLIAMENTARY ELECTIONS, III. 11.

FRAUD.

Undue influence—Misrepresentation—Ratification.]—The plaintiff in this action sought to set aside a transfer of land which the defendant had obtained from him by the exercise of what the Judge held to have been both fraud and undue influence, but the defendant contended that

the plaintiff had, after the commencement of the action, compromised and settled it by signing the agreement referred to in the judgment: — *Held*, that the alleged ratification as well as the original transfer had been obtained by fraud and undue influence and that the transfer should be set aside with costs. *Bridgman v. Green*, 2 Ves. Sr. 627, and *Mozon v. Payne*, L. R. 8 Ch. 881, followed. *Atkinson v. Borland*, 14 Man. L. R. 205.

See ATTACHMENT OF GOODS — BANKRUPTCY AND INSOLVENCY, V. 1. 4 — CRIMINAL LAW, III. 3 — EXECUTORS AND ADMINISTRATORS, 9 — JUDGMENT, II. 1 — LIMITATION OF ACTIONS, II. 2 — MORTGAGE, 11, 12 — PARTIES, I. 1 — PRINCIPAL AND AGENT, 2 — SOLICITOR, 5 — TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN, 6 — TRIAL, II. 4, 7 — VENDOR AND PURCHASER, 3, 6.

FRAUDULENT CONVEYANCE.

Husband to wife—*Land exempt as homestead—Effect of conveyance.*—The plaintiff recovered judgment against one of the defendants, and registered a certificate against his lands; he alleged that a conveyance made by one defendant to the other, his wife, was fraudulent and void under 13 Eliz. c. 5, and the Assignments Act, R. S. M. c. 7, and prayed that it should be set aside, and the lands sold to satisfy his judgment. The defendants contended that the property was their actual residence and home, and was, under the Judgments Act, R. S. M. c. 80, s. 12, exempt from the registered judgment and proceedings of the plaintiff. The defendants lived in the town of Neepawa, on the property in question, which was their actual residence and home; the man was not a farmer; the property was worth \$1,200; there was a mortgage on it of \$600; so that the interest of the defendants in the property was \$600. The statute, in such cases, allows an exemption of \$1,500:—*Held*, that, had not the man transferred the property to his wife, his right of exemption could not have been in any way impeached. Before the transfer the property was not available to his creditors for payment of their claims, and the conveyance did not remove from the reach of creditors anything on which they might have realized their judgments. *Osler v. Muter*, 19 A. R. 94; *Field v. Hart*, 22 A. R. 449. *Roberts v. Hartley*, 22 Occ. N. 185.

FRAUDULENT PACKING.

See CRIMINAL LAW, III. 3.

FRAUDULENT PRACTICES.

See MUNICIPAL ELECTIONS.

FRAUDULENT PREFERENCE.

See PARTIES, IV. 3.

FRAUDULENT REMOVAL AND CONCEALMENT OF GOODS.

See CRIMINAL LAW, III. 4.

FRAUDULENT REPRESENTATIONS.

See VENDOR AND PURCHASER, 6.

FRUIT MARKS ACT.

See CRIMINAL LAW, III. 3.

GAMING.

Dealing in shares — Broker—Payment of differences—Illegality—Criminal Code, s. 201.—The defendant instructed the plaintiffs to sell shares for him; the plaintiff asked for cover, and the defendant paid \$600; no time was fixed for delivery; the plaintiffs asked the defendant for more, as shares were rising, and finally called for \$2,400, which the defendant refused to pay. The plaintiffs then, as they alleged, purchased the shares to satisfy their own liability, and sued for amount paid:—*Held*, that, as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal. *British Columbia Stock Exchange, Limited, v. Irving*, 8 Brit. Col. L. R. 184.

See CRIMINAL LAW, III. 8, 9.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GAS COMPANY.

See CONTRACT, I. 4—MUNICIPAL CORPORATIONS, X. 10—WAY, II. 6.

GIFT.

Assignment of right to Crown lands—*Notarial act*—*Parent and child*—*Subsequent patent to donor*—*Rights of donee*—*Want of registration of act*—*Sale of timber*—*Right to payment*—*Apparent owner.*]—By a notarial act the parents of a family of twelve living children assigned and abandoned to one of their sons all the rights, privileges, and advantages resulting and belonging to them by virtue of an Act of the Legislature assented to 2nd April, 1890, intitled an Act giving the privilege to the father and mother of a family of twelve living children, of a grant of 100 acres of public land. The notarial act recited that the assignment or abandonment was made gratuitously and out of parental love, and purported to give the son the right to enjoy and dispose of such rights and privileges, as owner thereof and in perpetuity, upon the charges, clauses, and conditions imposed by the statute:—*Held*, CASAULT, C.J., dissenting, that this act of donation granted to the donee the lot which the donors had claimed from the government, and to which afterwards the latter had given the donors a title of concession; and that it was not necessary to render the donee proprietor of such lot that the donor should make a new assignment.—2. That the acceptance of the gift appeared by the same act, and that the signature of the notary affixed to the act after that of the donee made the act of donation perfect, and it was not necessary that the donee should notify the donors of the perfecting of the act.—3. That the defendants, from whom the donee claimed the value of wood cut upon this lot, they being neither heirs, legatees, nor creditors of the donors, and not pretending to have any right in or to the lot, were not in a position to set up the want of registration of the act of donation.—4. That the defendants, if they paid the amount claimed to the donee, he having the apparent title, would be discharged as regards the heirs of the donors, if they should become entitled by virtue of the want of registration. — 5. That the statute 53 V. c. 26 authorizes such a gift *inter vivos*. *Gélinas v. St. Maurice Lumber Co.*, Q. R. 21 S. C. 270.

2. Donatio mortis causa—*Cash in bank*—*Deposit receipt*—*Intention*—*Interest.*]—M. deposited with a bank \$6,000 on deposit receipt, to be accounted for by the said bank to M. only upon production of the receipt. During his last illness, M. signed three orders, directing the bank to pay the sum of \$2,000 each, out of said deposit, to three individuals named in the orders, and delivered the orders, together with the deposit receipt, to D. M., to be delivered to the persons named. D.

M. delivered one of the orders to the wife of M., for whom it was intended, and retained the others for the other persons named:—*Held*, that the evidence shewed an intention on the part of M. to give the donees the fund represented by the deposit receipt, and that the delivery of the orders with the receipt constituted an assignment of the fund. The delivery to D. M. for the benefit of the three persons mentioned was sufficient. The omission on the part of M. to make any provision for distribution of the interest due on the deposit was merely a matter of defective enumeration, and was not to be regarded as indicating an intention on the part of M. not to give the deposit receipt or the sum represented by it. *McDonald v. McDonald*, 35 N. S. Reps. 205.

See HUSBAND AND WIFE, IV. 3, 4, VII. 1, 3, 4—LIMITATION OF ACTIONS, II. 5—REGISTRY LAWS, 1—VENDOR AND PURCHASER, 7, 13—WILL.

GRAND JURY.

See CRIMINAL LAW, IV. 1.

GUARANTY.

See CONTRACT, 5—MUNICIPAL CORPORATIONS, III. 5, V. 3—PRINCIPAL AND SURETY, 5.

GUARDIAN.

See BANKRUPTCY AND INSOLVENCY, I.—EXECUTION, VI. 3.

HABEAS CORPUS.

Application for—Forum—Districts—*Judges—Court of King's Bench—Consent.*]—A person deprived of his liberty, who wishes to obtain the issue of a writ of *habeas corpus*, must make his application for such writ to any Judge who may be in the district in which the prisoner is confined, and who is qualified and authorized to exercise his judicial functions therein.—2. If there be no Judge within the limits of such district, the application for a writ of *habeas corpus* may be made either to a Judge in any adjoining district, or to any Judge in the city of Montreal or in the city of Quebec, according as an appeal from the district where the applicant is confined would be brought to one or the other city.—3. The Court of King's Bench, appeal side, has original jurisdiction at Montreal or Quebec in matters of

habeas corpus with respect to any person confined in a district from which appeals are brought to one or the other city; but a Judge of the Court of King's Bench has no jurisdiction to grant an order in Chambers in such matter, unless it be first established that there was no Judge within the limits of the district where the prisoner is confined, when the application was made to such Judge of the Court of King's Bench.—4. Where a Court or Judge is not vested with jurisdiction by law, the consent of the parties cannot confer jurisdiction. *Ex p. Tremblay*, Q. R. 11 K. B. 454.

See EXTRADITION, 2—LIQUOR LICENSE ACT, 11. 1—SUPREME COURT OF CANADA.

HAIL INSURANCE.

See INSURANCE, III.

HALF-BREED.

See INDIAN, 1, 2.

HAWKERS.

See MUNICIPAL CORPORATIONS, III. 8, 12.

HIGH COURT OF JUSTICE FOR ONTARIO.

See APPEAL, V.—COURTS, VI.

HIGHWAY.

See MUNICIPAL CORPORATIONS, VII.—RAILWAY, III.—WAY.

HOLIDAYS.

See COURTS, V. 3—LANDLORD AND TENANT, IV. 5.

HOMESTEAD.

See ASSESSMENT AND TAXES, IV. 1—CONTRACT, IV. 6—FRAUDULENT CONVEYANCE.

HUDSON BAY CO.

See WAY, III. 1.

HUSBAND AND WIFE.

I. ACTIONS BY AND AGAINST—PARTIES AND SERVICE.

II. ALIMONY.

III. COMMUNITY.

IV. MARRIAGE CONTRACT.

V. SEPARATE ESTATE OF WIFE.

VI. SEPARATION.

VII. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

VIII. OTHER CASES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 15—DOWER—FRAUDULENT CONVEYANCE—INFANT, 4—INTERDICT. 2—PLEADING, VI.—SERVICE OF PAPERS. 2—SUCCESSION—TRUSTS AND TRUSTEES, 5.

I. ACTIONS BY AND AGAINST—PARTIES AND SERVICE.

1. Absent husband—Service—Authorization of wife as sole defendant.]—When a husband who is absent is made a party to a cause for the purpose of assisting and authorizing his wife, the defendant, and when it does not appear by the report of the bailiff that any attempt has been made to serve him in this Province, a petition to a Judge for authorization by the Court of the wife's being brought before the Court in the action, will be dismissed. *Crédit Foncier Franco-Canadien v. Dufresne*, 4 Q. P. R. 244.

2. Authorization of wife—Pleading—Opposition—Swearing to—Proper officer—Costs against wife—Community—Res judicata.]—It is not necessary to allege specially the authorization given by a Judge to a married woman to be a party to a cause, if such authorization appears somewhere in the proceedings for which such authorization is required.—2. An opposition sworn to before the prothonotary of a district different from that in which such opposition is filed, is, nevertheless, sworn to before a competent officer: Art. 23 C. P.—3. Although costs have been incurred for the purpose of obtaining possession of real estate of a married woman, it does not follow that she should be obliged to pay them in any other quality than as common, when the judgment which has been pronounced against her for such costs has not determined in which quality she is obliged to pay them. Therefore, it cannot be set up, against an opposition alleging that the married woman is only obliged to pay such costs in her quality of common, that, in view of the judgment in the principal action in which she has been ordered to pay costs jointly

and severally with her husband, there is *res judicata* as to her liability on this head; and a like ground of opposition will not be rejected as frivolous upon a motion for that purpose. *Vidal v. Latulippe*, Q. R. 21 S. C. 219.

3. Community—Action by—Personal injuries to wife.]—The right of action for damages for personal injuries sustained by a married woman, common as to property, belongs exclusively to her husband, and where she is joined in the action, she may be dismissed from the case on demurrer. *Troude v. Meldrum*, Q. R. 20 S. C. 531.

4. Community—Action by—Wife as witness.]—Where in an action pertaining to the community the wife is joined with her husband, the wife has no more right to testify in the cause than if the action had been instituted by the husband alone. *Dunfy v. Kelly*, Q. R. 20 S. C. 231.

5. Conservation of wife's personal property—Intervention.]—A wife contractually separate as to property may be a party to an action without the assistance or the authorization of her husband, or of a Judge, when she seeks the administration and conservation of her personal property; therefore, she may alone intervene in a cause for the conservation of her personal property, such a proceeding being only an act of simple administration. *Beauchamp v. Beauchamp*, 4 Q. P. R. 400.

6. Libel by wife—Liability of husband—Verdict for \$10—Costs.]—Action against a husband and wife for damages for a libel published by the wife. At the trial in Vancouver the jury returned a verdict in the plaintiff's favour for \$10:—*Held*, by MARTIN, J., following *Seroka v. Kattenburg*, 17 Q. B. D. 177, that the husband was liable; and, also, that the costs should follow the event. *Mackenzie v. Cunningham*, 22 Occ. N. 43, 8 Brit. Col. L. R. 206.

7. Wife sued with husband as mis-en-cause—Failure to serve husband—Authorisation of Court.]—The plaintiff sued "Dame M. P. D., the wife, separate as to property, of F. J. B., and the said F. J. B., made a party to assist his said wife." Process in the action was served on the wife herself on the 15th November, 1901, at Quebec. It was not served on the husband. The action was entered in Court on the 21st November. On the same day the defendant alone, without the assistance of her husband, and without any authorization, appeared by her advocates. On the 23rd November the plaintiff served those advocates with a notice of a petition, alleging that the

husband had left the country not to return, that it was impossible to serve him, and praying that the Court would authorize the defendant to defend the present cause, which was an hypothecary action:—*Held*, that the wife not being able in such an action to defend without the assistance or the authorization of her husband, or the authorization of the Court, the plaintiff, who sued her as assisted by her husband, and who could not, because the husband had left the country, effect service upon him, should, before bringing the action, have obtained the authorization of the Court. Such authorization should be refused him in the case as it stood, because the wife was not regularly before the Court; and the service which had been made and the appearance which she had entered by her advocates were absolutely void. The question how a married woman may be authorized or served, discussed. *Credit Foncier Franco-Canadien v. Dufresne*, Q. R. 21 S. C. 108.

II. ALIMONY.

Lunatic wife—Admission to asylum—Removal by relatives.]—Leave to appeal to the Court of Appeal from the judgment in 21 Occ. N. 560, 2 O. L. R. 541, refused. *Hill v. Hill*, 22 Occ. N. 107, 3 O. L. R. 202.

See VI. 6.

III. COMMUNITY.

1. Action by wife—Authorization by husband—Declaration—Personal property.]—Article 1298, C. C., does not take away from a wife, common as to property, the right of exercising, with the authorization of her husband, personal actions belonging to her.—2. It is necessary, however, that the declaration in such an action should make it appear that the personal property which she claims does not fall into the community. *Donohue v. Donohue*, 4 Q. P. R. 300.

2. Action by wife alone—Tort—Refusal of husband to join.]—A married woman, *commune en biens*, authorized *de justice* upon the refusal of her husband, may maintain an action in her own name alone to recover damages for injuries to her person and her honour by acts of violence of which she has been the victim.—2. Although the compensation which she obtains may be the property of the community, the principle of the action must chiefly be considered, and it has a character peculiarly related to her person and honour, which she has the right to

protect even against her husband. *Baker v. Gingras*, Q. R. 20 S. C. 85.

3. Plea of—Exception to form.]—Community between husband and wife, who are sued for damages, although it is a ground of defence upon the merits, may be pleaded by an exception to the form if it constitutes a good defence. *Shank v. Bourassa*, 4 Q. P. R. 287.

See I. 2, 3, 4, IV. 1.

See PARTITION, 4.

IV. MARRIAGE CONTRACT.

1. Community—Stipulation for usufruct of survivor—Registration.]—A contract of marriage provided that there should be universal community, and also stipulated a donation to the surviving consort of the usufruct, during life, of all property existing at the dissolution of the community by the death of the consort dying first. Nothing existed in the community, at the date of its dissolution, that would not have formed part of it by mere operation of law:—*Held*, that the stipulation, in such marriage contract, of usufruct in favour of the surviving consort, although described as a donation, is not a donation but a marriage covenant, and is not subject to the formality of registration. Art. 1411, C. C. *Huot v. Bienvenu*, Q. R. 21 S. C. 341.

2. Construction—"Meubles et effets mobiliers"—Money in bank.]—Unless the context clearly indicates the contrary, the words "*meubles et effets mobiliers*" in a marriage contract comprise money deposited in a bank. *Sabourin v. Montreal City and District Savings Bank*, Q. R. 21 S. C. 391.

3. Gift to wife—Expenditure in purchase of land—Deed—Notice—Registration—Rights of mortgagee—Rights of children of marriage.]—The husband by the marriage contract promised to expend, within five years, \$7,000, which he gave to his wife (separate as to property), in the purchase of an immovable in the name of the wife, but in which she should have only the usufruct, and the children the property. After the marriage, the wife, with the authorization of her husband, bought an immovable in her own name. There was nothing either in the deed of sale, nor in any other writing, which shewed that this purchase was made with the money of the husband, or with the sum given in the marriage contract; on the contrary, everything shewed that it

was the wife who was purchasing for herself and with her own money, and so the matter appeared at the registry office. Afterwards the wife borrowed money from the plaintiff, and, with the authorization of her husband, hypothecated the immovable as her absolute property to the plaintiff. The plaintiff having caused the immovable to be seized under his execution against the wife, her children claimed it by virtue of the marriage contract, and they proved orally that the intention of the husband and wife, at the time of the purchase, was to make it in order to conform to the contract of marriage, and that the husband had himself furnished the purchase money in fulfilment of the contract:—*Held*, that the claim of the children could not, upon such testimony, prevail against the plaintiff; that, in order to prevail against him, the deed of sale or some other registered deed should have mentioned that the purchase was made with the sum given by the husband to the wife; that the plaintiff, in consequence, had the right to cause the whole of the immovable to be sold as the property of the wife. *Gaudreau v. Tetu*, Q. R. 20 S. C. 402.

4. Gift to wife—Insolvency of husband—Dower—Renunciation of—Hypothec—Registration.]—A gift in a marriage contract by the intending husband to his intended wife, of the furniture and household effects garnishing the common domicile, is deemed to be by gratuitous title, and is invalid as against a creditor of the husband, donor, who was insolvent at the time of the marriage.—2. *Dower*, whether customary or conventional, is not a gift but a debt, and is by onerous title. This rule applies to conventional dower even when it exceeds the customary dower which it replaces.—3. *Renunciations to dower* are to be very strictly construed in favour of the wife; and even where, as in the present case, the marriage contract contains what purports to be a renunciation to dower, whether customary or prefix, the stipulation of a life rent payable to the wife, which rent is expressly stated to be in lieu of dower, is in effect a stipulation of conventional dower, and is governed by the same rules which govern dower. Such stipulation cannot, therefore, be set aside by a creditor without proving knowledge by the wife of her husband's insolvency at the date of the marriage.—4. The wife has no legal hypothec to secure the payment of conventional dower, and the registration of a mere notice, as provided for legal hypothec, without description of the property affected, does not charge the husband's property with a hypothec in favour of the wife. *Turgeon v. Shannon*, Q. R. 20 S. C. 135.

V. SEPARATE ESTATE OF WIFE.

1. Sale of—*Payment of husband's debt*—*Nullity*—*Reimbursement of purchaser.*]—A married woman, separate as to property, may sell one of her immovables to pay the debt of her husband—in this case to secure the liberation of her husband then under arrest at the suit of one of his creditors—and such sale does not fall under the prohibition of Art. 1301, C. C.—2. In any event, even if the wife could assert the nullity of the sale, she could succeed in the action only upon offering to reimburse the purchaser the amount which he has paid her, over and above the price of sale, to extinguish her personal debt. *De Kerouack v. Gauthier*, Q. R. 20 S. C. 320.

2. Separate business—*Consent of husband*—*Certificate*—*Place of doing business.*]—Under the provisions of R. S. N. S., 5th ser., c. 94, s. 53, when a married woman does, or proposes to do, business on her separate account, in addition to filing her husband's consent thereto, she is to record a certificate in writing setting forth her name and that of her husband, the nature of the business, and the place where it is, or is proposed, to be carried on, and giving, "if practicable," the street and the number on the street; and where the nature of the business, or the place where it is carried on, is changed, a new certificate shall be filed accordingly. The plaintiff, who carried on business as a grocer in a city, under a license from her husband, enabling her to carry on such business, filed a certificate giving the particulars required by the Act, except as to the street and the number on the street, as to which it was set out that it was not practicable to do so, as the premises had not yet been selected. Goods claimed by the plaintiff as her separate property having been levied upon by the defendant, as sheriff of the county, under a writ of execution for the husband's debt:—*Held*, that it was incumbent upon the plaintiff to select the premises before filing her certificate, the provision being intended to apply not only to towns having streets named and numbered, but to towns which had not streets so named and numbered. *Held*, also, that the words "the place" meant the place in the city, town, or municipality where it was proposed to do the business, and that where the place was changed a new certificate must be recorded. *Pearce v. Archibald*, 34 N. S. Reps. 543.

VI. SEPARATION.

1. Action for—*Evidence of parties.*]—In an action for *séparation de corps*

the husband and wife may be heard as witnesses, even in support of the action. *Talbot v. Guilmartin*, Q. R. 10 K. B. 564.

2. Alimentary allowance—*Authorization of wife.*]—A wife who is not authorized to leave the conjugal domicile cannot demand an alimentary allowance, in the course of an action for *séparation de corps*. *Protain v. Prevost*, 5 Q. P. R. 103.

3. Alimentary allowance—*Rights of wife against relatives*—*Past debts.*]—A wife, common as to property, abandoned by her husband, who is absent in a foreign country, against whom she has begun an action for separation of the person, which is actually pending, may, her poverty being shewn, and with the authorization of a Judge, claim against a relative or connection who is bound to provide her with support, an alimentary allowance for herself and her children.—2. A wife who, before an action in which she claims an alimentary allowance, has contracted debts in respect of the means of livelihood, may claim an alimentary allowance in respect of the past in order to pay such debts. *Girard v. Vincent*, Q. R. 21 S. C. 206.

4. Evidence—*Facts anterior to reconciliation.*]—Under Articles 196 and 197 of the Civil Code, the plaintiff in an action for separation from bed and board is not entitled to adduce evidence regarding facts anterior to the last reconciliation between the consorts, without first having proved some fact which, if not of sufficient gravity alone to warrant a separation, should at least strongly support the demand therefor. *Courteau v. Skelly*, Q. R. 20 S. C. 216.

5. Lunatic husband—*Authorization of wife to proceed against curator.*]—The plaintiff, common as to property with her husband, alleged that they had been married in 1882, and had been living apart since the year 1884, and that since that time she had supported herself by her own work; that he had recently been interdicted for insanity; and that his curator had obtained a judgment for \$3,500 damages for personal injuries suffered by the husband before the date of interdiction. She asked that she be authorized to *ester en justice*, in an action against the curator in his quality, for *séparation de corps et de biens* from her husband:—*Held*, that the inability of a husband interdicted for insanity to receive or provide for his wife is not a ground to support an action by the wife for separation from bed and board, and

no legal grounds were alleged for a judicial authorization of the wife to bring such action against the husband's curator. *Deneen v. McLeod*, Q. R. 21 S. C. 54.

6. Pleading—Misconduct — Alimony—Custody of children.]—In an action by the wife for separation from bed and board, the plaintiff also asked for an alimentary allowance and the care of children; the husband pleaded admitting some of the acts alleged in the declaration, but denied the motive alleged, and asserted that the acts in question were caused by the misconduct of the plaintiff herself:—*Held*, that, although the plaintiff's misconduct might not be an answer to the claim for separation, yet it would affect her right to the care of the children and to an alimentary allowance; and a demurrer to the plea of misconduct was overruled. *Courteau v. Skelly*, Q. R. 20 S. C. 215.

7. Providing residence for wife—Conjugal domicile.]—In an action for separation, personal and as to property, brought by a wife against her husband, the Judge may, according to circumstances, in place of allotting to the wife a provisional residence outside the conjugal domicile, authorize her to remain in such domicile, and order the husband to leave it. *Hébert v. Michaud*, 4 Q. P. R. 297.

8. Provisional alimentary allowance—Vacation.]—A Judge has no jurisdiction in vacation to order the payment of a provisional alimentary allowance in an action for *séparation de corps*. *Currie v. Cunin*, 5 Q. P. R. 56.

VII. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

1. Loan or gift—Statute of Limitations—Executors and administrators—Right of retainer—Devolution of Estates Act.]—In 1876 Mary Starr advanced by way of loan or gift to her husband the purchase money of certain land, which was accordingly conveyed to him. On his death in 1893 he devised the land to Mary Starr and one of his sons in equal shares. In 1901 she obtained an order for partition or sale of so much of the land as had not been theretofore sold, and a sale of such residue of the land being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the land as above mentioned:—*Held*, that, even assuming that such money had been advanced by her by way of loan, her

claim was barred by the Statute of Limitations. There is no reason why the Statute of Limitations should not be applied to a claim by a wife against her husband to recover a loan from him, in the same way as if she was not his wife:—*Held*, also, that, though she was executrix under the will of her husband, she had no longer any right of retainer in respect of her alleged debt, inasmuch as by her own acts, that is, first by registering no claim within the twelve months allowed for this purpose, and then treating the property as vested in the defendants, the heirs of her co-devisee, who had previously died, she had put the assets out of her own possession and control. *In re Starr, Starr v. Starr*, 21 Occ. N. 592, 2 O. L. R. 762.

2. Promissory note — Obligation by wife with husband.]—A promissory note made by a wife to the order of her husband, and indorsed by him, is not, in the absence of any evidence that the note was signed by the wife for her husband, a contravention of Art. 1301, C. C., as constituting an obligation contracted by the wife with her husband. *Dupuis v. McTavish*, Q. R. 21 S. C. 455.

3. Prospective gift of money by husband to wife—Attachment by judgment creditor of wife.]—It is essential to a gift *inter vivos* that the donor should actually divest himself of his ownership in the thing given; and the following clause in a marriage contract does not constitute such gift:—"En considération dudit futur mariage ledit futur époux fait don à ladite future épouse d'une somme de \$800 courant, à prendre sur ses biens les plus apparents, et avant tout autre créancier." And such sum cannot be attached in the hands of the husband under a writ of *saisie-arrest* issued by a creditor, upon a judgment against the wife. *Pagé v. Beauchamp*, Q. R. 20 S. C. 220.

4. Purchase of land — Gift — Prescription — Surrender of leases — Merger — Lien.]—Freehold property and leaseholds, the reversion in which was vested in the plaintiff's wife by devisee under her father's will, were purchased by the plaintiff in 1893, while acting as manager of her landed estates, with his own money. The freehold property was conveyed by the vendor to the plaintiff's wife by his directions, and the surrender of leases was to the plaintiff and wife. Under the law at that date a husband was entitled to the rents and profits of his wife's real estate. By s. 4 (1) of the Married Women's Property Act, 1885 (N.B.), real estate belonging to a married woman, not acquired from her husband, is held and may be disposed of by her as a *feme sole*:

—*Held*, that the presumption that a purchase by a husband in the name of his wife is intended to be a gift to her was not rebutted by the evidence in the case. —2. That the wife could not alienate the freehold estates so acquired from her husband, at least during his lifetime.—3. That on the purchase of the leases the estate under them merged in the freehold of the wife, and that she could dispose of the whole estate without the husband's consent, and free of any equity in him for repayment of the purchase money or money expended by him in making repairs to the property. *De Bury v. De Bury*, 22 Occ. N. 134, 2 N. B. Eq. Reps. 348.

VIII. OTHER CASES.

1. Action by husband against wife.]—In an action by a husband against his wife for a declaration that certain real and personal property claimed by both parties, belonged to him, and for an injunction to restrain the wife from disposing of the same:—*Held*, that a husband can sue his wife in respect of both real and personal property as if she were a *feme sole*. *Semble*, the law in the Territories is practically the same as that in England as to suits between husband and wife, except that in the Territories one may sue the other in respect of torts, while in England this is not so. *England v. England*, 5 Terr. L. R. 204.

2. Affidavit.]—A wife may swear to the affidavit required by Art. 208, C. P., in a proceeding taken in the name of her husband. *Godburn v. McPeak*, Q. R. 20 S. C. 294, 4 Q. P. R. 190.

HYPOTHEC.

See BANKRUPTCY AND INSOLVENCY, I. 10
—COMPANY, I. 1—COSTS, I. 11—
HUSBAND AND WIFE, IV. 4—
NOTARY, 1—REGISTRY LAWS, 3.

ILLEGAL VOTING.

See CRIMINAL LAW, III. 5.

IMPRISONMENT.

See ARREST—BANKRUPTCY AND INSOLVENCY, IV. 3—CANADA TEMPERANCE ACT, 1—CRIMINAL LAW—MUNICIPAL CORPORATIONS, IX. 2.

IMPROVEMENTS.

Lien for—Purchase money—Occupation rent—Mistake of title.]—Under the circumstances of this case, the defendants having taken possession of land under an agreement to purchase in fee, with covenants for good title free from incumbrances, from the plaintiff, who claimed under a devise which was construed to be of a life estate only, the defendants were declared to have a lien on the land for lasting improvements made and purchase moneys paid after being charged with a fair occupation rent. *Young v. Denike*, 22 Occ. N. 27, 2 O. L. R. 723.

See ASSESSMENT AND TAXES, IV. 4—
LANDLORD AND TENANT, IV. 2—MINES
AND MINERALS—MORTGAGE, 6, 8—VEN-
DOR AND PURCHASER, 9—WILL, II. 15.

INCIDENTAL DEMAND.

See ACCOUNT, 3—PLEADING, V.

INCOME.

See ASSESSMENT AND TAXES, IV. 2,
VII. 3.

INDEMNITY.

See PARTIES, I. 3, III. 2, 3.

INDIAN.

1. Half-breed—Indian Act—Band—Repute.]—The Indian Act, R. S. C. c. 43, defines (s. 2 h) "Indian" as meaning *inter alia* "any male person of Indian to have *actually* belonged to a particular band:—"*Held*, (1) against the contention that "of Indian blood" means of full Indian blood, or at least of Indian blood *ex parte paterna*—that a half breed of Indian blood *ex parte materna* is "of Indian blood." (2) Against the contention that the defendant having been shewn to have *actually* belonged to a particular band, this disproved, or was insufficient to prove, that he was *reputed* to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of *actual* membership in the band. (3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a

person of Indian blood—that while the mother lost her character of an Indian by such marriage, except as stated in that section, it did not affect her blood which she transmitted to her son. *Regina v. Howson*, 1 Terr. L. R. 492.

2. Intoxicating liquor — Sale — Knowledge of licensee — Half-breed.]—A half-breed who has “taken treaty” is an Indian within the meaning of the Indian Act. But where a person licensed to sell intoxicating liquor sold some to a half-breed, his conviction therefor was quashed, because *mens rea* was not shewn, there being no knowledge on the part of the licensee that the half-breed had “taken treaty.” *Sherras v. De Rutzen*, [1895] 1 Q. B. 918, followed. *Regina v. Mellon*, 22 Occ. N. 343.

INDIAN LANDS.

Sale or lease—Invalidity — Relative, not absolute.]—The nullity of sales or leases of lands forming part of an Indian reserve, declared by 61 V. c. 34, s. 2 (D.), is only a relative nullity, and can be invoked only by the Indians; those who have bargained with them cannot avail themselves of it. *Boucher v. Montour*, Q. R. 20 S. C. 291, 4 Q. P. R. 175.

See CONSTITUTIONAL LAW, 3.

INDUSTRIAL DESIGN.

See TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN, 2.

INFANT.

1. Bond—Void or voidable—Ratification—Breach—Damages—Interest.]—To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock at \$10 per share, the defendant gave the plaintiff his bond in the penal sum of \$1,100, conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at \$50 per share, less expenses of sale, not to exceed ten per centum. The defendant was an infant when he executed the bond:—*Held*, that the bond was not void *ab initio*; that it was only voidable;

and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age.—2. That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was \$495, the price of the 11 shares, less ten per centum.—3. That the recovery was not a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment. *Beam v. Beatty*, 22 Occ. N. 58, 3 O. L. R. 345. See the next case.

2. Bond—Void or voidable—Ratification.]—The bond with a penalty of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant, is void, and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority. Judgment of *Ferguson, J.*, 3 O. L. R. 345, 22 Occ. N. 58, reversed. *Beam v. Beatty*, 22 Occ. N. 381, 4 O. L. R. 554.

3. Lease—Repudiation at majority—Partition—Parties—Tenant in common—Mesne profits—Damages.]—The plaintiff, while an infant, joined with an adult brother and sister in a lease to the defendants of a park property, of which all three were tenants in common, for a period of ten years. The defendant pulled down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it, and brought crowds of people there. During the term the plaintiff came of age, and at once repudiated the lease, refusing to be bound by it, and effected a partition with the other two tenants in common of the land, to which the defendants were not parties. In an action to recover possession of the plaintiff's part of the land under the partition; for a declaration that the partition was binding, or for a new partition between him and the company; for a declaration that the lease was not binding on him, and that he had been excluded from possession; and for mesne profits and damages:—*Held*, that the partition made could not be declared binding on the company, who were not parties to it. *Held*, also, that the brother and sister were not necessary parties to any new partition between the plaintiff and the company. *Held*, also, on the evidence, that the company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and that he was entitled to recover mesne profits from the time he became of age, and damages; and a partition was ordered between him and the company for the residue of the term. Judgment of *Meredith, C.J.*, 1 O. W. R.

25, reversed. *Monro v. Toronto R. W. Co.*, 22 Occ. N. 231, 4 O. L. R. 36.

4. Married woman—Party to action — *Authorization—Husband—Curator.*] —An infant, being a married woman, may appear in Court in a personal action (*et mobilière*), without other assistance and authorization than that of her husband, made a party for that purpose, and has no need of the assistance of a curator. *Galerieau v. Bertrand*, Q. R. 20 S. C. 283.

5. Tutor of—Removal—Procedure—Necessity for action.]—A demand for the removal of the tutor of an infant can only be made by action in the ordinary form, commencing with a writ of summons in the name of the sovereign. *Es p. McNicol*, Q. R. 21 S. C. 170.

See ALIMENTARY ALLOWANCES—HUSBAND AND WIFE, VI. 6—INSURANCE, IV. 6, 9—LIQUOR LICENSE ACT, IV. 3—NEG-LIGENCE, 1—PEREMPTION, 7.

INJUNCTION.

Interim injunction—Railway—Expropriation — *Crossing line of another company—Appeal—Questions for trial.*] —On the application of the plaintiffs, who alleged *inter alia* that the defendants' railway was not commenced within two years, that no map or plan and profile of the whole line of railway had been prepared and deposited in the department of the Minister of Railways, and that the work being done by the defendants was not authorized and was not being prosecuted in good faith under their charter, but was really for the benefit of the Great Northern Railway Company, so that it might extend its railway system, which lies south of the international boundary, into British Columbia, injunctions were granted restraining until the trial of the action the defendants from continuing in possession and proceeding with the expropriation of the land of the plaintiff hotel company, and also from taking any proceedings toward effecting the proposed crossing of the right of way of the plaintiff railway company. Motions to dissolve the injunctions were refused. The full Court (IRVING, J., dissenting) dismissed an appeal on the ground that there were several points of importance which should be decided at the trial. *Yale Hotel Co. v. Vancouver, Victoria, and Eastern R. W. and Navigation Co., Grand Forks and Kettle River R. W. Co. v. Vancouver, Victoria, and Eastern R. W. and Navigation Co.*, 9 Brit. Col. L. R. 66.

2. Repetition of slander—Public entertainment—Imputation of murder.] —Injunction granted until the trial to restrain the defendants, who professed to be mind-readers, from pretending to give information at their public entertainments as to the cause of the death of the plaintiff's husband, intimating, as they had done at such entertainments, that he met with his death at the hands of a supposed friend, and thereby suggesting the idea that his late partner and the plaintiff were concerned in the matter. *Monson v. Tus-sand*, [1894] 1 Q. B. 671, referred to. *Quirk v. Dudley*, 22 Occ. N. 388, 4 O. L. R. 532.

See ARBITRATION AND AWARD, 3 — DEVOLUTION OF ESTATES ACT—MUNICIPAL CORPORATIONS, IV. 2, X. 2, 7—MUNICIPAL ELECTIONS, 11, 12—NUIS-ANCE, 1, 3—SPECIFIC PERFORMANCE, 1—TIMBER—TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN—TRADE UNION —WAY, 1, 3, III. 4.

INLAND REVENUE ACT.

See REVENUE, 3.

INSCRIPTION.

See TRIAL, 1.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSPECTION.

See MINES AND MINERALS, 14.

INSPECTION OF MINES ACT.

See MASTER AND SERVANT, II. 7.

INSURANCE.

- I. ACCIDENT.
- II. FIRE.
- III. HAIL.
- IV. LIFE.
- V. MARINE.

I. ACCIDENT.

1. Application—Beneficiary not named in policy—Right to proceeds—

Accident policy—Act for benefit of wives and children.]—Where, through error, and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy, he is, nevertheless, entitled to the benefit of the insurance; *DAVIES and MILLS, JJ., dissenting. Per SEDGEWICK, J.*—The New Brunswick Act for securing to wives and children the benefits of life insurance (55 V. c. 25) applies to accident insurance, as well as to life. *Cornwall v. Halifax Banking Co., 22 Occ. N. 360, 32 S. C. R. 442.*

2. Baggage man — Conditions in policy — Hazardous occupation — Voluntary exposure to danger.]—An accident policy issued to M., who was insured as a baggage man on a railway, contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company.) This insurance does not cover . . . death resulting from . . . voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakeman, whose occupation was classed by the company as more hazardous than that of a baggage man: — *Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 521, 21 Occ. N. 553, which sustained the judgment for the plaintiff at the trial, 32 O. R. 284, 21 Occ. N. 76, that, as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions. *Held*, also, that as the evidence shewed that the insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition. *McNevin v. Canadian Railway Accident Ins. Co., 22 Occ. N. 223, 32 S. C. R. 194.*

3. Proofs of loss — Sufficiency of — Waiver — Death by accident — Finding of jury — Vagueness of.]—Proofs of loss were furnished within the time limited by an accident policy, without any objection being then taken to their sufficiency, or further proofs asked for, the refusal to pay being based on the contention that the circumstances surrounding the death of the insured brought it within a clause of the policy providing against liability where the death was by suicide, duelling, &c., or from natural causes; objection to

the sufficiency of the proofs having been taken for the first time in the statement of defence delivered a couple of years afterwards:—*Held*, that the proofs as furnished were sufficient; but, in any event objection to their sufficiency, or the right to call for further proofs, was waived. By the policy, the death was required to be by accidental bodily injury, caused by violent external means: while by s. 152 of the Insurance Act, R. S. O. c. 203, which is to be read with the policy, "accident" is defined as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The finding of the jury was that there was no evidence to satisfy them that the deceased came to his death by his own hand, but that he came to his death by external injury unknown to them:—*Held*, that the finding was too vague to be construed as a finding of accidental death; and a new trial was directed. *Fowlie v. Ocean Accident and Guarantee Corporation, 22 Occ. N. 280, 4 O. L. R. 146.*

See MASTER AND SERVANT, II. 15.

II. FIRE.

1. Cancellation of policy — Notice of cancellation received after loss.]—The insured sent to the company his policy, with an indorsed surrender clause executed, and a letter asking that the insurance be terminated, and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office, and did not reach the company till the morning after the insured goods had been destroyed by fire:—*Held*, that the letter did not take effect from the time of its being posted, but only from the time of its receipt; and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt, that the attempted surrender did not operate, and, therefore, that the company were liable for the loss. *Skellings v. Royal Ins. Co., 22 Occ. N. 253, 4 O. L. R. 123.*

2. Conditions — Prior insurance — Abandonment — Subsequent insurance — Interim receipt — Estoppel.]—R., having a policy of insurance for \$2,000 in the M. Co., wrote to D., a sub-agent of the R. Co., that he was going to abandon that insurance, and insure in the R. Co. for about \$3,000. B. gave D. his note for \$51 and paid him \$25 in cash, and D. sent B. the usual interim receipt of the R. Co., promising the subsequent

issue of a policy which was to be subject to the conditions indorsed on the receipt. One of these provided that the policy should be void if there was any prior insurance, unless the consent of the company were indorsed. D. discounted the note and in due course accounted to the R. Co. for the full amount of the premium. The goods insured were destroyed by fire before the maturity of the note, which B. paid at maturity. No formal application for the insurance was signed by B., but a policy was made out before the fire and sent to D., who did not, however, deliver it to B. In actions brought upon the two policies by the assignees of B.:—*Held*, that B.'s statement that he was going to abandon the insurance in the M. Co. was not merely an expression of intention, but was a term or condition that affected the very existence of the proposed insurance in the R. Co., which was not to become effective until that condition was fulfilled, and, as B. never did so abandon, there never was any effective insurance on his goods in the R. Co.; and therefore the M. Co. could not set up the conditional contract of insurance in the R. Co. as a breach of the statutory condition against a subsequent insurance. *Commercial Union Assce. Co. v. Temple*, 29 S. C. R. 206, and *Western Assce. Co. v. Temple*, 31 S. C. R. 373, followed. *Whitla v. Royal Ins. Co.*, *Whitla v. Manitoba Assce. Co.*, 22 Occ. N. (G), 72, 266, 14 Man. L. R. 90.

3. Conditions — Prior insurance — Subsequent insurance — Substitution of policies — Implied assent — Adjustment of loss — Waiver.—In an application for insurance, particulars of prior insurance in two other companies of \$4,000 in each company were given, but in the policy in question prior insurance for only \$4,000 was assented to, neither company being named. The defendants pleaded as a breach of the statutory conditions non-disclosure of prior insurance for \$4,000 in one of the two companies:—*Held*, that the plea must be read strictly and without amendment, and that so read the assent in the policy to insurance of \$4,000 might be treated as an assent to the prior insurance complained of in the plea; and *semble*, that, had the defendants not intended to assent to the prior insurance of \$8,000, they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application. *Held*, also, that to a subsequent insurance for \$4,000, in another company, in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary. Assent, express or implied, to subsequent insurance is sufficient even if given after the

loss has occurred. In this case such assent was held to be sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted. *Mutchmor v. Waterloo Mutual Fire Ins. Co.*, 22 Occ. N. 406, 4 O. L. R. 606.

4. Conditions — Subsequent insurance—Destruction of property insured—Sole owner—Mortgagor—Pleading.—A policy of insurance against fire contained the following condition: "If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof, . . . this policy shall become void, unless consent in writing by the company be indorsed hereon:—"*Held*, following *Commercial Union Assce. Co. v. Temple*, 29 S. C. R. 206, that where additional insurance was applied for, but not accepted until after the property insured was destroyed by fire, the condition had no application. A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole and unconditional owner of the property insured. The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured. The land upon which the buildings insured stood was subject to a mortgage:—*Held*, that the defence that the lands were not owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise incumbered, whereas, &c., it was mortgaged. *Temple v. Western Assce. Co.*, 35 N. B. Rens. 171.

5. Conditions — Waiver — Acts of officers.—A fire insurance company cannot be presumed to have waived a condition precedent to an action on a policy on account of unauthorized acts of its officers. *Hyde v. Lafaire*, 32 S. C. R. 474.

6. Contract — Lex loci — Lex fori — Principal and agent — Payment of premium—Interim receipt—Repudiation of acts of sub-agent.—The *lex fori* must be presumed to be the law governing a contract, unless the *lex loci* be proved to be different. The appointment of a local agent of a fire insurance company is one in the nature of a *delectus persona*, and he cannot delegate his authority nor bind his principal through the medium of a

sub-agent. *Summers v. Commercial Union Assurance Co.*, 6 S. C. R. 19, followed. The local agent of a fire insurance company was authorized to effect interim insurances by issuing interim receipts, countersigned by himself, on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt countersigned by him (the canvasser) as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium:—*Held*, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority. *Held*, further, that, even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurances. *Canadian Fire Insurance Co. v. Robinson*, 22 Occ. N. S. 31 S. C. R. 488.

7. Mutual plan—Annual renewal—Proposal for increased premium—Non-acceptance—Condition of payment in advance—Delivery of receipt—Waiver.—On the 31st October, 1898, the defendants issued their policy on the mutual plan to the plaintiffs for an insurance of \$20,000 upon their property, and on the 31st October, 1899, a further policy for \$10,000. The policies provided for insurances for one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The plaintiffs paid the premiums in 1898, 1899, and 1900, but not in advance. On the 28th October, 1901, the executive officer of the defendants wrote to the plaintiffs enclosing renewal receipts and asking the plaintiffs to remit the amounts of the cash premiums. The rates being higher, some correspondence ensued, and on the 16th November, 1901, when a fire took place, the plaintiffs had not paid the cash premiums nor signed premium notes. The defendants reinsured their risk as soon as the premiums became payable, and had not cancelled these reinsurances down to the time of the trial:—*Held*, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901. *Seemle*, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the de-

fendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount. *Doherty v. Millers and Manufacturers Insurance Co.*, 22 Occ. N. 295, 4 O. L. R. 303.

8. Proof of loss—Condition—Waiver—Delay—Agent—Adjuster.—A condition of the policy required that proof of loss "shall be made by the assured." The son of the assured filled in and signed the statement of loss, under the general authority of a notarial power of attorney:—*Held*, that this was a sufficient compliance with the condition of the policy. 2. Where the insurer retains the proof of loss, without objection as to its sufficiency, for more than sixty days before action taken, the company will be considered to have waived the condition which requires a delay of sixty days after filing claim before the institution of suit; and the fact that a blank in the statement was filled in, at the request of the company, within the period of sixty days before suit, will not affect the right of action. 3. The condition which requires proof of loss to be furnished within thirty days after the fire may be waived either expressly or impliedly; and the assured is held to be relieved from this condition if the presentation of the claim has been delayed by the company's investigation of the loss, or if the representations of the company's authorized agents have led the assured to understand that compliance with this condition will not be required. 4. While adjusters of fire losses are not, as a general rule, agents of the companies under an authority sufficient to make their statements binding upon the companies for whom they act, yet an adjuster may become a duly authorized agent of the company by the course of procedure in a particular case. *c. g.*, where the adjuster was the only medium of communication after the fire between the company and the assured, and was engaged by the company to look over the proofs, advise as to a settlement, &c. *Western Assce. Co. v. Pharand*, Q. R. 11 K. B. 144.

9. Renewal—Prior insurance—Action—Parties—Mortgage.—The renewal, as it is commonly called, of a contract of insurance is not a renewal or extension of the original contract, but a new contract based, as far as applicable, upon the original application and in accordance with the policy issued in pursuance thereof. Where, therefore, at the time of such a new contract by way of renewal, no prior insurance is in force, the insurance is not avoided, although when the original contract was entered into prior insurance was in force, and this fact was not disclosed. Judgment of ROSE, J., 32 O. R.

309, 21 Occ. N. 124, reversed. Mortgagees to whom by a policy the loss is made payable as their interest may appear, have a right of action upon the policy in their own name against the insurers, and are entitled to enforce payment to the extent of their interest. But if in such a case there is no mortgage or subrogation clause containing a direct agreement with the mortgagees, they stand in the same position as the mortgagor, and their claim may be defeated by any defence which would have been a good defence as against the mortgagor. *Livingstone v. Western Ins. Co.*, 16 Gr. 9, and *Mitchell v. City of London Assce. Co.*, 15 A. R. 262, followed. *Omnium Securities Co. v. Canada Fire and Marine Ins. Co.*, 1 O. R. 494, observed upon. *Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co.*, *Agricultural S. and L. Co. v. Alliance Assce. Co.*, 21 Occ. N. 582, 3 O. L. R. 127.

See ARBITRATION AND AWARD, 2 — ASSESSMENT AND TAXES, V. 3 — ATTACHMENT OF DEBTS, I. 3 — COMPANY, II. 1 — LIMITATION OF ACTIONS, I. 1 — PRINCIPAL AND AGENT, 3 — WRIT OF SUMMONS, II. 2.

III. HAIL.

Mutual company — *Assessment of premium notes—Withdrawal from membership—Presumption of continuance of policy—Impossibility of performance of condition.*—In an action by a company incorporated under the Mutual Hail Insurance Act, R. S. M. c. 106, to recover the amount of an assessment imposed by resolution of the directors upon one of its members, for the second crop season after the issue of the policy, it is incumbent on the company to shew that by the terms of the policy the person called on to pay the assessment is still a member of the company, and if no evidence is given to shew what the terms of the policy were in regard to the period covered by it, the action should be dismissed. If a member of such a company is entitled to withdraw from membership upon certain conditions, including the surrender of the policy issued to him, he cannot exercise such right without surrendering the policy, although the loss of it has rendered it impossible for him to perform that condition. *Croockewitt v. Fletcher*, 1 H. & N. 893, and *Cutter v. Powell*, 6 T. R. 320, followed. *Manitoba Farmers' Mutual Hail Ins. Co. v. Fisher*, 22 Occ. N. 303, 14 Man. L. R. 157.

IV. LIFE.

1. Application for—Issue of policy—Date—Completed contract—Due dates

of premiums.—The initialling of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not, without communication of the fact to the applicant, constitute any contract with him.—If a policy is afterwards prepared, and the applicant informed that it is ready for him, this will constitute an acceptance of the original application; and such policy may be properly antedated as of the date of the application.—A provision in the application and policy that the insurance shall not be binding on the company, or the policy go into effect, until payment of the first premium, will not postpone or affect the due dates at which the respective premiums will fall due, so as to make them different from those mentioned in the policy. *Armstrong v. Provident Savings Life Assce. Socy.*, 22 Occ. N. 13, 2 O. L. R. 771.

2. Apportionment of insurance money—Revocation by will—Application of foreign law—Lien for premiums.]

—A contract of life insurance entered into by a company whose head office is in Ontario, the policy having issued from the head office and providing for payment of the insurance money there, is an Ontario contract, and must be interpreted and carried out in accordance with Ontario law, although the assured lived in Manitoba and made application there to a local agent for the insurance, but an assignment of or dealing with the benefits of the policy made by the assured in Manitoba will be governed by the law of this Province relating thereto. The deceased, who was a resident of Manitoba, insured his life with a company whose head office was in Ontario, and by the policy the insurance money was appropriated in favour of his wife, but by his will he absolutely revoked this appropriation and directed that the money should become part of his estate and should be paid to his executor. Section 12 of the Life Assurance Act, R. S. M. c. 88, as re-enacted by 62 & 63 V. c. 17, permits such a revocation and new disposition of the insurance money, but the corresponding statutory provision in Ontario (R. S. O. 1897 c. 203, s. 160) forbids it:—*Held*, that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition, and that the insurance money must be paid to the executor as part of the deceased's estate. *Toronto General Trusts Co. v. Sewell*, 17 O. R. 442, and *Lee v. Abdy*, 17 Q. B. D. 309, followed. *Held*, also, that a will is an instrument in writing within the meaning of the Manitoba statute above referred to. The widow was held entitled to a charge in her favour for insurance premiums paid by her to keep the policy in

force. *National Trust Co. v. Hughes*, 22 Occ. N. 101, 14 Man. L. R. 41.

3. Beneficiary—Murder of assured—Liability of insurers.]—The judgment of the Court of Queen's Bench, Q. R. 9 Q. B. 499, holding that the insurers were not released from their obligation by the murder of the assured by the primary beneficiary, was affirmed on appeal. *Standard Life Assce. Co. v. Trudeau*, 31 S. C. R. 376.

4. Benefit society—Beneficiary—Supposed wife—"Dependent"—Effect of payment into Court.]—The plaintiff was the wife of Philip Crosby, deceased, having been married in 1860. In 1886 the deceased went through a second ceremony of marriage with the defendant, who did not know that she was marrying a man whose wife was living. In 1900 the deceased made an indorsement on his certificate of insurance in a benevolent society, revoking his former direction as to payment, and directing payment to be made to "Mary Ball, otherwise known as Mary Crosby." The defendant was the holder of the certificate, and claimed the money as a "dependent" of deceased:—*Held*, that the defendant, having lived with the deceased, believing herself to be his wife, and being supported by him, was, under one of the rules of the society, No. 174, entitled to the fund as a "dependent" of the deceased. *Held*, also, that although the society had not stood upon their strict rights, but had paid the money into Court to be dealt with by the Court, that fact did not affect the rights of the parties, which must be determined according to law, and not *ex aequo et bono*. *Crosby v. Ball*, 22 Occ. N. 324, 4 O. L. R. 496.

5. Benefit society—Beneficiary certificate—Alteration of constitution—Retroactivity—Internal appeals—Domestic person—Waiver—Cheque—Estoppel.]—Action on a beneficiary certificate dated the 19th October, 1896, issued by the defendants, who were incorporated under the Benevolent Societies Act, R. S. O. 1877 c. 167, to the plaintiff, conditioned, *inter alia*, that he should comply with the constitution, rules, or orders governing, "or that might thereafter be enacted by the defendants to govern, the Order and its benefit funds," and by which the defendants agreed that, on the plaintiff attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount:—*Held*, that the constitution of the defendants having been duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in

1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff was entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it:—*Held*, also, that the plaintiff was not bound before action to exhaust the intricate series of appeals within the society provided for by the rules, for, under R. S. O. 1897 c. 203, s. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proofs of loss, and any rules, conditions, or stipulations to the contrary shall, as against the assured, be void. *Held*, also, that defendants had waived a requirement of their constitution that the insured should sign an acceptance. *Held*, also, that plaintiff was not estopped from insisting that the whole of the benefit was due, by reason of having accepted a cheque expressed to be for the full amount of the first instalment. *Dodige v. Royal Templars of Temperance*, 22 Occ. N. 321, 4 O. L. R. 423.

6. Benefit society—Beneficiary certificate—Designation of beneficiary—Indorsement—Will—Infant children of assured.]—A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died; and he then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder:—*Held*, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R. S. O. 1897 c. 203, s. 151, s. (6), by 1 Edw. VII. c. 21, s. 2, s. 4. *In re Snyder*, 22 Occ. N. 280, 4 O. L. R. 320.

7. Condition—Domestic tribunal—Renunciation of right of set-off.]—It may be stipulated by a policy of insurance that the assured shall not sue the insurance company until he has endeavoured to obtain justice through the officers of the company in the manner provided by its by-laws. But no stipulation will be valid which has for its object directly or indirectly to hinder the insured from having recourse to the Courts or to force him to go before a tribunal, even a voluntary one, sitting in a foreign country.—2. A person may by agreement renounce the right of set-off, but such renunciation will not be presumed, and must be stipulated

for in a clear and precise manner; in case of doubt as to whether there has been renunciation, the set-off must have effect. *Dahmé v. Supreme Court of the Order of Foresters*, Q. R. 21 S. C. 439.

8. Contract—Condition—Payment of premium—Delivery of policy—Concurrent death of assured.]—The husband of the plaintiff had, on the 24th February, 1900, made to the defendant company an application for insurance containing the following condition: "The policy applied for, if it is issued, will not come into force until the premium shall have been actually paid to the company and accepted by it, while the person whose life is offered for assurance is alive and in good health." In making this application for insurance the plaintiff's husband paid \$4 on account of the premium, and, the medical examination having been satisfactory, the company issued a policy of insurance at New York on the 8th March, 1900, and deposited it in the post office of that city on the 9th March, addressed to its agent at Montreal, to whom the letter containing the policy was delivered upon the 10th March (a Saturday). On the 8th March the plaintiff's husband was seized with an illness, of which he died on the 10th March between half-past nine and ten o'clock in the morning. The plaintiff afterwards offered the balance of the premium to the agent of the company, who refused to give her the policy:—*Held*, that if, in principle, the acceptance of the proposal for insurance constituted a valid contract of insurance (Art. 2481, C. C.), in this case the acceptance of the proposal was subject to the condition stated, and such condition not having been complied with, no contract of insurance existed.—2. That, in view of the condition, the deposit of the policy in the post office at New York did not constitute a delivery to the deceased. *Girard v. Metropolitan Life Ins. Co.*, Q. R. 20 S. C. 532.

9. Contract made by minor—Plea of lesion.]—Action on a promissory note for \$686.25 given in payment of the first premium on a policy of life insurance for \$25,000. The defendant pleaded that he was a minor when the contract was made; that it was disadvantageous to him, as it absorbed nearly all his annual revenue; and that as soon as his tutor had heard of it he had served a protest on the company on the ground that the contract was injurious to his pupil:—*Held*, that the defendant had established his plea, and that it was not his interest to have so large an insurance, especially as his health was not good, and the premium took up nearly all of his fixed income. Action dismissed, but without costs, inasmuch as the plaintiffs had been led into error as to the

defendant's age, health, and financial circumstances. *Imperial Life Ins. Co. v. Charlebois*, 22 Occ. N. 417.

10. Delivery of policy—Payment of premium.]—A contract for life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, having ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, neglects to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon. Judgment of the Court of Appeal, 27 A. R. 675, 21 Occ. N. 17, reversed. *Mowat v. Provident Savings Life Assurance Society*, 22 Occ. N. 221, 32 S. C. R. 147.

11. Delivery of policy—Payment of premium—Evidence.]—The production from the custody of representatives of the insured of a policy of life insurance raises a *prima facie* presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid, and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional. The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the Province of Quebec, in commercial matters, such evidence is admissible under the provisions of Art. 1233, C. C. *Mutual Life Assurance Co. of Canada v. Giruère*, 22 Occ. N. 276, 32 S. C. R. 348.

12. Foreign company—Heir of beneficiary—Proof of heirship—Action—Tender—Payment into Court—Costs.]—A foreign company is not presumed to know the law of succession of this Province, and, before suing such a company upon a benefit certificate, the plaintiff ought to make known legally to the company and state upon competent authority his position as legitimate heir of the beneficiary, by obtaining from a Judge of the Superior Court letters of verification such as are provided for by Arts. 1411 *et seq.*, C. P.—2. In an action taken without these formalities, offers of the amount due to whatever person has the right to it, and a deposit in Court of the amount, will be declared good and valid, and the action will be dismissed *without* costs up to the plea in which the company declares that it submits its rights to the Court, and *with* costs subsequent to such

plea. *Roy v. Supreme Council Catholic Benevolent Legion*, 4 Q. P. R. 277.

13. Tender of premium—Refusal to accept—Necessity for tender of future premiums.]—In an action by the widow of a man whose life was insured by the defendants for \$1,000, upon payment of a monthly premium of \$1.34, to recover the amount of the insurance upon proof of his death, the plaintiff alleged that she tendered the monthly premium for January, 1892, but the defendants refused to accept it, or any future premium, unless the insured should be re-examined. He died in June, 1895:—*Held*, upon the evidence at the trial, that the plaintiff had not discharged the burden of proving the tender; but, in any case, one tender would not have been sufficient, the circumstances not being such as to justify a reasonable belief that future tenders would be rejected. *Webb v. New York Life Ins. Co.*, 22 Occ. N. 179.

14. Unmatured policy — Present value of reversion—Mode of calculating—Statute—Amendment—Declaration as to former law.]—The ascertainment of the present value of the reversion in the sum assured by the policy at the decease of the life insured, as directed by the judgment in 21 Occ. N. 232, 1 O. L. R. 256, is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with the calculation. The statute 1 Edw. VII. c. 21 (O.), assented to on the 15th April, 1901, altering the manner of valuing unmatured policies, and enacting that the alterations declared the law of the Province as it existed on the 14th April, 1892, did not affect the rights of the claimants under their policies, because those rights had been declared (by the judgment referred to above) before the Act was passed, and judgments are not re-opened even by such legislation. *In re Merchants' Life Assn. of Toronto, Vernon's Claims*, 22 Occ. N. 19, O. L. R. 682.

See, also, *S. C. (Master in Ordinary)*, 22 Occ. N. 65.

15. Wager policy—Endowment—Action for cancellation—Return of premiums.]—If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit, and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. III. c. 48, s. 1 (Imp.). The Act applies to an endowment as well as to an all life policy. Judgment of the Court of Appeal, 2 O. L. R. 559, 21 Occ. N. 557, affirmed. In an action by the company for cancellation of the policy under the Act, a return

of the premiums paid will not be made a condition of obtaining cancellation. Judgment of the Court of Appeal reversed. *North American Life Assurance Co. v. Brophy*, 22 Occ. N. 250, 32 S. C. R. 261.

See COMPANY, IV. 6—WILL, II. 11.

V. MARINE.

1. Assurance broker—Change in policy—Authorization—Deviation—Custom—Necessity.]—When an insurance company has insured a cargo for a voyage from Montreal to New Carlisle, and the assurance broker has of his own motion changed the description of such voyage by adding to it the words "and to Bonaventure River," which was the voyage the ship was to make, the contract of assurance is void *ab initio*, even when the loss takes place between Montreal and New Carlisle, the insurance broker not being able to change the description of the voyage without a special authorization, and the parties not being agreed upon a port of destination. Judgment in Q. R. 15 S. C. 469 affirmed on this point. When a cargo is insured for a voyage described as "from Montreal to New Carlisle and Bonaventure River," without indication that the ship will touch at intermediate ports, the fact that the ship is delayed at Levis for six or seven hours, and for four days and six hours at St. Michel de Bellechasse, constitutes a deviation and vitiates the contract of assurance. Judgment in Q. R. 15 S. C. 476 reversed on this point. In order that custom or necessity may be invoked as authorizing such delay, the custom must be universally recognized or at least notorious enough to be known to the assurers, and the necessity must be such as could not be foreseen before the departure of the vessel; and in this case no such custom or necessity was proved. *Mannheim Ins. Co. v. Atlantic and Lake Superior R. W. Co.*, Q. R. 21 S. C. 200.

2. Shipwreck—Abandonment—Refusal to accept—Acceptance by conduct—Powers of master—Arrival of owner's agent—Misdirection—Waiver—Evidence—Understanding of witnesses—Special jury—Demour of witnesses—Service of writ and of agent.]—The plaintiff's vessel having put into port damaged, notice of abandonment was given to the insurers, all of whom declined to accept. By direction of the agent for the insurers, the cargo was taken out and stored, and the vessel repaired, after which a portion was reloaded, when it was discovered that the vessel was leaking. The cost of repairs up to this time was over \$4,000, and the vessel was valued at only \$5,000. The persons who had made the repairs, in order to preserve their lien, refused to allow the cargo to be taken out a second

time, and, in default of payment, took proceedings against the ship and cargo, under which they were finally sold:—*Held*, that the refusal to accept the abandonment did not prevent the working of an acceptance, and what was done constituted an acceptance of the abandonment, or, if not an abandonment, such a wrongful conversion of the ship as would preclude the insurers from setting up non-acceptance.—2. That the direction to the jury that the powers of the master in case of shipwreck were displaced upon the arrival of the owner, or of an agent having express authority to represent him, was right.—3. That misdirection as to the particular agent who waived proofs of loss was immaterial, if there was an acceptance of the abandonment.—4. That a mistake of the trial Judge as to a matter of fact about which there was no dispute was not ground for a new trial unless it was shewn that his attention had been directed to the mistake.—5. That under Order 37, Rule 6, the misdirection must have been such as to have occasioned some substantial wrong or miscarriage.—6. That evidence of a witness as to what he understood or did not understand generally was properly rejected, where the memory of the witness appeared to be defective as to conversations.—7. That where the underwriter was wrongfully interfering with the control of the ship, the insured might elect at the last moment to hold that the underwriter had accepted the abandonment.—8. That if the renewal of the notice of abandonment, when the project of the insurers to repair failed, did not conclude the matter, the vessel was lost to the insured by the sale.—9. That the Court, even if dissatisfied with the verdict, especially after a second trial, will defer to the opinion of a special jury of men peculiarly able to understand the subject matter.—10. That where such jurors were furnished with a short hand report of the evidence of witnesses on a former trial, it was not important that they did not have an opportunity of observing the demeanour of the witnesses.—11. That the amount claimed by the plaintiff for services of the master and crew, while the vessel was in the hands of the underwriters, did not come within the "sue and labour" clause, and was not recoverable; nor was an amount sought for services of the plaintiff's special agent, who was acting adversely to the underwriters. *McCleod v. Ins. Co. of North America*, 34 N. S. Reps. 88.

INTERDICT.

1. Action against—Parties—Curator—Amendment.]—Interdiction for prodigality renders the interdict incapable of

administering his estate, or of being lawfully served with or of lawfully appearing in judicial proceedings.—2. Where a writ has issued against an interdict for prodigality instead of against his curator, the defect cannot be cured by adding his curator as a defendant. *Greene v. Mappin*, M. L. R. 5 Q. B. 108, followed. *Leroux v. De Beaujeu*, Q. R. 20 S. C. 235, 4 Q. P. R. 35.

2. Action by—Husband and wife—Family council—Curator.]—If a woman, interdicted for drunkenness, wishes to bring an action for separation from bed and board, against her husband and curator, and the grounds stated in the petition are sufficient to justify such an action, the Court will order that a family council be held to advise as to the appointment of a curator *ad hoc*. *Clermont v. Charost*, 4 Q. P. R. 427.

See LUNATIC, 2.

INTEREST.

1. Irregular judgment—Moneys retained under—Refund.]—Where executors, who were also residuary legatees, acting *bona fide* under a judgment afterwards held by the Court of Appeal to be irregular and not binding on the parties concerned, retained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud or misconduct, they were held not chargeable with interest. *Boys' Home v. Lewis*, 3 O. L. R. 208.

2. Written contract—Debt and time certain—3 & 4 Wm. IV. c. 42, s. 28.]—To entitle a creditor to interest under 3 & 4 Wm. IV. c. 42, s. 28 (Imp.), the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. Judgment in 21 Occ. N. 97, 12 Man. L. R. 228, affirmed. *Sinclair v. Preston*, 22 Occ. N. 9, 31 S. C. R. 408.

See APPEAL, X. 9—COMPANY, IV. 3—CONSTITUTIONAL LAW, 1—COURTS, V. 2—CROWN, IV. 3—DEBENTURES—EXECUTORS AND ADMINISTRATORS, 3—GIFT, 2—INFANT, 1—LANDLORD AND TENANT, IV. 1—MORTGAGE, 1-5—PLEADING, III. 3—REVENUE, 2—SOLICITOR, 2—WILL, I. 6, II. 12—WRIT OF SUMMONS, III. 1, 3.

INTERPLEADER.

See SOLICITOR, 6.

INTERROGATORIES.

See DISCOVERY, II. — SERVICE OF PAPERS, 1.

INTERVENTION.

Re-opening of cause — Preliminary exceptions — Deposit.] — An intervenant has not the right, at any stage of the case and without deposit, to re-open it on questions pleadable only by preliminary exceptions, *Bisaillon v. Curé, &c., of St. Valentin*, 4 Q. P. R. 191.

See COMPANY, V. 13—COSTS, VIII. 4 — HUSBAND AND WIFE, I. 5—PLEADING, VI.—SET-OFF, 2.

INTOXICATING LIQUORS.

Action for price—License—Production—Pleading.]—The plaintiff was a grocer, and sued to recover the amount of an account for intoxicating liquors sold. The defendant moved for an order that the plaintiff should be directed to declare whether at the time of the sale of such beverages he had a license required by law, and to produce such license:—*Held*, that the plaintiff was not obliged to allege that he was the holder of a license nor was he obliged to produce one as long as the defendant did not by his pleading allege that the plaintiff had not obeyed the law upon this point. *Martel v. Paquet*, 5 Q. P. R. 100.

See CANADA TEMPERANCE ACT—CONSTITUTIONAL LAW, 4—CONTRACT, V.—INDIAN, 2—INTERDICT, 2—LIQUOR LICENSE ACT.

INVENTORY.

See PLEADING, IV. 2.

INVESTMENTS.

See COMPANY, IV. 5.

JOINDER OF CAUSES OF ACTION.

See MECHANICS' LIENS, III. 5—PARTIES, I. 3—WRIT OF SUMMONS, II. 10.

JOINDER OF CLAIMS.

See TRIAL, II. 1.

JOINDER OF ISSUE.

See ACTION, 4.

JOINDER OF PARTIES.

See PARTIES, II.

JOINT LIABILITY.

See WAY, II. 6.

JUDGE OF HIGH COURT.

See APPEAL, V. 3.

JUDGMENT.

I. FOREIGN JUDGMENT.

II. REVOKING OR SETTING ASIDE.

III. SUMMARY JUDGMENT.

IV. OTHER CASES.

See APPEAL, VIII. 1, 3, 4, 5, 7, IX. 3, 4 — APPEARANCE, 1 — ASSESSMENT AND TAXES, II.—ATTACHMENT OF DEBTS, II. 6, 7, III. 3 — BANKRUPTCY AND INSOLVENCY, I. 6—BILLS OF EXCHANGE AND PROMISSORY NOTES, 7—COSTS, I. 8, VIII. 3—COURTS, II. 1, IV., V. 3, IX. 5—EXECUTION, II. 4, VI. 4—EXECUTORS AND ADMINISTRATORS, 2 — INTEREST, 1 — LUNATIC, 2—MECHANICS' LIENS, III. 2 — MINES AND MINERALS, 1—PARTITION, 3—PARTNERSHIP, 1—PLEADING, XI. 2, III. 4, VII. 1, 2—PROHIBITION, 2—RAILWAY, VI. 7—RES JUDICATA—SALE OF LAND—SOLICITOR, 4—STATUTES, 1—SUPREME COURT OF CANADA—TRIAL, II. 7, IV. 1, 3—WRIT OF SUMMONS, II. 13.

I. FOREIGN JUDGMENT.

1. Action on—*Lis pendens*—Similar action in another Province.]—A judgment rendered in a Province of the Dominion other than the Province of Quebec will not be considered as a judgment rendered in a foreign country, and the Quebec courts are obliged to recognize a judgment so pronounced if it is in accordance with the provisions of Art. 211, C. P.—2. A defendant by a plea of *lis pendens* may except to a suit begun in the Province of Quebec by alleging that a suit of the same nature, between the same parties, and for the same cause of action,

is pending in another Province of the Dominion.—3. But, if the action has no object but to have the judgment rendered in another Province of the Dominion declared executory, the fact that the plaintiff has set up a like cause of action in another Province, and that it is actually pending, does not justify a plea of *lis pendens*, provided that the Court is not asked to pronounce upon the cause of action, but only to state that the judgment has been regularly obtained. *Blackwood v. Percival*, 22 Occ. N. 417, 5 Q. P. R. 410.

2. Action on—Plea to—Damages not due.—A defendant who is sued upon a foreign judgment declaring a contract to be executory and awarding damages by reason of its non-execution, may, notwithstanding such judgment, by virtue of Arts. 111 and 202, C. P., plead to the allegation of the debt in the declaration, that the damages claimed are not due and give the grounds for such conclusion. *Reid v. McCurry*, 4 Q. P. R. 251.

3. Action on—Pleading—Declaration—Original cause of action.—An action was brought in the Province of Quebec upon a foreign judgment. The defendant made an exception to the form, upon the ground that the plaintiff had failed to indicate the causes of action in the suit in which judgment had been rendered:—*Held*, that the plaintiff bringing an action upon a foreign judgment is not bound to state the grounds of the original action, where it is shewn, by the certificate of the clerk of the Court by which the judgment was rendered, that the claim sued on was personally served on the defendant, together with the writ of summons in the action in which the foreign judgment was rendered. *Smith v. Beaubien*, 22 Occ. N. 419.

4. Action on—Proof of—Exemplification—Void contract—Company—Extra-territorial contracts of carriage.—A default judgment obtained in a foreign jurisdiction, though liable to be set aside so long as it stands, is "final and conclusive," within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this Province. In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous, such as being founded on an *ex facie* void contract. The Province may create a company with power to undertake extra-territorial contracts of carriage, and so it is not *ultra vires* of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory. *Per MARTIN, J.*—An exemplifica-

tion of judgment under the seal of the Court in which the judgment was pronounced, is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary. *Boyle v. Victoria Yukon Trading Co.*, 22 Occ. N. 377, 9 Brit. Col. L. R. 213.

See WRIT OF SUMMONS, III. 1, 2.

II. REVOKING OR SETTING ASIDE.

1. Action—Petition—Fraud—Affidavit.—[The revocation of a judgment may be demanded by a direct action, while it may also be effected by means of a petition.—2. One who attacks, on the ground of fraud, a judgment against him, and alleges that it causes him serious prejudice, is not obliged to make it appear in his declaration that, but for the alleged fraud, the judgment would have been different from what it is.—3. A petition should be accompanied by an affidavit, but if, upon an inscription in law against a direct action, the absence of such affidavit is not set up as a ground, the Court cannot, of its own motion, take notice of the absence of the affidavit. *Charette v. Leveillé*, 4 Q. P. R. 310.]

2. Exception to petition—Validity as tierce-opposition.—[A court document intitled "petition for revocation of judgment," but not containing any of the necessary grounds, will not be rejected upon exception to the form if it can be held valid as a tierce-opposition. *In re Montreal Cold Storage and Freezing Co.*, 5 Q. P. R. 91.]

3. Laches.—[Judgment was signed against the defendant for \$542.68 and costs, in default of appearance, on the 2nd July, 1892. In 1901 he moved to set it aside on the grounds that he was never served with the writ of summons and that he did not owe any money to the plaintiff. The plaintiff's husband swore that on the 21st June, 1892, he personally served the defendant, with whom he was well acquainted, with the writ of summons in the usual way, in the presence and hearing of the plaintiff's solicitor, and the affidavit of the solicitor shewed that he was present on the occasion in question, when the defendant, after being served with the writ of summons, admitted that the amount set out in the indorsement was correct and that he had no defence:—*Held*, that, the defendant not having explained the delay on his part of nearly nine years, nor satisfied the Court that he had any merits, and the judgment being regular, the application should be refused. *Fooks v. Cox*, 22 Occ. N. 44.]

III. SUMMARY JUDGMENT.

1. County Court, B. C.—Defences—Leave to defend—Affidavit—Cross-examination.]—On a motion for speedy judgment in a County Court action, it is open to the defendant to set up other defences than those disclosed in his dispute note.—2. On the facts, the defendant was entitled to unconditional leave to defend.—3. *Per* IRVING, J.:—The defendant should have been allowed to cross-examine the plaintiff on his affidavit. *McGuire v. Miller*, 9 Brit. Col. L. R. 1.

2. Motion for—Affidavit of plaintiff—Cross-examination on—Discretion to refuse.]—On the return of a summons for judgment under Order XIV., an application was made on behalf of the defendants for leave to cross-examine the plaintiff on his affidavit filed in support of the summons. No affidavit of merits had been filed on behalf of the defendants:—*Held*, refusing the application, that it is only in exceptional cases that a defendant will be permitted to cross-examine the plaintiff on his affidavit, and then only after the defendant has filed an affidavit of merits. *Ward v. Dominion Steamboat Linc Co.*, 22 Occ. N. 424, 9 Brit. Col. L. R. 231.

See APPEAL IV. 1—COSTS I. 10—WRIT OF SUMMONS, II.

IV. OTHER CASES.

1. Account—Time fixed by judgment for rendering—Damages in default—Death of defendant during time fixed—Revivor—Universal legatee—Payment of costs.]—On 16th November, 1901, the judgment of the Court required the defendant to render to the plaintiff, within 30 days, an account of a quantity of wood which defendant had to dispose of for plaintiff, and, in case of default to render the account, to pay to plaintiff \$9,000, with interest, and costs in any case. On 30th November, 1901, the defendant died, leaving his wife his universal legatee. His decease was not entered on the roll. On 2nd December, 1901, the widow, as universal legatee, paid the costs of the action. On 13th January, 1902, the plaintiff served the judgment on the universal legatee, with a demand for payment of the \$9,000 within eight days, in default of which the judgment would be executed against her. On 21st January, 1902, she presented a petition alleging the death of her husband, her capacity of universal legatee, and asking that she should be added as a party to the suit in place of her husband and allowed to proceed in it. The plaintiff answered that the 30 days

having expired, the judgment had become final as to the \$9,000; that the petitioner had acquiesced in the judgment by paying the costs; and that there was no suit to which the petitioner could be made a party:—*Held*, that the plaintiff had not at the time of the defendant's death acquired a right to the \$9,000, since it was not due till after the expiry of 30 days, and then only in default of the account being produced within that time.—2. That the decease of the defendant stopped the running of the 30 days, for a dead man cannot render an account; and it was not a case within Arts. 268, 269, C. P., which say that suits are valid up to the day of service of notice of a party's death, for as against the defendant there had been no suit since his death.—3. That the universal legatee, in paying the costs of the action, acquiesced in the judgment, but did not acquiesce in the default to render an account and to pay the \$9,000.—4. That the universal legatee was in a position to take up the suit at the point where it was at the death of the defendant.—5. *Quare*, as to the effect of the judgment, whether the defendant, if he had lived, could, after the expiry of the 30 days, have demanded and obtained further time to render the account. *Girard v. Letellier*, Q. R. 21 S. C. 192.

2. Date of—Amendment—Death of plaintiff between argument and judgment—Administrator ad litem.]—The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some month later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument. *Turner v. London and South-Western R. W. Co.*, L. R. 17 Eq. 561, and *Ercroft v. Coulthard*, [1897] 2 Ch. 554, followed.—The defendants were entitled to have an administrator *ad litem* appointed to represent the plaintiff's estate in order that the costs of the action and appeal might be recovered. *Gunn v. Harper*, 22 Occ. N. 208, 225, 3 O. L. R. 693.

3. Defence arising after action brought—Confession—Judgment for costs without Judge's order—Other defences.]—The defendant under Order 24, Rules 1 and 2, pleaded a defence arising

after action brought, which was a good answer to the whole action. The plaintiff confessed this defence and signed judgment against the defendant for costs under Rule 3 of Order 24, which provides that the plaintiff may deliver a confession of such defence, and may thereafter sign judgment for his costs up to the time of pleading such defence, unless the Court or a Judge shall otherwise order. The defendant moved to set aside the judgment because (1) it was entered up by the prothonotary without a Judge's order, and (2) such judgment could not be entered while the other defences remained undisposed of:—*Held*, that the words of the Rule specifically enable the plaintiffs to sign a judgment without further proceedings except taxing costs, unless the defendant obtain an order otherwise. The subsequent defence amounts to a waiver of the original defence pleaded. It would be futile to go to trial on the remaining defences, as there is no question remaining to be tried, as in *Hoght v. Tottenham*, [1892] W. N. 88, *Bridgetown, &c., Co. v. Barbados, &c., Co.*, 38 Ch. D. 378, distinguished. *Ruggles v. M. and V. B. R. W. Co.*, 22 Occ. N. 432.

4. Desistment—Proof of—Authority of attorney—Ratification.—The authority of an attorney *ad litem* to file a desistment from a judgment in the name of his client, or the ratification of such desistment by the client, cannot be proved by witnesses, when the judgment is for more than \$50, without a commencement of proof by writing. *Gauthier v. Barcelo*, Q. R. 19 S. C. 498, 4 Q. P. R. 224.

5. Proof of—County Court—Entries by clerk in book—Irregularity.—To prove a County Court judgment the plaintiff produced the procedure book of the County Court shewing the entries therein of the different proceedings in the action in which such judgment was alleged to have been recovered, and also filed a copy of such entries, certified as a true copy by the clerk of the Court, pursuant to s. 46 of the County Courts Act. Amongst the entries so proved was one of judgment by default against M., which entry itself, by s. 103 of the Act, constituted the judgment of the County Court:—*Held*, that, as the entry of the judgment in the procedure book constituted the judgment, and as the Court itself was a court of record, the entry of the judgment became a record of a court of record. If so, its production, or the statutory proof of it by a certified copy, proved the jurisdiction of the Court over the matters in respect of which the judgment was recovered, and the recovery, existence, and validity of such judgment.

It was argued that the procedure book shewed on its face that the judgment was invalid, as it did not shew the note required by s. 105 to be made in such book:—*Held*, that the making of such note was only a ministerial act to be performed by the clerk; it was not a part of the judgment itself; the validity of the judgment did not depend on such note being made, The failure to make it would seem to be merely an irregularity. *Dixon v. Mackay*, 22 Occ. N. 374.

6. Service of—Opposition—Interruption of Right.—The service of judgment required by Art. 1166, C. P., as a means of interrupting the defendant's right to file an opposition thereto, must be that of a duly stamped and certified copy of said judgment. *Migneron v. Yon*, 4 Q. P. R. 185.

JUDGMENT DEBTOR.

Examination of transferee—Third mortgage — "Exigible under execution."—A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver. *Canadian Mining and Investment Co. v. Wheeler*, 22 Occ. N. 123, 3 O. L. R. 210.

See MANDAMUS, 1—PROHIBITION, 1.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL, VI.

JUDICIAL SURETY.

See PRINCIPAL AND SURETY, 6.

JURORS.

See ATTACHMENT OF DEBTS, I. 4—TRIAL, II. 9, 10.

JURY.

See CRIMINAL LAW, IV. 2—NEGLIGENCE, 5—NEW TRIAL—TRIAL, II.

JURY NOTICE.

See TRIAL, III.

JUSTICE OF THE PEACE.

1. Certiorari — *Return of moneys collected.*]—A justice of the peace whose judgment is removed upon a writ of *certiorari*, must, in presenting to the Court the documents relating to the matter, deposit all sums of money collected by him under his judgment.—2. If he does not do so a rule *nisi* may be issued against him obliging him to make such deposit. *Mercier v. Plamondon*, Q. R. 21 S. C. 335.

2. Conviction—Superior Court—Certiorari.]—The Superior Court has power over a conviction by a justice of the peace in a penal matter. *Mercier v. Plamondon*, Q. R. 20 S. C. 288.

3. Convictions—Separate offences — *Disposition of both cases after hearing evidence in both.*]—Two informations were preferred before a justice of the peace against the accused for distinct offences of selling liquor to Indians. At the conclusion of the first case, the magistrate reserved his decision, and proceeded with the second case, in which he convicted, and then dismissed the first. On an application to quash the conviction, the magistrate stated on affidavit that in convicting he was governed only by the evidence in the case in which the conviction was made:—*Held*, that the postponement by the magistrate of his decision in the first case until he had concluded the second, did not, under the circumstances, render the conviction in the second case bad in law. *Regina v. McBerny*, 3 Can. Crim. Cas. 339, distinguished. *Re v. Ning*, 22 Occ. N. 423, 9 Brit. Col. L. R. 254.

4. Disqualification — Interest.]—Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and the fine to be imposed upon the accused will ultimately be paid over to said association, have no jurisdiction, and are prevented from acting on account of interest sufficient to disqualify them. *Daigneault v. Emerson*, Q. R. 20 S. C. 310.

5. Preliminary inquiry—Continuation before another magistrate—Jurisdiction—Commencement de novo.]—A preliminary inquiry in a criminal matter commenced before a magistrate cannot be continued by another.—2. But if a magistrate who has commenced a preliminary

inquiry, dies or is deposed from office or resigns, or if he discharges himself from the matter, another competent magistrate may take the matter in hand, but he must begin the inquiry *de novo*; he may not continue the proceedings already commenced.—3. A Judge of sessions of the peace who commenced a preliminary inquiry, having obtained leave of absence, and having, without finishing the inquiry, departed for a journey to Europe, was held to have discharged himself from the matter; and in this case, with the consent of the Crown, the prosecutor properly obtained from another magistrate, who replaced the former, an order to commence *de novo* the preliminary inquiry.—4. A writ of *certiorari* to prevent the second magistrate from seising himself of the matter and re-commencing it was refused. *Bertrand v. Angers*, Q. R. 21 S. C. 213.

See CANADA TEMPERANCE ACT—CERTIORARI, 1 — COURTS, VI. — CRIMINAL LAW, I. 1, III. 14—MALICIOUS PROSECUTION, 4—MASTER AND SERVANT, III. 1, 2—PROHIBITION, 3.

KEEPING BAWDY HOUSE.

See CRIMINAL LAW, III. 6, 7.

KEEPING DISORDERLY OR COMMON BETTING HOUSE.

See CRIMINAL LAW, III. 8.

LACHES.

See COMPANY, V. 5—COSTS, VI. 1—JUDGMENT, II. 3—MINES AND MINERALS, 13—MISTAKE—MUNICIPAL CORPORATIONS, I. 1 — PLEADING, XI. 1 — TRIAL, II. 2 — VENDOR AND PURCHASER, 5, 11.

LAND SUBSIDY.

See RAILWAY, X. 1.

LAND TITLES ACT, N.W.T.

1. Execution—Renewal—Refiling — Notice to execution creditor — Confirmation of tax sale—Statute—Retroactivity.]—The Land Titles Act, 1894, s. 92, s. s. 1, is amended by 63 & 64 V. c. 21, s. 2 (assented to 7th July, 1900), by the addition

of a proviso, "that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the Registrar . . . unless before the expiration of such period of two years a renewal of such writ is filed with the Registrar in the same manner as the original is required to be filed with him." This proviso is not retroactive so as to apply to a writ of execution which would have expired but was renewed before the 7th July, 1900; such a writ, therefore, remains in full force though a renewal thereof has not been filed with the Registrar either before or after that date. The execution creditor in such a writ should consequently be notified of an application for the confirmation of a tax sale of land of the execution debtor. *Re Town of Prince Albert*, 4 Terr. L. R. 510.

2. Executions against lands — Renewal — Expiry — Memorandum on certificate of title — Sheriff — Judge's order — Seizure — Statute — Amendments.] — The Land Titles Act, 1894, s. 92, provides for the delivery by the sheriff of a copy of a writ of execution against lands to the registrar, until the receipt by whom no land shall be bound by the writ. It also provides that "no certificate of title shall be granted . . . except subject to the rights of the execution creditors under the writ while the same is legally in force," and also that the registrar on granting a certificate of title shall by memorandum hereon express that it is subject to such rights. This section was amended by 63 & 64 V. c. 21, s. 52 (which came into effect on being assented to the 7th July, 1900), by adding a proviso to the effect that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him:—*Held*, that this proviso applies only to writs of execution filed with the registrar *after* the passing of the amending Act, and, therefore, among other consequences, a writ of execution filed with the registrar *before* the passing of the amending Act, and regularly renewed, does not require to be re-filed with the registrar. The Land Titles Act, 1894, s. 93, provides that upon the delivery to the registrar of a certificate by the sheriff or a Judge's order shewing the expiration or satisfaction or withdrawal of the writ, the registrar shall make a memorandum on the certificate of title to that effect. 63 & 64 V. c. 21, s. 3, substituted for the above section a provision that upon the satisfaction or withdrawal from his hands of any writ the sheriff should transmit a certificate to that effect to the registrar, and that the

registrar on its receipt or on receipt of a Judge's order shewing the expiration, satisfaction, or withdrawal of the writ, should make a memorandum on the certificate of title to that effect:—*Held*, that now a sheriff cannot give a certificate of the expiry of a writ of execution; that unless the proviso added to s. 92 applies, and the writ appears by force of that proviso to have expired, the registrar can make a memorandum of its expiry only upon a Judge's order. If the sheriff has begun to execute a writ, e.g., by seizure, it does not require a renewal. The delivery by a sheriff to the registrar of a copy-writ pursuant to s. 92 is not a seizure or other inception of execution which will prevent the expiry of the writ. *In re Blanchard Estate*, 5 Terr. L. R. 240.

3. Tax sale transfer — Registration — Time — Appeal — Non-prosecution — Notice of appeal — Time for.] — Rule 460 of the Judicature Ordinance, C. O. 1898 c. 21, providing for two clear days' notice of motion, except by special leave, applies to motions to the Court *en banc*. An order stopping the registration of a tax sale transfer and Judge's order confirming the sale, as provided for by s. 97 of the Land Titles Act, also acts as an order extending the time for registration of the transfer, as provided for by s. 95 of the Act. An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in the Land Titles Office, as directed by the order appealed from. *In re Donnelly*, 5 Terr. L. R. 270.

LANDLORD AND TENANT.

- I. LEASE.
- II. LIEN OF LANDLORD.
- III. OVERHOLDING TENANTS.
- IV. OTHER CASES.

See CROWN, II. 3—PLEADING, III. 5—REPLEVIN — WATER AND WATER-COURSES, 1.

I. LEASE.

1. Agreement for — Construction — Condition — Waiver.] — The defendant contracted to let to the plaintiff a house, then under construction, for the term of one year from the 1st June, 1900, at the rental of \$20 per month, payable monthly in

advance. It was agreed that in the event of the house not being completed by the 1st June there should be a proportionate reduction in the rent. The house was not completed by the time agreed, but the plaintiff moved in on the 24th June, when the work was still unfinished. No rent was charged for the month of June, but the plaintiff paid rent in advance for the months of July, August, September, and October, and continued in occupation of the premises until the 1st May, 1901, when he moved out. In an action by the plaintiff for damages for goods distrained by the defendant for rent in arrear:—*Held*, that the trial Judge was right in construing the agreement as a letting for a year from the 1st June, 1900, with a condition that if the occupancy was prevented by reason of the house not being ready for occupation at that time, there should be a deduction from the rent in respect to the period of time during which the house was not occupied. *Held*, also, that the payments made by the plaintiff shewed a waiver of the provision made in respect to the house being finished by a fixed date, or rather, in respect to the reduction which was to be made in consequence of its not being finished. *Acorn v. Hill*, 34 N. S. Repts. 508.

2. Agreement for — Municipal corporation — Lease to railway company — Settling — Taxes — Rent — Covenants. — Property of a city municipality, when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (Assessment Act, R. S. O. 1897 c. 224, s. 7, s.s. 7); and such tax is a tenant's tax payable by him, and not in any event payable by the landlord as between him and the tenant. Section 26 of the Act, as to tenants deducting taxes from their rent, has no application to such a case, as it applies only to taxes which can be legally recovered from the owner. The reason of the rule embodied in that section disappears when the property is in the hands of the landlord exempt, and becomes liable to be taxed only when in occupation of a tenant. *Seemle*, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner," within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee. Where the municipality had entered into an agreement to grant a lease for a rent specified, but no mention had been made of taxes:—*Held*, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity and exercising its sovereign power to lay taxes upon the property when no longer

exempt, by reason of its being under lease. Taxes and rent are distinct things and collectable by the corporation in different capacities, and the imposition of the yearly taxes is not a derogation from or inconsistent with the contract. A covenant by a tenant to pay taxes is a "usual" covenant, and it lay upon the tenant here objecting to give it, to shew by competent evidence that it was not so in such a case as that in question here or in this country, which the tenant had failed to do. No covenant to repair should be inserted in the lease, the jurisdiction to keep the railway in effective operation being in the Railway Committee of the Privy Council, and it not having been shewn that this was insufficient to protect the city. *In re Canadian Pacific R. W. Co. and City of Toronto*, 22 Occ. N. 235, 4 O. L. R. 134.

3. Agreement for—Specific performance.—Where the lessee refuses to sign a notarial lease in the terms of the agreement between him and the lessor in respect of the premises leased, the lessor has a right to bring suit, and have the lessee condemned to sign the lease, and, in default of his so doing, to have it ordered that the judgment of the Court shall serve as such lease. *Walsh v. Brooke*, Q. R. 21 S. C. 394.

4. Forfeiture—Waiver—Estoppel — Covenant — Sublease—Company—Assignment for creditors.—A lease to a joint stock company provided that, in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due, and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting:—*Held*, reversing the judgment of the Court of Appeal, 1 O. L.R. 172, 21 Occ. N. 111, that the lessors and the company were distinct legal persons, and the individual interests of the former were not affected by the above action. *Salamon v. Salamon*, [1897] A. C. 22, followed. The assignee of the company held possession of the leased premises for three months, and the lessees accepted rent from him for that time, and from sublessees for the month following:—*Held*, reversing the judgment, that, under the facts of the case, the lessors could not be said to have waived their right to claim a forfeiture of the lease. Mortgagees of the premises having notified the sub-tenants to pay rent to them, the assignee paid them a sum in

satisfaction of their claim, with the assent of the lessors, against whose demand it was charged:—*Held*, that this, also, was no waiver of the lessors' right to claim a forfeiture. *Quære*: Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee? *Littlejohn v. Soper*, 22 Occ. N. 45, 31 S. C. R. 572.

5. Option to purchase—Revocation of by death—Specific performance—Consideration—Tender—Evidence—Declarations against interest.—A provision in a lease, whereby the lessor grants to the lessee an option to purchase the leased property within a limited time, is not a *nudum pactum*. Such an option is, within the time limited, binding on a deceased lessor's personal representatives, though not so expressed. Statements, whether written or orally made, by the lessor as to the terms of the lease are not, after the death of the lessor, admissible as evidence in favour of his successor in title as being declarations against the deceased's interest. *Per* MCGUIRE, C.J.—Such statements merely amount to statements of an agreement which must be supposed to be made on fair terms, and, consequently, as much in favour of the maker's interest as against it. Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender." The questions of the necessity for a formal tender, a contract under seal importing a consideration, the inadequacy of the consideration in an action for specific performance, discussed. *Yuill v. White*, 22 Occ. N. 312, 5 Terr. L. R. 275.

6. Renewal—Increased rent—Arbitration.—In a lease for twenty-one years the rent fixed was, for the first year \$106.88, for the next four years \$130 a year, for the next five years \$145 a year, and for the remaining eleven years \$178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants" as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—*Held*, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved

for the whole term, and not for any particular year or years of it; it might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past. *In re Geddes and Garde*, 22 Occ. N. 455, 32 O. R. 262, approved. *In re Geddes and Cochrane*, 22 Occ. N. 54, 3 O. L. R. 75.

See COURTS, I. 1, VIII. 1, 4—DOWER, 2—INFANT, 3—LIQUOR LICENSE ACT, III. 1—MINES AND MINERALS, 13—OPPOSITION, 2—REPLEVIN—SPECIFIC PERFORMANCE, 2.

II. LIEN OF LANDLORD.

1. Notice of rights of third person—Assigns of landlord.—If notice to the landlord of the rights of property of third persons in the goods upon the demised premises affects a subsequent purchaser of the freehold, it is not so with regard to mere knowledge of the fact acquired by the landlord. Therefore, such purchaser may enforce his lien upon the goods in the possession of the tenant, notwithstanding the knowledge which his grantor had of the rights of third persons. *In re Bolduc*, Q. R. 19 S. C. 524.

2. Proceeds of sale of tavern license—Assignment for creditors—Costs—Priorities.—The proceeds of the sale of a tavern license (sold upon an assignment for the benefit of creditors) are not subject to the lien of a landlord.—2. The only costs which have priority over special liens are those incurred in the interest of privileged creditors and for the preservation of their lien. Therefore, in the case of an assignment for the benefit of creditors, the costs of the assignment and of the administration and liquidation of the insolvent estate have not priority over the claim of a landlord, but it is otherwise with the costs of the sale of the articles subject to his lien, of the inventory of such articles, and of the distribution of the proceeds of the sale. *Poulin v. St. Germain*, Q. R. 11 K. B. 353.

III. OVERHOLDING TENANTS.

1. Forcible entry—Costs.—In an action for damages for forcibly and unlawfully entering the premises occupied by the plaintiff, as tenant of the defendant, and ejecting the plaintiff therefrom, the trial Judge found that, although the defendant had technically violated the plaintiff's right of possession, the plaintiff was retaining possession in violation of good faith, and that her evidence as to

the circumstances and manner of her removal was untrue:—*Held*, that the trial Judge was justified (following *Rice v. Ditmars*, 21 N. S. Reps. 140.) in depriving the plaintiff of costs. *Russell v. Murray*, 34 N. S. Reps. 548.

2. Order for possession—Review by Court—Evidence—Breach of covenant in lease—Notice specifying.]—Under the Overholding Tenants Act, R. S. O. 1897 c. 171, two things must concur to justify the summary interference of the County Court Judge: the tenant must *wrongfully* refuse to go out of possession, and it must appear to the Judge that the case is *clearly* one coming under the purview of the Act. It is only the proceedings and evidence before the Judge, sent up pursuant to the *certiorari*, at which the High Court may look for the purpose of determining what is to be decided under s. 6 of the Act. Where there was nothing in the evidence to shew that the tenant had violated the provision of the lease for breach of which the landlord claimed the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession. *Per Boyd, C.*:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by s. 13 of the Landlord and Tenants Act, R. S. O. 1897 c. 170, which is applicable to summary proceedings under the Overholding Tenants Act. *In re Snure and Davis*, 22 Occ. N. 234, 4 O. L. R. 82.

IV. OTHER CASES.

1. Arbitration and award—Valuation of buildings—Interest on amount fixed by award.]—In a lease of twenty-one years it was provided that the buildings should be valued at the end of the term by three valuers or arbitrators, whose award should be made within the six months next preceding the 1st November, 1900, and the value paid by the lessor within six months from that date, with interest from that date. Valuers or arbitrators were duly appointed, and possession given by the lessees on the 31st October, 1900, the last day of the term, but the award was not made until the 30th November, 1901:—*Held*, that the lessees were entitled to interest on the value of the buildings, as ascertained by the award, from the 1st November, 1900. *Toronto General Trusts Corporation v. White*, 22 Occ. N. 178, 3 O. L. R. 519.

2. Bonus for improvements—Rent by anticipation—Cancellation of lease—Recovery of bonus—Commercial estab-

lishment—Civil contract.]—A sum of \$300 paid by the tenant to the landlord as a bonus for improvements made to the demised premises, is equivalent to an additional rent paid by anticipation.—2. If the lease is afterwards, by a judgment, cancelled at the suit of the tenant, for default of the landlord to make repairs which it is his duty to make, the latter will be ordered to pay back such bonus in the same way as any other rent paid by anticipation.—3. The letting of an immovable for a commercial establishment is a purely civil contract. *Côté v. Cantin*, Q. R. 21 S. C. 432.

3. Claim for cancellation of lease—Questioning landlord's title.]—A tenant, who has had peaceable enjoyment of an immovable leased to him, cannot demand the cancellation of the lease and damages on the ground that a third person, who has not disturbed him in his enjoyment, is the owner of a part of such immovable. *Charpentier v. Quebec Bank*, Q. R. 21 S. C. 206.

4. Destruction of building—Fire—Accident—Negligence—Defects of construction—Knowledge.]—One of the covenants of the lease from plaintiff to defendant provided that the tenant should deliver up the premises, at the expiration of the lease, "in as good order as the same may be found in at the commencement, reasonable wear and tear, and accidents by fire excepted." A fire occurred, the origin or cause of which had not been specifically determined, but, in the opinion of the Court, it was proved that the fire did not arise from any fault of the defendant or of persons for whom he was responsible. In an action by the lessor to recover from the lessee the value of the building, less the amount of the insurance:—*Held*, following *Evans v. Skilton*, M. L. R. 3 Q. B. 325, 16 S. C. R. 631, that a fire in the leased premises, the cause of which is unknown and undetermined, is presumed to be an accident, in the absence of any proof of fault or negligence on the part of the lessee, or of persons for whom he was responsible.—2. Where the lessor alleges that the construction of the building leased was perfect, that there was no fault on his part, and that the fire was caused by the fault of the lessee, or of those for whom he was responsible, the lessor is entitled to prove instances of laxness in discipline and general management as regarded fire, and the lessee, on his part, is entitled to prove faults in the construction of the building.—3. In support of the tenant's allegation that he acted as a prudent administrator, and that the fire was a *cas fortuit*, it is competent for him to adduce testimony, not only to exclude all causes that might

suggest neglect on his part, but also to include all causes that would support his exoneration from responsibility.—4. The lessor's knowledge of defects in the equipment of the building, whether they represented faults of construction or of maintenance, may be proved by oral testimony.

—5. Where the lessor has made additions and repairs to the premises during the term of the lease, he is presumed to have had knowledge of the condition of the electric wires and smoke stack.—6. Where a watchman has been employed by the tenant, without any stipulation in the lease that a watchman shall be kept on the premises, and there is not proof of usage, the fact that he only made his rounds once an hour is not of importance in determining the tenant's responsibility under Art. 1629, C. C. *Ford v. Phillips*, Q. R. 21 S. C. 1.

5. Notice to quit—Days of grace—Computation—Holidays.—The period of three days allowed to a tenant to give up possession, according to Art. 1089, C. P., is a delay in procedure which is extended to the juridical day following, if it expires on a Sunday or a holiday. *Beaudry v. Harrigan*, 5 Q. P. R. 99.

6. Rent—Action for — Defence—Disturbance of possession.—A tenant being sued for rent may plead that he has not had the peaceable enjoyment of the demised premises, or that he has had only a part enjoyment. *Synod of Diocese of Montreal v. Kelly*, Q. R. 20 S. C. 19.

7. Repair of premises—Injury to tenant.—The lessee is not obliged to notify the lessor of the need of repairs to the leased premises, which the lessor is obliged to make. It is the duty of the proprietor to inspect his own property from time to time, and ascertain what repairs are necessary. He is, therefore, although not notified of any defects, responsible in damages for an accident which happened to the tenant in consequence of the weakness of a railing on the leased premises. *Troude v. Meldrum*, Q. R. 21 S. C. 75.

8. Repair of premises—Injury to third person.—A tenant, bound by the terms of his lease to make *grosses reparations*, is not responsible (as between himself and his landlord) for an accident to a third person happening on the premises which he occupies as tenant, when he has not been guilty of negligence on his part, and the accident has happened by reason of faulty construction of a structure upon the premises. *Allan v. Fortier*, Q. R. 20 S. C. 50.

LAW SOCIETY.

1. Barrister and solicitor—Admission of one from another Province—Term of service—Legal Professions Act.—To come within the exception in s.-s. 5 of s. 37 of the Legal Professions Act, it is not necessary that the applicant should have been a graduate at the time he commenced to study law, or that his term of study or service was shortened because he was a graduate. An applicant who obtained his degree after call or admission would come within the exception. *Calder v. Law Society of British Columbia*, 9 Brit. Col. L. R. 56.

2. Barrister and solicitor—University graduate—Legal Professions Act.—The applicant matriculated at the University of Dalhousie, Halifax, Nova Scotia, in August, 1892, and an LL.B. degree was conferred on him by the University on the 23rd April, 1895; in March, 1892, he began to study law and signed articles in Nova Scotia, and on the 2nd April, 1895, he was called and admitted there. Subsequent to his call and admission, he was employed two years in the office of a Halifax firm of barristers and solicitors. The term of service under articles in Nova Scotia for call and admission is ordinarily four years, but in case of a college graduate it is three years. In British Columbia, a graduate, in order to have his law course shortened, must be a graduate at the time he commenced to study law:—*Held, per McCOLL, C.J.*, that the fact that the applicant was graduated after he was called in Nova Scotia precluded the circumstance of his being a graduate from having shortened his term of study. *Quare*, whether the plaintiff would have succeeded if he had graduated before the 2nd April, 1895. *In re King and Law Society of British Columbia*, 22 Occ. N. 154, 8 Brit. Col. L. R. 356.

See SOLICITOR, 2.

LEASE.

See LANDLORD AND TENANT.

LEAVE TO APPEAL.

See APPEAL, II. 2, IV. 1-8, VI. 2, VIII. 1, X. 1, 2, 3, 8—EXECUTION, I. 2.

LEGACIES.

See REVENUE, 5—WILL.

LEGAL PROFESSIONS ACT, B. C.

See LAW SOCIETY.

LEGITIMACY.

See BASTARD—MARRIAGE, 3.

LESION.

See INSURANCE, IV. 9.

LETTERS OF ADMINISTRATION.See EXECUTORS AND ADMINISTRATORS,
4, 9.**LIBEL.**

See DEFAMATION.

LICENSE.See COMPANY, IV. 6—CROWN, I. 4, 5—
INTOXICATING LIQUORS—LANDLORD
AND TENANT, II. 2—LIQUOR LI-
CENSE ACT—MUNICIPAL CORPORA-
TIONS, III. 8, 11, 12—PATENT FOR
INVENTION, 9—PAYMENT.**LICITATION.**

See PARTITION, 1.

LIEN.

1. Thresher's lien on grain—Measurements—Weights and Measures Act—Illegality—Consent—Breaking and entering—Damages.—Action for breaking and entering the plaintiff's granary on his farm and wrongfully removing therefrom and converting to the defendant's use a quantity of wheat. The defendant was a thresher, and justified the act complained of by setting up that he was entitled to a lien upon the plaintiff's grain by virtue of the Ordinance respecting Threshers' Liens (C. O. c. 60), and the amendments thereto, and that he did the acts complained of for the purpose of satisfying such lien. The plaintiff in reply to this justification set up that the defendant

agreed to thresh his grain at a set price per bushel, and that the grain threshed on account of which the lien was claimed was not measured or weighed, as required by s. 21 of the Weights and Measures Act, R. S. C. c. 104, and therefore that the defendant was not entitled to any lien. The evidence shewed that no measure was used in ascertaining the quantities. The defendant took the number of cubic feet in each variety of grain threshed, and allowed 128 cubic feet as 100 bushels of grain:—*Held*, that this means of ascertaining the quantities rendered the dealing void under s. 21. *Macdonald v. Corrigan*, 9 Man. L. R. 284, followed. *Held*, also, that, no agreement or consent on the part of the plaintiff could give the agreement validity. *Held*, also, that, although a thresher is not precluded from correcting his method of ascertaining the quantity, he must do so by his own act, and cannot avail himself of the act of a third person. Section 1 of 1 Edw. VII. c. 26 applies to sales and delivery, and not to work and services. *Held*, lastly, that plaintiff was entitled to damages measured by the price at which the wheat taken was sold, that being admitted to be the market price, and to nominal damages for the breaking and entering. *Conn v. Fitzgerald*, 22 O.C. N. 345.

2. Woodmen's Lien Act—“Logs and timber”—*Contractor—Bond—Estoppel.*—The appellant, under a contract in writing made by him with the respondent, for an agreed price per thousand, cut upon the land of the respondent a quantity of logs, and hauled them to a portable mill upon the land, where they were manufactured into deals, planks, &c. The work was performed in part by the appellant himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers and teams, by the terms of the contract hired and paid by the appellant. A portion of the amount due to the appellant under the agreement being unpaid, he caused an attachment to be placed upon the above mentioned deals, planks, &c., claiming a lien thereupon by virtue of the Woodmen's Lien Act, 1894:—*Held*, that the words “logs and timber,” as employed in s. 1 of s. 2 of the Act, were not intended to include deals or other manufactured lumber; also, that the evidence shewed the appellant to be a contractor, and not within the class of persons for whose benefit, by s. 3, liens were established; also, per HANINGTON, J., that the respondent, by giving a bond in order to secure the payment of the amount claimed if the lien should prove effectual, and thus obtaining a release of the deals, &c., attached, did not estop himself from disputing the validity of the lien. *Baxter v. Kennedy*, 35 N. B. Reps. 179.

See **BANKS AND BANKING**, 2, 5—**COMPANY**, V. 6—**COSTS**, I. 6, 7—**HUSBAND AND WIFE**, VII. 4—**IMPROVEMENTS—INSURANCE**, IV. 2—**LANDLORD AND TENANT**, II.—**MECHANICS' LIENS—SOLICITOR**, 4, 5, 7—**TIMBER—TRUSTS AND TRUSTEES**, 4—**VENDOR AND PURCHASER**, 7—**WILL**, II. 15.

LIEN CONTRACT.

See **SALE OF GOODS**, II.

LIEN NOTE.

See **CRIMINAL LAW**, III. 2.

LIEUTENANT-GOVERNOR.

See **MUNICIPAL CORPORATIONS**, III. 4, X. 2—**PARTIES**, IV. 6.

LIFE INSURANCE.

See **INSURANCE**, IV.

LIGHTS.

See **EASEMENT**, I.

LIMITATION OF ACTIONS.

I. **CLAIM TO REALTY.**

II. **OTHER CASES.**

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 11—**CROWN**, I. 3—**EASEMENT**, 1—**EXECUTION**, II. 4—**HUSBAND AND WIFE**, VII. 1—**MEDICINE AND SURGERY**, 2—**MISTAKE—MUNICIPAL CORPORATIONS**, V. 2—**PENALTIES AND PENAL ACTIONS**, 5—**PEREMPTION—RAILWAY**, VI. 6—**SHIP**, I. 3—**WILL**, I. 6.

I. **CLAIM TO REALTY.**

1. **Mortgage—Payments on—Insurance premium—Entries in books—Acknowledgments in writing—Remedy on bond—Absentee.**—A mortgage and bond given by G. to C. to secure the repayment of a sum of money were dated the 7th January, 1877. The last payment of interest was made in September, 1879.

C. was absent from the Province when the mortgage and bond were given, and did not return until 1880. The plaintiffs, as executors of C., on the 30th June, 1900, brought two actions: (1) to foreclose the mortgage and to recover the amount secured by the mortgage and bond; and (2) to obtain possession of the land. The only defence set up to both actions was that of the Statute of Limitations. Under one of the clauses of the mortgage the mortgagee was empowered to make payment of insurance premiums, in default of payment by the mortgagor, and "to charge such payments with interest at the rate aforesaid upon the mortgaged premises," but there was no provision, in terms, making the advance a part of the principal sum secured by the mortgage:—*Held*, that the effect of the provision was merely to make the advance a lien upon the land for its payment with interest, and was only in the nature of a further charge or additional mortgage. The repayment by the mortgagor of the amount advanced was not such a payment on account of the principal sum secured as would take the case out of the Statute of Limitations. An entry in the books of the solicitor for the mortgagee shewing the payment of the amount advanced for insurance, and the subsequent repayment of the amount, was not sufficient evidence of an advance by and repayment to the mortgagee, such entries being consistent with the view that the solicitor advanced the money on his own account on the credit of the mortgagor. Renewal receipts for premiums of insurance, taken in connection with a clause in the policy making the loss, if any, payable to the mortgagee, were not acknowledgments in writing within s. 21 of the statute. *Held*, also, following *Sutton v. Sutton*, 22 Ch. D. 511, and *Steward v. England*, [1895] 2 Ch. 820, that the limitation imposed by s. 21 of the Act applied as well to the remedy on the bond as to that under the mortgage against the land. *Cogswell v. Grant*, 21 Occ. N. 351, 34 N. S. Repts. 340.

2. **Parent and child—Tenancy at will—Right of entry—Commencement of statute—Caretakers—Entry by consent—Assessment—Agreement—Concealment of facts—Family arrangement—Will—Devise—(Charge—Election—Mistake).**—In 1879 the defendant was put by his father in possession of a farm of which the title was in the father, who said he had bought it for the son. The defendant continued in possession until his father's death in 1900, occupying for his own benefit, taking the profits, paying no rent, and giving no acknowledgment of title; he also made improvements at his own expense. There was no evidence that the defendant was a caretaker or servant:—

Held, that the father's title was extinguished before his death by the Real Property Limitation Act. The defendant became upon his entry a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year, when the defendant became a tenant at sufferance. The effect of s. 5, s.-s. 7, of R. S. O. c. 133, is that it is for the purposes of the statute only that the tenancy at will is to be deemed determined at the expiration of a year. But there was no entry by the father sufficient to prevent the running of the statute; a visit to the son, not being against his consent, would not be such an entry. The assessment of both father and son in 1882, at the request of the son, as freeholders of the farm, was not evidence of a new tenancy at will. *Doe d. Bennett v. Turner*, 7 M. & W. 226, distinguished. An agreement made a few days after the death of the father between the devisees and legatees under his will, whereby the defendant admitted that the father was the owner of the farm, and agreed to abide by the will, which devised the farm to him charged with a large sum, was not under the circumstances set out in the case, even when viewed as a family arrangement, binding on the defendant. *Fane v. Fane*, L. R. 20 Eq. 698, applied and followed. *Held*, also, that if there was any election by the defendant to take under the will, it was made under a mistake as to the defendant's rights; and besides, if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it. *McCowan v. Armstrong*, 22 Occ. N. 55, 3 O. L. R. 100.

3. Possession as against mortgagee—Foreclosure decree.—In an action for possession of land the plaintiff's title was derived under a sheriff's deed made under direction of the Court in foreclosure proceedings, and dated 23rd July, 1896. The defendant relied upon the Statute of Limitations, and gave evidence of more than twenty years' possession of the land in dispute without payment of rent or acknowledgment of title. It appearing that the defendant went into possession at a date subsequent to the date of the mortgage under which the plaintiff claimed:—*Held*, that the defendant could not acquire title by possession against the mortgagee so long as the mortgage was kept alive. It is enacted by the Statute of Limitations, R. S. N. S. 1900 c. 167, s. 23, that "any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover such land at any time within twenty years next after the last payment of the principal money or interest secured

by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action first accrued."—*Held*, that the granting of the decree of foreclosure was an adjudication that, at that date, the mortgage was in force, and that, therefore, the plaintiff's title came under the provisions of the section quoted. *Held*, also, that a third party could not, by a possession of twenty years, acquire title notwithstanding the provisions of the statute, and that plaintiff's title could not be defeated by defendant's possession, even although it were shewn to be of a more definite kind than was disclosed by the evidence. *Archibald v. Laclor*, 35 N. S. Reps. 48.

II. OTHER CASES.

1. Bill of exchange—Period of limitation.—A bill of exchange given for a commercial debt is barred by five years' lapse of time. (*Guimond v. Blanchard*, Q. R. 21 S. C. 106.)

2. Contract—Fraud—Creditor's action—Knowledge of fraud—Pleading.—Inasmuch as an action by a creditor to set aside a contract for fraud must, under Art. 1040, C. C., be brought within one year from the time of his obtaining a knowledge of such contract, and inasmuch as that Article is prohibitory in its terms, and denies absolutely the right of action unless exercised within the year, it is essential, whenever the fact does not appear by the dates of the contract attacked and of the institution of the suit or proceeding, that the party seeking the avoidance of the contract should allege and prove that he only obtained knowledge thereof within the year preceding the institution of his suit or proceeding. Where not pleaded, the objection based on the omission of such allegation may be raised at any stage of the case. *Gagnon v. Dunbar*, Q. R. 20 S. C. 515.

3. Goods sold and delivered—Division Court—Amendment of defence—Misleading particulars of claim.—Action in a Division Court for the amount of an account for goods sold and delivered to the defendant by the plaintiffs. The particulars attached to the summons gave the dates of sale as in 1896, and the action was brought within six years from the earliest date given. The defendant entered a dispute note, but did not give notice of a defence of the Statute of Limitations. When the plaintiffs' books were produced at the trial, they shewed that the entries were all made in 1895, more than six years before action:—*Held*, that

the defendants should have leave to amend by setting up the statute as a defence, and were entitled upon that defence to defeat the action. *Mcchan v. Berry*, 22 Occ. N. 237.

4. Interruption of statute—Assignment for creditors—Claim against estate.]—An assignment of property for the benefit of creditors does not interrupt prescription.—2. The lodging of his claim by a creditor in the hands of the curator of the estate of an insolvent, the collocation, and part payment of such claim, by the curator, interrupt prescription. *Carter v. McLean*, Q. R. 20 S. C. 395.

5. Interruption of statute—Claim for services—Gift in recognition of—Payment—Subsequent annulment.]—The defendant had for several years been the agent and solicitor of a lady, and she, to testify her profound gratitude for his services, and as a mark of her affection, made him a gift of \$8,000 out of her estate from the moment of her decease and before the division of her property. This gift was annulled by the Court (Q. R. 12 S. C. 162, 13 S. C. 205), upon the ground that it was a *donatio mortis causa*. The defendant then accounted for the sum which he had received from the executors in respect of the gift, but asserted a set-off of a greater amount as due to him by the estate of the deceased for solicitor's and agent's charges. The plaintiff replied that the defendant's claim was prescribed:—*Held*, that, although the gift had been declared void, the prescription of the defendant's claim had been interrupted by the recognition and promise to pay which the gift imported, and had been suspended until the decease of the donor, the defendant not being able before that to claim the price of his services; and, moreover, the prescription had been interrupted by the payment by the executors of the amount of the gift. *Boucher v. Morrison*, Q. R. 20 S. C. 151.

6. Interruption of statute—Proof of payments—Admissions.]—In a commercial matter, governed by Art. 1235, C. C., proof of payments interrupting prescription may be made by the admission of the defendant: Art. 1245, C. C. *Guay v. Guay*, Q. R. 11 K. B. 425.

7. Principal and agent—Reformation of agent's account.]—An action for the reformation of an agent's account is prescribed by a period of five years. *Grange v. Sauvé*, 5 Q. P. R. 100.

LIQUIDATOR.

See COMPANY, V.

LIQUOR ACT OF MANITOBA.

See CONSTITUTIONAL LAW, 4.

LIQUOR LICENSE ACT.

I. NORTH-WEST TERRITORIES.

II. NOVA SCOTIA.

III. ONTARIO.

IV. QUEBEC.

See CONTRACT, V.—INDIAN, 2—INTOXICATING LIQUORS—LANDLORD AND TENANT, II. 2—MUNICIPAL CORPORATIONS, III. 3.

I. NORTH-WEST TERRITORIES.

1. Conviction — Appeal — Condition precedent—Affidavit — Validity of Territorial Ordinance requiring.]—A Territorial Ordinance enacting that no appeal shall lie from a conviction under the Liquor License Ordinance, unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the convicting justice that he did not, by himself or otherwise, commit the offence, is not *ultra vires* of the Legislative Assembly. The omission to make such affidavit within the time prescribed is fatal to the jurisdiction of the Court to which the appeal is given, and is an omission which cannot be waived so as to confer jurisdiction. *Cavanagh v. McImoylc*, 5 Terr. L. R. 235.

2. Conviction — Appeal — Forum — Contravention of Ordinance by agent—Presumption—Intra vires—Forfeiture of license.]—Notice having been given of an appeal from a conviction for an infraction of the Liquor License Ordinance (a consequence of which conviction was a forfeiture of the license of the person convicted), to "the presiding Judge sitting without a jury at the sittings of the Supreme Court for the Judicial District of Western Assiniboia, to be holden at the town of Regina on Tuesday the 25th day of March, 1902," the Attorney-General applied to a Judge under Ordinance 1901, c. 33 (amending the Liquor License Ordinance), s. 21, s.-s. 3, to expedite the hearing:—*Held*, that the appeal was to the Supreme Court for the Judicial District named, generally, and not merely to a Court coming into existence only on the day mentioned, and that a Judge had jurisdiction to hear the application. *Held*, on the hearing of the appeal, that s. 64, s.-s. 5, of the Liquor License Ordinance (declaring that a contravention by a servant or agent shall be presumed to be the

act of the licensee) was *intra vires*, although the effect might be to inflict imprisonment (on non-payment of fine) upon a person who had not personally violated the Ordinance. *Held*, also, that forfeiture of license results under s. 82 from a second or any subsequent offence against s. 64, notwithstanding that the convictions occurred in different licensing years. *Res v. McLeod*, 5 Terr. L. R. 245.

3. Conviction — Appeal — Necessity for affidavit — Statute — Jurisdiction of Legislative Assembly.—Section 2 of c. 32 of Ordinances of 1900, amending the Liquor License Ordinance (C. O. 1898 c. 89), requires that a special affidavit of the party appealing shall be transmitted with the conviction to the Court to which the appeal is given:—*Held*, against the contentions (1) that this provision is applicable only where the appeal is based on a denial of the facts established in evidence, and not where a question of law arising on such facts is involved; and (2) that the provision is *ultra vires* of the Legislative Assembly of the Territories—that there was no jurisdiction to entertain an appeal where this provision had not been complied with. *Res v. McLeod*, 4 Terr. L. R. 513.

4. Selling liquor in forbidden houses — Proof of license.—Upon a charge of having had a bar-room open and sold liquor during prohibited hours the prosecution must either allege or prove that the defendant was a licensee. *Regina v. Davidson*, 21 Occ. N. 98, 4 Terr. L. R. 425.

been paid, was open to debate, but that, even if the decision of the stipendiary magistrate was erroneous, it could not be reviewed upon *habeas corpus*; and the application must be dismissed. *Res v. Clements*, 34 N. S. Reps. 443.

2. Sale by agent—Conviction—Service of minute—Burden of proof—Occupant.—The Liquor License Act, R. N. S. 1900 c. 100, s. 111, provides that "the occupant of any house, shop, room, or other place in which any sale has taken place, shall be personally liable to the penalty, notwithstanding such sale was made by some other person who cannot be proved to have so acted under or by direction of such occupant."—*Held*, that the defendant was properly convicted for sales made by his son, who lived with him in a house occupied by the defendant and his family. *Per* RITCHIE, J., that the service, upon the person convicted, of an incorrect copy of the minute of conviction, followed by service of a correct one, would not invalidate the proceedings, or prevent the magistrate from preparing a conviction in accordance with the original minute made by him, and issuing process to enforce the penalty or imprisonment. *Per* GRAHAM, E. J., that the son living with his father was a person "suffered to be or remain" on the premises within the meaning of the Act, s. 111, s.s. 2; that the burden was on the defendant of proving that the sales were made without his authority; and that the defendant was an "occupant" within the meaning of the Act. *Res v. Conrod*, 35 N. S. Reps. 79.

II. NOVA SCOTIA.

1. Prosecution—Witness for defence—Compelling attendance—Fees—Jurisdiction of magistrate—Habeas corpus.—On a prosecution before the stipendiary magistrate for the city of Halifax, for a violation of the Liquor License Act, proof was given of service of a summons on M., who, it was asserted, was a material witness for the defendant, but without tendering witness fees, and an application was made to the magistrate for a warrant to compel the attendance of the witness, the fees being at the same time tendered to the magistrate. The application was refused on the sole ground that fees were not tendered in the first instance to the witness, and the trial was proceeded with, and the defendant convicted. On application for a writ of *habeas corpus*:—*Held*, WEATHERBE, J., dissenting, that the question whether, in a case under the Liquor License Act, the witness could be compelled to attend, or the party was entitled to a warrant, unless the fees had

III. ONTARIO.

1. Execution—Fieri facias—Liquor license—Assignment of—Covenant by lessee to re-assign license.—A license under the Liquor License Act cannot be seized by a sheriff under a writ of *fieri facias*. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into such a license. The right to sell liquor at a particular place under such a license is a personal one, and is not assignable by the holder of it unless he obtain the consents and comply with the conditions of s. 37 of the Liquor License Act, R. S. O. c. 245. A covenant in the lease of an hotel by the lessee, that at the expiration of the lease he will assign to the lessor the license, if any, then held by him, is not a covenant binding upon the assignee of the term as such. It is a merely personal covenant, having nothing to do with the land or its tenure. *Walsh v. Walper*, 22 Occ. N. 49, 3 O. L. R. 158.

2. Will—Devise of hotel premises to widow—Benefit of children—Division of income—Transfer of license to widow—Creditors—Receiver.]—A testator by his will devised hotel premises to his wife during widowhood, for the benefit of herself and four children, the income to be applied for their support and maintenance until the children became of age, and in case of daughters until marriage. On the widow marrying, the property was to go to children, the widow being paid \$1,000. On the testator's death in 1896, the widow applied to the license commissioners and obtained a transfer of the license to her for the remainder of the year; and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and the children thereof, no money of the estate going into the business:—*Held*, that, after the testator's death, the license and good-will of the hotel business belonged to the widow personally, and formed no part of his estate; and apart therefrom the income was divisible amongst the widow and children as in *Allen v. Furness*, 20 A. R. 34. *Held*, also, that creditors of the widow were entitled to attach the widow's interest in the property, which could be reached by the appointment of a receiver. *Taylor v. Macfarlane*, 22 Occ. N. 325, 4 O. L. R. 239.

IV. QUEBEC.

1. Municipal council—Confirmation of license—Affidavit—Irregularities—Certificate.]—The function of a municipal council, when it is called upon to confirm a certificate for a hotel license, is limited to examining, verifying, and confirming such certificate; and irregularities contained in the affidavit of the petitioner, required by Art. 11 of the License Act of Quebec, do not affect the validity of the resolution of the council confirming the certificate, such affidavit being required only for the satisfaction of the collector of the revenue of the Province.—2. It is not necessary that the oath required by Art. 21 of the License Act should be set forth in writing. Therefore, in this case, the deponent having actually taken the oath before the council in session, although an affidavit was prepared of which the jurat was signed by the secretary-treasurer, instead of by a member of the council, proof of the authenticity of the signatures affixed to the certificate was held to have been regularly made. Judgment in 19 S. C. 162 affirmed. *Duhamel v. Parish of St. Francois du Lac*, Q. R. 21 S. C. 89.

2. Sale to drunkard — Action by wife—Petition for authorization—Notice

forbidding sale.]—A married woman does not need judicial authorization to *ester en justice* under the provisions of s. 149 of the License Law of Quebec, 63 V. c. 12. 2. A notice forbidding the sale of liquor to the plaintiff's husband, not strictly according to the provisions of s. 147 of the same Act, is null and of no effect. *Faulkner v. Faulkner*, 4 Q. P. R. 173.

3. Sale to minor—Indirect sale.]—Article 91 of the License Act must be interpreted strictly. To hold the license holder responsible in law, the sale must be made directly to the person under 18 years of age. *Perkins v. Brats*, Q. R. 20 S. C. 536.

LIQUOR TRAFFIC REGULATION ACT.

See MUNICIPAL CORPORATIONS, III. 3.

LIS PENDENS.

Vacating — Ex parte application — Registration.]—The plaintiff having registered a *lis pendens*, a local Judge, on the plaintiff's *ex parte* application, made an order vacating it, and the plaintiff registered the order within 14 days of its being made:—*Held*, that ss. 98 and 99 of the Judicature Act, giving a Judge the power to vacate a certificate of *lis pendens* where the plaintiff or other party at whose instance the certificate was issued does not in good faith prosecute the litigation, and allowing registration of the vacating order only, on or after the fourteenth day from the date of the order, are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered. Where a party to an action registers a *lis pendens* for his own benefit, he may get an order vacating it at any time, and register the same. *McGillivray v. Williams*, 22 Occ. N. 373, 4 O. L. R. 454.

See ATTACHMENT OF DEETS, II. 11—JUDGMENT, I. 1.

LITIGIOUS RIGHTS.

See CHOSE IN ACTION, ASSIGNMENT OF, 1—PLEADING, VII. 15.

LOAN COMPANY.

See MORTGAGE, 5.

LOCAL IMPROVEMENTS.

See **ASSESSMENT AND TAXES**, I. 2, IV. 3, V. 1, 2—**MUNICIPAL CORPORATIONS**, X. 8.

LOCAL OPTION.

See **MUNICIPAL CORPORATIONS**, III. 9, 10.

LORD CAMPBELL'S ACT.

See **DAMAGES**, 1, 2.

LOST DEED.

See **DEED**, 2.

LOST PROPERTY.

Rights of finder — *Third person* — *Master and servant*—*Property found by servant on master's premises.*] — The defendant was a shop-keeper, and the plaintiff a salesman in the employment of the defendant in the shop. One day the plaintiff picked up from the floor of the shop a roll of bank-notes, and handed it to the defendant, who caused inquiry to be made for the owner, and put the notes in his till for safe-keeping. No claim was made, and the defendant kept the notes:—*Held*, that the property in question was "lost," in the legal sense of the word; and in such a case, as against all other persons than the owner, the finder becomes the substantial owner of the thing found by him, and may maintain trover or other appropriate action to enforce such right of ownership. *Bridges v. Hawkesworth*, 15 Jur. 1079, 21 L. J. Q. B. 75, and *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, referred to. And the plaintiff was not, by reason of being in the employment of the defendant, deprived of his rights as a finder. *McDowell v. Ulatzer Bank*, 60 Alb. L. J. 346, distinguished on the ground that it was the duty of the porter of the bank who found the lost property in that case, to pick up such articles and hand them over to the bank, and his possession was the possession of the bank itself. *Haynes v. Mundle*, 22 Occ. N. 152.

LOTTERY.

See **CRIMINAL LAW**, III. 9.

LUNATIC.

1. Confinement in asylum—*Certificates—Municipal officers—Mandamus.*] — The father of an insane person, who has not the means to pay the whole cost of the lodging, maintenance, and treatment of such person in an asylum for the insane, may by mandamus compel the mayor and the secretary-treasurer of the municipality in which such person lives to sign and attest the certificates required by Art. 3195a *et seq.*, R. S. Q. (added by 55 & 56 V. c. 30), for the confinement of such person in an asylum for the insane; and the provision of Art. 3225b, R. S. Q., which renders such officers liable to a penalty of \$20 in case of their refusing to sign and attest such certificates, does not exclude recourse by mandamus to compel them to do so. *Cournoyer v. St. Martin*, Q. R. 21 S. C. 305.

2. Proceedings to set aside interdiction—*Recovery of costs—Solicitor—Effect of judgment.*] — An advocate or notary, acting upon the instructions of an interdict for insanity, and in good faith believing that the cause of interdiction had ceased, but acting without the consent and contrary to the instructions of the curator, is not entitled to recover from the curator in his said quality the costs of such proceedings, which were unsuccessful because it was held that the cause of interdiction had not ceased. *Semble*, a judgment setting aside the interdiction would have a retroactive effect to the date of the cessation of the cause of interdiction, and would necessarily validate an agreement by the interdict to pay the costs of the proceedings to obtain the removal of the interdiction. Judgment in Q. R. 16 S. C. 565 affirmed. *Bouchard v. Bastien*, Q. R. 19 S. C. 507.

3. Tort committed by—Responsibility of parent.] — Where a lunatic has attained his majority, but is living in his father's house, the father is not responsible for damage caused by the lunatic, although the father has failed to procure an interdiction of the son as such, if it appears that the son has for a long time been withdrawn from the authority of his father, and it is not proved that the father knew the dangerous character of his son's malady, or that the damage complained of would be the consequence of his imprudence or negligence. *Theroux v. Carrier*, Q. R. 21 S. C. 156.

See **APPEAL**, IV. 1 — **HUSBAND AND WIFE**, II., VI. 5 — **INTERDICT**—**REVIVOR**, I — **WILL**, IV. 3.

MACHINERY.

See **MASTER AND SERVANT**, II. 2, 3.

MAINTENANCE.

See ALIMENTARY ALLOWANCES.

MALICE.

See ARREST, IV. 3—DEFAMATION, I. 2, II. 5—FALSE ARREST, 1, 2—MALICIOUS PROCEDURE—PARLIAMENTARY ELECTIONS, VI. 1.

MALICIOUS PROCEDURE.

1. **Arrest and trespass—Reasonable and probable cause—Malice—Post office—Letter with fictitious address.**]—The plaintiff, a letter carrier employed by the post office department at Montreal, was intrusted with the delivery of two decoy letters for the purpose of testing his honesty. Each of the letters contained a small sum of money. One of the letters bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter returned. There being no entry of this letter, after the usual time for making such entry had elapsed, the plaintiff was detained and searched by the defendant, a peace officer acting under the instructions of the department. The letter not being found on the plaintiff he was released. On the following day the letter was returned to the post office:—*Held*, that the plaintiff having violated the rules of the department, there was reasonable and probable cause for detaining and searching him, and that his action for damages against the officer, who acted without malice, could not be maintained. 2. A letter is a post letter, although directed to a fictitious address. *Mayer v. Vaughan*, Q. R. 20 S. C. 549.

2. **Damages—Charge of theft—Permission to take property.**]—The plaintiff was committed for trial on a charge of stealing two loads of wheat straw, the property of defendant, but was afterwards acquitted, and sued for damages for malicious prosecution:—*Held*, that the evidence strongly supported plaintiff's contention that defendant gave him permission to take the straw, and that the damages were properly assessed at \$400. *Hulme v. Chant*, 22 Occ. N. 216.

3. **Illegal arrest—Joint conviction—Invalid warrant—Constable—Resolution of municipal council—Ultra vires.**]—The three plaintiffs were summoned before a magistrate to answer a charge of interfer-

ing with and spoiling a spring by the side of a highway, but did not attend, and, in their absence were convicted and fined, the conviction imposing one fine on all three. A resolution having been passed by the township council indemnifying the magistrate against costs, he issued a warrant, directed "to all or any constables," following the form of the conviction, and this warrant was handed to a constable, who got the defendant M., one of the informants and also a constable, to assist him, and arrested the plaintiffs and kept them in gaol until the fine and costs were paid. In an action against the township corporation and M. for maliciously enforcing an invalid conviction:—*Held*, that M. acted as a constable in the execution of the warrant, and was entitled to protection as such; he was, by virtue of s. 21 of the Code, exempt from criminal prosecution; and in a civil action was entitled to the protection of R. S. O. c. 88, ss. 1 (2), 13, 14, as to notice of action and time of commencing action. *Ex p. McCleave*, 35 N. B. Reps. 100, distinguished. —2. That there was no proof of knowledge by the council that the conviction and warrant were illegal, and no proof of malice, that the resolution was *ultra vires*, and the legal consequences were to be visited, not on the municipality, but (if at all) upon the offending members. *McSorley v. Mayor, &c., of St. John*, 6 S. C. R. 531, distinguished. *Gaul v. Township of Ellice*, 22 Occ. N. 157, 3 O. L. R. 438.

4. **Justice of the peace—Action against—Notice of action—Malice—Jurisdiction—Trespass.**]—The plaintiff caused to be served upon the defendant, a justice of the peace, notice of action claiming damages for maliciously, and without reasonable and probable cause, causing plaintiff to be arrested and confined in the common gaol under a warrant issued in a civil action, brought and tried before the defendant, in which one C. was plaintiff, and the present plaintiff defendant, said warrant having been issued without authority, and after the debt for which said suit was brought, and said warrant issued, was satisfied. The plaintiff's statement of claim was framed on the theory that the justice had jurisdiction, but that he acted maliciously, and without reasonable and probable cause. There was no count or paragraph founded on want or excess of jurisdiction. *Held*, per GRAHAM, E. J., and MEAGHER, J., that it was not necessary, under the circumstances, to consider whether the justice had exceeded his jurisdiction or not; and the warrant having been properly issued, and the only question being whether or not it could be enforced after the debt was paid, that this question was not covered by the notice, and that the action must be dismissed: R. S. N. S. c. 101, s. 12. *Per WEATHERBE*,

J., that the plaintiff could not succeed, the jury having found that the defendant acted in good faith, and that he had reasonable and probable cause for directing the arrest of the plaintiff, and that he was not actuated by malice; and *quære*, whether, after the warrant was issued, plaintiff could adjust the debt by giving new securities. *Per RITCHIE, J.*, that the plaintiff could not succeed, the notice of action being defective; and *quære*, whether the plaintiff could not have succeeded if trespass had been alleged. *Hennacy v. Farquhar*, 35 N. S. Reps. 22.

5. Mandamus—Record of acquittal—Clerk of the Peace—General sessions—Fiat of Attorney-General.]—The judgment of a Divisional Court, 2 O. L. R. 315, 21 Occ. N. 432, affirmed; *ARMOUR, C.J.O.* dissenting. *Re v. Scully*, 22 Occ. N. 360; *Attorney-General v. Scully*, 4 O. L. R. 394.

6. Reasonable and probable cause—Malice—Information bad in law—Assistance in prosecution for criminal offence—Special damages.]—The defendant went before a justice of the peace with the intention of laying an information against the plaintiff for stealing. The justice prepared, and the defendant swore to, an information for "unlawfully taking the defendant's calf into his (plaintiff's) possession." The plaintiff appeared before the justice and was held to bail to appear for trial. The defendant honestly believed the calf to be his, but not that plaintiff was guilty of a theft; he believed him guilty of some criminal offence. The Crown prosecutor examined the papers sent up by the magistrate, and, without having had an interview with defendant, laid a charge of theft. The defendant, then becoming aware that the charge was theft, assisted in endeavouring to secure a conviction, but the plaintiff was acquitted. The Judge trying an action for malicious prosecution found that the defendant was actuated by malice both in laying the charge and in aiding in the prosecution:—Held, that the defendant without reasonable and probable cause laid the information before the justice as for an indictable offence, and procured the plaintiff to be prosecuted for theft before the Court, and was liable in damages to the plaintiff.—2. That an action will lie where the procedure is criminal in form, though the charge be bad in law.—3. That the defendant was liable for the part he took in prosecuting the charge before the Court. *Fitzjohn v. MacKinder*, 9 C. B. N. S. 505, followed.—4. That the defendant, having "set the stone rolling," was responsible for the consequences, inasmuch as he had not, as he should have voluntarily done, informed the Crown

prosecutor of the facts.—5. That amounts paid by plaintiff to witnesses attending the trial of the criminal charge, for subpoenas and serving, for counsel fees, for expenses of himself and wife attending such trial, for expenses of himself and his servant attending the preliminary examination, should be allowed as special damages. *Powell v. Hütgen*, 5 Terr. L. R. 16.

See FALSE ARREST.

MALICIOUSLY KILLING CATTLE

See CRIMINAL LAW, III. 11.

MALPRACTICE.

See MEDICINE AND SURGERY, 2—PLEADING, X. 3.

MANDAMUS.

1. To County Court Judge—Judgment debtor—Arrest—Disclosure—Order for discharge.]—The order provided for by 60 V. c. 28, s. 15, is a substitute for the remedy by writ of mandamus, and it will therefore be granted only in cases where mandamus will lie. In discharging or refusing to discharge a debtor who has made a disclosure under 59 V. c. 28, s. 7, the Judge or other officer is acting judicially and not ministerially; therefore the Court refused to make an order under s. 15 commanding the Judge of a County Court to discharge a debtor who had made a disclosure before him. *Es p. Keerson*, 35 N. B. Reps. 233.

2. To municipal corporation—Projection over highway—Demolition—Discretion.]—A mandamus to order the demolition of a projection over a city street should be asked against the city corporation, and not against one of its officers.—2. To justify the issuing of mandamus in a similar case, the complainant must shew a particular act of neglect of duty on the part of the city, involving a real injustice and damage to him.—3. Mandamus is not strictly demandable as of right, but may be issued or withheld in the discretion of the Court. *Pettigrew v. Baillargé*, Q. R. 20 S. C. 173.

See COMPANY, II. 3—COURTS, VI.—CRIMINAL LAW, III. 5—LUNATIC, 1—MALICIOUS PROCEDURE, 5—MUNICIPAL CORPORATIONS, VIII. 6, X. 9—SCHOOLS, I. 3.

MANSLAUGHTER.

See CRIMINAL LAW, III. 12.

MARINE INSURANCE.

See INSURANCE, V.

MARRIAGE.

1. Competency of Protestant Minister to marry two Roman Catholics — *Invalidity of ecclesiastical decrees.*] — The plaintiff, who had been baptized and had made his first communion as a member of the Roman Catholic church, was married to the defendant, who, at one time at least, had also professed the same religious belief, by a minister of a Protestant denomination, by virtue of a license issued in the regular form under the hand and seal of the Lieutenant-Governor. Subsequently the plaintiff applied to the ecclesiastical court of the diocese in which he resided for a decree pronouncing the marriage null, on the ground that according to law two Roman Catholics could only be married by a Roman Catholic priest. This decree was granted, and the decision of the court was confirmed on appeal to Rome. The plaintiff asked by this action that the pretended marriage should be declared null as to its civil effects; and that the Court should recognize and affirm, and give full force and effect to, the ecclesiastical decree:—*Held*, that, even if both parties were Roman Catholics at the date of the marriage ceremony in question, yet, according to law, their marriage could be validly solemnized by a Protestant minister; and (2) that, according to law, the sentence of the ecclesiastical tribunal, so far as it pretended to annul the marriage in question, was void, as no ecclesiastical court had competence or jurisdiction to pronounce the annulment of a marriage tie. *Delpit v. Côté*, 21 Occ. N. 307, Q. R. 20 S. C. 338.

2. Declaration of nullity—*Evading laws of Province of Quebec—Celebration by person not authorized—Church law.*] — A marriage celebrated by a priest or minister professing a faith other than that to which the parties belong, is void.— 2. If, before the coming into force of the Civil Code, any church whatever has established for its members a rule in restraint of marriage, and a marriage is celebrated contrary to the law decreeing such restraint, the court must, upon an action brought to declare the marriage void, and upon proof of such restraint, de-

clare the marriage void for civil purposes only.—3. In this case the parties (Roman Catholics) having, during their minority, and without the consent of their parents or the publication of banns, left their domicile in the Province of Quebec in order to go to be married before a Protestant minister in the United States of America, such marriage is void on account of having been contracted in fraud of the law and before a functionary who was not a curé of the domicile of either of the parties. *Durocher v. Degré*, 21 Occ. N. 393, Q. R. 20 S. C. 456.

3. Widow of deceased brother—*Validity—Legitimacy—Presumption—Will.*]—The testator was married on the 30th June, 1835, to the widow of his deceased brother; she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife:—*Held*, that the validity of the marriage between the testator and the widow of his deceased brother could not be disputed after the death of the testator; and the presumption arising from the testator's relationship with another woman was rebutted by the fact of his lawful wife being then alive; and the appellants, the children of the testator and the other woman, were not legitimate and had no *locus standi* to appeal from a judgment establishing a document as the will of the testator. *Hodgins v. McNeil*, 9 Gr. 305, and *Re Murray Canal*, 6 O. R. 685, approved. *Kidd v. Harris*, 22 Occ. N. 25, 3 O. L. R. 60.

See CRIMINAL LAW, III. 18—HUSBAND AND WIFE—WILL, V.

MARRIAGE CONTRACT.

See HUSBAND AND WIFE, IV.

MARRIED WOMAN.

See HUSBAND AND WIFE—INFANT, 4—TRUSTS AND TRUSTEES, 5.

MASTER AND SERVANT.

- I. DISMISSAL OF SERVANT.
- II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.
- III. WAGES OF SERVANT.

See CONSTITUTIONAL LAW, 1 — CONTRACT. VIII. 2.—CRIMINAL LAW, III. 12 — CROWN, IV. 2—DEFAMATION, II. 5 — LOST PROPERTY — MUNICIPAL CORPORATIONS, IX.—RAILWAY, VI. 6.

I. DISMISSAL OF SERVANT.

1. Damages—Percentage on sales.]—

The plaintiff, who had been employed by the defendants as manager, receiving a salary and a percentage on moneys received from sales, and had been dismissed upon the sale by the defendants of their business before the expiration of his engagement, was held entitled, *prima facie*, as damages to the amount of his salary for the unexpired term of his engagement and of the fixed percentage on moneys received after his dismissal in respect of sales previously made, but not to the fixed percentage upon the amount of sales which, it was contended, would have been made during the unexpired term had the business been carried on, the ascertainment of that amount being too speculative and uncertain. But the plaintiff having, shortly after his dismissal, obtained other employment, and having received in respect thereof remuneration to a larger amount than the damages calculated as aforesaid, it was held, that his action failed; and it was dismissed with costs. *Laishley v. Gould Bicycle Co.*, 22 Occ. N. 372, 4 O. L. R. 350.

2. Justification — Wrongful accusations—Knowledge of.]—

Where a servant, upon unfounded suspicion, endeavoured to make his fellow-servants believe that his master had committed a criminal offence:—*Held*, that the master was justified in dismissing his servant. *Held*, also, that though the master may have been unaware of these acts of his servant at the time of dismissing him, he was entitled to rely upon them as a defence to an action for wrongful dismissal. *Semble*, it was sufficient to justify the dismissal that the servant falsely informed customers of the master that he, the servant, had been placed in his position by other persons for the purpose of "straightening out the business." *McGeorge v. Ross*, 5 Terr. L. R. 116.

See PARTICULARS, 8 — WRIT OF SUMMONS, II. 7.

II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.

1. Building — Defective condition of appliances—Knowledge of master — Company—Officer of — Admissions by — Evidence—Onus — Non suit.]— The plaintiff was a labourer working for the defendants in the erection of an elevator. He was directed by a superintendent of the work, to go upon a planking which answered the purpose of a scaffolding in an excavation made for the purpose of placing therein the leg of the elevator. The planking gave

way while the plaintiff was on it, and he was precipitated to the bottom of the excavation, sustaining injuries. It was contended that the defendants had knowledge of the defective construction and unsafe condition of the scaffolding through J., their secretary-treasurer. It was not shewn that J. assumed to give orders to the men, or directions as to the practical work which was going on; but there was evidence that he was standing, with his hands in his pockets, looking down into the excavation on the morning of the accident, and that on former occasions he had been seen to call D. on one side and say something to him, which no one overheard. There was no evidence that the persons employed by the defendants were not proper and competent persons, or that the materials used were faulty or inadequate; nor was there any evidence that the defendants had any better means of knowing of the danger than the plaintiff:—*Held*, that the onus was on the plaintiff, and he had not made out a case to be submitted to the jury. Evidence was given of an admission made by J. to the plaintiff, after the accident, as to the defective condition of the scaffolding and the defendants' knowledge of it:—*Held*, that he had no authority to make admissions on behalf of the defendants, an incorporated company. *Wilson v. Botsford-Jenks Co.*, 22 Occ. N. 95.

2. Mill—Dangerous machinery—Want of guard — Factories Act — Workmen's Compensation Act.]— The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up about a machine—called a dove-tailing machine, consisting of rapidly-revolving knives—carrying pieces of board therefor; and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine and was going for another load, when he was directed by the operator to straighten them out. On his proceeding to do so, and not observing that the machine was in motion, he put out his hand to remove some dust on it, when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time in actual charge of it, the operator having left it and standing some fifteen feet away looking out of a window. The jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff:—*Held*, that the defendants were liable. *Moore v. J. D. Moore Co.*, 22 Occ. N. 283, 4 O. L. R. 167.

3. Mill—Dangerous work—Precautions—Liability.]—In order to free himself from responsibility, an employer must, either personally or through his foreman, not only order his employees to discontinue work considered dangerous, but must also either personally or through his foreman, see that the orders are respected and carried out, and if he does not do so, he is responsible for accidents which happen as a result of the non-observance of these orders. Judgment in *Q. R. 21 S. C. 32* reversed. *Fournier v. Lamoureux*, *Q. R. 21 S. C. 99*.

4. Mill—Opening in floor—Fencing—Contributory negligence.]—T. was working in a saw-mill at a time when the saws were stopped in order to change any saws requiring to be replaced. One only, the butting saw, was left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen sat on this table, and T., going towards the end to find a seat, slipped and fell into an opening in the floor where the deal ends were dropped on being cut off. On slipping he threw out his left arm, which came against the saw in motion, and was cut off:—*Held*, that the want of protection of the opening was negligence for which the owner was responsible. *Held*, also, *STRONG, C. J.*, hesitant, that, if T. was guilty of contributory negligence, he was sufficiently punished by a division of the damages at the trial. *Held*, per *SEDGEWICK, DAVIES*, and *MILLS, JJ.*, that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others. *Price v. Talon*, 22 Occ. N. 195, 32 S. C. R. 123.

5. Mill—Unguarded machinery—Fellow servant—Findings of jury—Damages.]—A workman employed by the defendants, in order to do his work, had to climb a step ladder and step over the unguarded rim of a cogwheel, to a plank on which he did his work. In coming from his work a truckman removed the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel and he was injured. At the trial the jury in answer to questions found that the injury to plaintiff was caused by the negligence of the defendants, and not by his own negligence or want of proper care; that it was only to a certain extent caused by the negligence of a fellow-servant, for, if the wheel had been properly guarded and the ladder properly fastened to the floor, the accident would not have happened; that the negligence of the defendants consisted in not guarding the wheel and fastening the ladder; that the wheel was a dangerous

part of the mill gearing, and was not, as far as practicable, securely guarded; that he would not have received the injury if it had been so securely guarded:—*Held*, that the findings of the jury as to negligence were amply supported by the evidence, and could not be interfered with; that the defendants were bound by the common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions; that the defendants were also bound by the Factories Act to securely guard, as far as practicable, all dangerous parts of their machinery: that the jury having so found, and their finding being supported by the evidence, the intervention of the truckman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence, for their negligence still remained an operative cause of the workman's injury. *Mann v. Ward*, 8 Times L. R. 699, not regarded as an authority. As the damages were excessive, a new trial was granted unless the plaintiffs would consent to reduce them. *Myers v. Sault Ste. Marie Pulp and Paper Co.*, 22 Occ. N. 203, 3 O. L. R. 600.

6. Mill—Use of dangerous materials—Proximate cause of accident—Presumptions—Findings of jury—Appeal.]—As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise, and consistent, that the employer is chargeable with negligence which was the immediate, necessary, and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate Court to relieve the employer of liability in a case where there is want of evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff have been sustained by two Courts below. *TASCHEREAU, J.*, dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both Courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *George Matthews Co. v. Bouchard*, 28 S. C. R. 580, and *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152, those findings ought not to be reversed on appeal. *Asbestos and Asbestic Co. v. Durand*, 30 S. C. R. 285, discussed and approved. *Dominion Cartridge Co. v. McArthur*, 22 Occ. N. 5, 31 S. C. R. 392.

7. Mines—Inspection Act—Statutory duty—Protection from falling cage.]—Action for damages for personal injuries

sustained by plaintiff, a miner, while working at the bottom of a shaft in the LeRoi mine. The cage or skip used for lowering and hoisting men fell and broke through the bulkhead or cage platform at the 800-foot level, and struck the plaintiff while working a few feet below:—*Held*, affirming the decision of McCOLL, C.J., that the cage or skip used for lowering and hoisting men is not "falling material," within the meaning of that term as used in Rule 20 of s. 25 of the Metalliferous Mines Inspection Act, and the amendment of 1899 (c. 49, s. 12) does not create any duty on the mine owner to provide protection from a falling cage. *McKelvey v. LeRoi Mining Co.*, 22 Occ. N. 246, 9 Brit. Col. L. R. 62.

8. Mines—Non-observance of rules—Mines Act.]—A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if, in consequence of the non-observance of these rules by a servant, that servant is injured, the master is not liable. It was held that the master was not liable in damages for the death of the servant resulting from the servant using, in direct violation of rules, the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act. *Anderson v. Mikado Gold Mining Co.*, 22 Occ. N. 175, 3 O. L. R. 581.

9. Mines—Shaft—Signals—Disregard of rules—Negligence—Contributory negligence—Damages—Employers' Liability Act, B. C.]—A miner was getting into a bucket by which he was to be lowered into the mine when, owing to the chain not being checked, his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine-owners, the jury found that the system of lowering the men was faulty, the men in charge of it negligent, and the engine and brake by which the bucket was lowered not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing, among other things, that signals should be given by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual, in descending, to signal with the bells, and that the injured miner knew of the rules, but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for the plaintiff:—*Held*, reversing that judgment, 22 Occ. N. 126, 8 Brit. Col. L. R. 344, and restoring the judgment of the trial Judge, 7 Brit. Col. L. R. 414,

that there was ample evidence to support the findings of the jury that the defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employers and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should, therefore, not have been granted. *Held*, further, that, as the negligence causing the accident was not that of the employers themselves, but that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employers' Liability Act, R. S. B. C. 1897 c. 69. *Warrington v. Palmer*, 22 Occ. N. 199, 32 S. C. R. 126.

10. Mines—Statutory mining regulations—Fault of fellow workmen.]—The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected, and an explosion of gas occurred, from the effects of which he died. In an action for damages by his widow:—*Held*, reversing the judgment below, 34 N. S. Reps. 319, *TASCHEREAU* and *SEGEWICK, JJ.*, dissenting, that, as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen. *Grant v. Acadia Coal Co.*, 22 Occ. N. 359, 32 S. C. R. 427.

11. Railway—Collision—Duty of engineman—Orders of conductor—Rules—Contributory negligence.]—By rule 232 of the defendants, "conductors and enginemen will be held equally responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains, unless such orders involve violation of the rules or endanger the train's safety; and rule 65 forbids them to leave the engine, except in case of necessity. Another rule provides that a train must not pass from double to single track until it is ascertained that all trains due which have the right of way have arrived or left. *M. was engineman on a special train which was about to pass from a double to a single track, and when the time for starting arrived he asked the conductor if it was all right to go, knowing that the regular train passed over the*

single track about that time. He received from the conductor the usual signal to start, and did so. After proceeding about two miles his train collided with the regular train, and he was injured. In an action against the company for damages in consequence of such injury:—*Held*, affirming the judgment of the Court of Appeal (31st December, 1901), that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone; that he was bound to obey the conductor's order to start the train, having no reason to question its propriety; and he was, therefore, not guilty of contributory negligence in starting as he did. *Müller v. Grand Trunk R. W. Co.*, 22 Occ. N. 353, 32 S. C. R. 454.

12. Railway — Contributory negligence—Nonsuit—Jury—Employers' Liability Act.—F., a conductor and brakeman in the employ of the defendant company, while turning the brake wheel, fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving:—*Held*, in an action by F.'s personal representatives to recover damages in respect of his death, that it was F.'s own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury. *Fawcett v. Canadian Pacific R. W. Co.*, 22 Occ. N. 244, 8 Brit. Col. L. R. 393.

13. Railway—Employer's liability—Excessive damages.—In the defendants' coal mine the haulage slope, which was necessarily used as a travelling road by the workmen, was not provided with manholes at intervals of not more than twenty yards, as required by the Coal Mines Regulation Act, and on account of this lack of sufficient manholes it was the custom of the defendants not to run the trip during the time the workmen were going to and coming from work. The plaintiff while coming from work was run into and injured by the trip, which had been started off during a prohibited time. The trip was a train of cars, operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by the defendants' negligence in letting the trip down, and on the verdict judgment was entered for the plaintiff for \$1,424 and costs. An appeal to the full Court was dismissed, the Court refusing

to reverse the findings of fact or to interfere with the damages as excessive. *Held*, also, that the place in question was a "railway" within the meaning of the Employers' Liability Act. *Booker v. Wellington Colliery Co.*, 22 Occ. N. 430, 9 Brit. Col. L. R. 265.

14. Railway — Lights on train.—A conductor in the defendants' employment, while performing the duty for which he was engaged at the Windsor station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train, nor was there any person stationed there to give warning of the movement of the train:—*Held*, that, by omitting to have a light on the rear end of the train, the railway company failed in their duty, and this constituted *prima facie* evidence of negligence. Judgment in Q. R. 11 K. B. 394 affirmed. *Boisseau v. Canadian Pacific R. W. Co.*, 22 Occ. N. 358, 32 S. C. R. 424.

15. Railway—Stipulation in contract of service for non-liability of master—Assurance fund—Constitution of aid society.—A master may validly stipulate with his servant that, in consideration of a contribution which he makes to the funds of a society of aid and assurance formed for the purpose of assisting workmen and their families in case of injury or death by accident, he shall not be responsible for the consequences of an accident sustained by the servant, caused by the fault of his fellow servants. *Regina v. Grenier*, 30 S. C. R. 42, followed. —2. In this case the society of aid and assurance had been legally constituted. *Ferguson v. Grand Trunk R. W. Co.*, Q. R. 20 S. C. 54.

16. Railway—Workmen's Compensation Act—Notice of injury—Absence of—Reasonable excuse—Meaning of—Cause of injury.—While the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, is for the employer's protection against stale or imaginary claims, and to enable him, while the facts are recent, to make inquiry, the injured workman, however, is the primary object of the legislative consideration: and therefore under that section and ss. 13 and 14, notice may be dispensed with where there is reasonable excuse for the want thereof, the employer not being prejudiced thereby. What constitutes reasonable excuse must depend upon the circumstances of each particular case, and a reasonable excuse will be inferred where, as here, there is the notoriety of the accident, the knowledge of the employers of the injury which

resulted in death, and its cause, and of a claim having been made on them by the deceased's representative, which they had stated they would take into their consideration, but to which no final answer had ever been given. In an action against a railway company for alleged negligence, it appeared that the deceased was killed by being run over while shunting cars. The evidence shewed that the space between two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but that the tracks themselves were in good condition, and it was merely a matter of conjecture, whether, at the time of the accident, the deceased was on the tracks themselves, or in the space between them:—*Held*, that, under these circumstances, the accident could not be said to be due to the defendants' negligence, and the plaintiffs' action failed. Judgment in 2 O. L. R. 219, 21 Occ. N. 497, reversed. *Armstrong v. Canada Atlantic R. W. Co.*, 22 Occ. N. 379, 4 O. L. R. 560.

III. WAGES OF SERVANT.

1. **Absence of agreement—Powers of justice of the peace—Appeal.**—When a servant is employed by a master without any agreement having been made either before entering upon his employment or during the course of it as to the rate of wages to be paid to him, a justice of the peace has power under the Ordinance respecting Master and Servant (C. O. 1898 c. 50, s. 3) to fix the rate of wages to be paid to the servant. Upon appeal the rate of wages fixed by the magistrate was varied. *Holness v. Niebergall*, 5 Terr. L. R. 250.

2. **Summary procedure—Justice of the peace—Jurisdiction—Counterclaim of master.**—On the hearing of a complaint before a justice of the peace, under the Ordinance respecting Masters and Servants (C. O. 1898 c. 50), by a servant against his master for non-payment of wages, the justice has no jurisdiction to allow against the amount of wages any sum by way of damages sustained by the master by reason of the servant's neglect or refusal to perform his duty. *Brown v. Craft*, 4 Terr. L. R. 461.

MAYOR.

See MUNICIPAL CORPORATIONS, IV. 3.

MEASUREMENTS.

See LIEN, 1.

MECHANICS' LIENS.

I. BRITISH COLUMBIA ACT.

II. MANITOBA ACT.

III. ONTARIO ACT.

IV. QUEBEC ACT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 16—CONTRACT, III. 1.

I. BRITISH COLUMBIA ACT.

1. **Clearing land.**—The defendant employed a contractor, under a written contract, to clear a quantity of land for the purpose of cultivation:—*Held*, that the plaintiff, a labourer who worked for the contractor upon the land, was not entitled to a lien for his work, under s. 4 of the British Columbia Mechanics' Lien Act, as amended. *Black v. Hughes*, 22 Occ. N. 220.

2. **"Owner"—Interest in land—Vendor and purchaser.**—The plaintiffs claimed a mechanics' lien for \$633 against the estate and interest of L. and T. in certain lots in the vicinity of New Westminster, for lumber furnished under the following circumstances: T., the registered owner, agreed to sell the land for \$1,200 to L.; \$50 was paid down, and the balance was to be paid immediately. No agreement in writing as required by the Statute of Frauds was executed, but L. entered into possession of the premises and proceeded to fit up the buildings for the purpose of his business as a butcher for a slaughter house, spending a large sum in so doing, and the lumber in respect of which the lien was claimed was used in building and repairing the slaughter house and putting up a fence on the land:—*Held*, that the lien attached only upon whatever interest L. might have in the land. *Anderson v. Goodsell*, 7 Brit. Col. L. R. 404, followed. *British Columbia Timber and Trading Co. v. Leberry*, 22 Occ. N. 273.

3. **Woodman's Lien—Action for wages—Pursuing both remedies—Estoppel.**—The plaintiff was employed by G., who had a contract with the defendants, to cut logs on their land, and brought this action in a County Court under the Mechanics' Lien Act for \$74.44 for wages. Before the commencement of this action the plaintiff and sixteen others obtained a joint judgment in the same Court against G., under the Woodman's Lien for Wages Act, for the gross amount of their wages. In that action G. and the company were defendants, but the action was discontinued against the company, as they released

all claim to the logs seized by the sheriff:—*Held*, that the plaintiff was estopped from proceeding under s. 27 of the Mechanics' Lien Act for the balance of his wages. *Wake v. Canadian Pacific Lumber Co.*, 22 Occ. N. 153, 8 Brit. Col. L. R. 358.

II. MANITOBA ACT.

1. One lien against two owners—Encroachment on wrong lot.]—A mechanic's lien registered against two lots of land owned by different persons in respect of work done upon two houses, one on each of the lots, on the order of one of the owners and for an amount claimed to be due for the work on both houses, without apportioning the amount as between the two, cannot be enforced under the Mechanics' and Wage Earners' Lien Act, 1898, nor can effect be given to the lien as against one of the lots only for the proper amount. *Currier v. Friedrich*, 22 Gr. 243, *Oldfield v. Barbour*, 12 P. R. 554, and *Rathbun v. Hayford*, 87 Mass. 406, followed. *Fairclough v. Smith*, 21 Occ. N. 447, 13 Man. L. R. 509.

2. Unpaid vendor—Lien subject to claim of—Notice.]—The purchaser of a lot of land under an agreement of sale, fixing 15th August, 1901, for payment of the purchase money, was allowed to enter into possession on 15th June, 1901, and to commence building on the land. He continued the expenditure of money upon the premises after the date fixed for payment, with the knowledge and concurrence of the vendors, but eventually abandoned the purchase, without having paid anything to the vendors. They then notified him that as he had not complied with the terms of the purchase as to time, his interest had ceased. The plaintiff's claim was for a lien on the interest of the purchaser in the property, for work done by him in the erection of the building, but he submitted to the lien of the vendors for the full amount of the purchase money of the land:—*Held*, that the vendors could not, under the circumstances, put an end to the rights of the purchaser by giving such a notice, and that, apart from the provisions of s. 11, s.s. 2, of the Mechanics' and Wage-Earners' Lien Act, 61 V. c. 29, the plaintiff was entitled to the lien asked for, with the usual inquiries and directions. *Hoffstrom v. Stanley*, 22 Occ. N. 337, 14 Man. L. R. 227.

III. ONTARIO ACT.

1. Action begun by statement of claim—Service out of Ontario—Jurisdic-

tion to allow.]—There is no authority in the Courts of this Province to allow service out of Ontario of a statement of claim filed as the initial step in an action. *In re Busfield, Whaley v. Busfield*, 32 Ch. D. 123, followed. Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons. *Semble*, that if there were power to allow service of such a statement out of Ontario, it could not be allowed *nunc pro tunc* after it had been effected without an order. Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanic's lien, under R. S. O. 1897 c. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside. History of the legislation in Ontario as to service out of the jurisdiction. *Pennington v. Morley*, 22 Occ. N. 183, 3 O. L. R. 514.

2. Material men — Agreement between owner and contractor—Drawback—Value of plant — Completion of work—Judgment — Estoppel.]—The plaintiffs furnished materials to the contractors for certain works, and the action was brought against the contractors and the owner to realize a lien under the Mechanics' Lien Act. After work to the value of \$24,290.88 had been done, the owner took possession of the works, the materials on the ground, and the plant and machinery of the contractors, and no work had since been done by them under the contract. An action by the contractors against the owner for damages for improperly taking the works out of their hands and to recover the value of the materials, machinery and plant, and some supplies taken by the owner, and also to recover a large sum on account of work done, had been dismissed:—*Held*, that the 15 per cent. which, under s. 11 of the Act, R. S. O. c. 153, the owner was required to deduct from any payments made in respect of the contract and to retain as a fund for the discharge of liens, was to be computed on the value of the work and materials, but not upon the value of the plant as well, notwithstanding that for the security of the owner the plant was declared to be for the purposes of the contract his property. *Held*, that, if the judgment dismissing the action brought by the contractors were binding on the plaintiffs, they would not be benefited by a postponement of the trial until the final completion of the works, for the effect of that judgment was that the contractors had forfeited all right to payment for any work which they had performed and for which they had not been paid; and, even if the judgment were not binding on the plaintiffs, the case should not be sent back

for a new trial. *Birkett v. Brewder*, 22 Occ. N. 93.

3. Mining location — Blacksmith — Cook.]—A blacksmith, employed for sharpening and keeping in order tools used for the work of mining, is entitled to a lien for his wages on the mining location, but a cook who does the cooking for the men employed is not. Adjoining mining locations even when they are water lots, if "enjoyed with" the mining location on which the mine is situated, are subject to liens for work performed in the mine. *Davis v. Crown Point Mining Co. of Ontario*, 22 Occ. N. 52, 3 O. L. R. 69.

4. Several buildings — Lien for work on one—Registration — Time — Estimate of work done.]—Where a contract is made with the respective owners of adjoining lands, on which two separate buildings are erected, but included under one roof, for the repair thereof, at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches and can be enforced under the Mechanics' Lien Act, against the lands of each of such owners for the price of the work done and the materials provided on each respective building. The findings of the local Master who tried a mechanic's lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of such work and materials, was upheld, for, though the evidence was contradictory, there was evidence to support such findings. *Booth v. Booth*, 22 Occ. N. 131, 3 O. L. R. 294.

5. Statutory action to realize—Joining other causes of action—Parties—Architect.]—In an action begun under s. 31 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, by the filing of a statement of claim, to realize a lien created by the Act, the plaintiff cannot include other causes of action and other matters. Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as a defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out. *Seemle*, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien. *Bagshaw v. Johnston*, 22 Occ. N. 33, 3 O. L. R. 58.

IV. QUEBEC ACT.

1. Claim of Lien—Registration—Description of land.]—The description of an immovable, in the notice for registration of a workman's privilege, as "part of lot 4101 of the cadastre of the parish of Montreal," but omitting the conterminous properties, does not comply with Art. 2168 of the Civil Code, which provides that in any place where the official plans are in force the true description of a part of a lot is by stating that it is a part of a certain official number upon the plan and in the book of reference, and mentioning who is the owner, and the properties conterminous thereto; and such notice does not create any privilege. *Therrien v. Hénault*, Q. R. 21 S. C. 452.

2. Increased value — Vendor of owner—Estimate of increase — Registration of lien—Contestation—Pleading.]—The question of the increase in value of an immovable by reason of work done by a workman can only be raised by the vendor of the owner and his creditors.—2. The increase in value is fixed by an estimate, at the time of the decree, when the money is insufficient to pay a workman who has registered a lien or in case of a contestation of the increase by those interested.—3. When there is a contestation, it should be by means of a plea on the merits and not by inscription in law.—4. The defendant being the owner of the immovable, the workman is not bound to allege increase in value. *Therrien v. Hénault*, 5 Q. P. R. 61.

3. Material man—Notice—Registration.]—The hypothec or lien of the material man is distinct and independent of the *saisie-arrest* mentioned in Art. 2013 (h) and (i), C. C., and is not subject to the conditions of notice mentioned in (g), nor to the condition of registration. *QUIMET, J., dissenting. Madaren v. Villeneuve*, 4 Q. P. R. 322, Q. R. 11 K. B. 131.

4. Time for registering lien — Completion of work.]—The point of commencement of the 30 days given by Art. 2013b of the Civil Code for the registration of the lien of a labourer, workman, or contractor, is the moment at which the work upon the building in the construction of which they have laboured is completed, and not the date at which the use of the building has been begun. *Quintal v. Bénard*, Q. R. 20 S. C. 199.

MEDICAL PRACTITIONER.

See MEDICINE AND SURGERY.

MEDICINE AND SURGERY.

1. Fees of physician—Action for—Pleading—Irrelevant allegations.]—The plaintiff, a practising physician, sued the defendant for \$3,000 for professional services. In his declaration he set up the fact that the case was notorious, and that the public had been daily kept aware of the defendant's condition, and of all details connected therewith, thus putting the plaintiff's professional reputation at stake. These facts were alleged as partly justifying the large amount of the fee claimed. The defendant inscribed in law against these allegations:—*Held*, that the allegations complained of could not be connected with the point at issue, which was the amount of the fee due to the plaintiff. The inscription was, therefore, maintained, and the allegations complained of were struck out of the declaration. *Marien v. Lussier*, 22 Occ. N. 418.

2. Malpractice—Limitation of actions—Ontario Medical Act—Termination of services—Trial—Jury.]—An action against surgeons for malpractice was held to be barred by s. 41 of the Ontario Medical Act, R. S. O. 1897 c. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these occasions she did not go as a patient, but as a person with a grievance, she having previously consulted another surgeon, and also a solicitor. Actions of malpractice are now more properly tried without a jury. Upon the evidence, it was held, also, that the plaintiff, upon whom the burden rested, had failed to make out a case of negligent malpractice; and the action was dismissed. *Town v. Archer*, 22 Occ. N. 258, 4 O. L. R. 383.

MERGER.

See HUSBAND AND WIFE, VII. 4.

MESNE PROFITS.

See INFANT 3.

MILITARY RESERVE.

See CROWN, I. 1.

MINES AND MINERALS.

1. Adverse action—Certificate of improvements—Co-owner—Estoppel—

Notice—Res judicata—Judgment in rem]

—A judgment in an adverse action under s. 37 of the Mineral Act is not a judgment *in rem*. One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements. *Bentley v. Botsford*, 8 Brit. Col. L. R. 128, followed. *Per* MARTIN, J.—Section 37 does not apply to co-owners of the same claim, but to owners of conflicting claims. *Fry v. Botsford*, *MacQuillan v. Fry*, 22 Occ. N. 421, 9 Brit. Col. L. R. 234.

2. Adverse action—Plan—Survey—Affidavit—Condition precedent.]—In an adverse action the plan to be filed pursuant to s. 37 of the Mineral Act must be based on a survey made by a provincial land surveyor. The filing of the affidavit and plan pursuant to that section is a condition precedent to the plaintiff's right to proceed with his action. *Paulson v. Beaman*, 9 Brit. Col. L. R. 184.

3. Application under Mineral Act, B.C.—Forum—Extension of Time.]—An order to extend the time for filing the affidavit and plan required by s. 37 of the Mineral Act must be made by the Court, and cannot be made by a Judge in Chambers. *Noble v. Blanchard*, 7 Brit. Col. L. R. 62, not followed as to this point; *McCOLL, C.J.*, dissenting. *Murphy v. Star Exploring and Mining Co.*, 22 Occ. N. 104, 8 Brit. Col. L. R. 421.

4. Assessment work—Affidavit—Notice—Certificate.]—Decision of WALKER, J., 7 Brit. Col. L. R. 418, holding certain irregularities cured by the certificate of work, affirmed by the full Court. *Laur v. Parker*, 8 Brit. Col. L. R. 223.

5. Certificate of work—Impeachment of—Evidence—Mineral Act, s. 28—Amendment Act, 1898, s. 11—Parties—Attorney-General.]—Appeal from judgment dismissing the plaintiffs' adverse action. The defendant relied on certificates of work obtained by him in respect of the mineral claims covering the ground in dispute, and the plaintiffs sought to shew that the full amount of work required by the statute as a prerequisite to such certificates of work being issued had not been performed. The trial Judge refused to admit the evidence, holding that evidence impeaching a certificate of work could not be received in any proceeding to which the Attorney-General was not a party. The full Court affirmed the decision, holding that if a certificate of work is to be set aside the Attorney-General must be a party, and until set aside all things are

presumed in favour of its holder. The plaintiffs in making their case admitted that the defendant had obtained certificates of work:—*Held*, by the full Court, that this in itself was affirmative evidence of the defendant's title, within the meaning of s. 11 of the Mineral Act Amendment Act of 1898. *Cleary v. Boscowitz*, 22 Occ. N. 41, 8 Brit. Col. L. R. 225.

6. Co-owner's interest in claim—*Seizure by sheriff—Lapse of miner's license—Sheriff renewing—Rights of co-owners.*—A sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under s. 4 of the British Columbia Mineral Act Amendment Act of 1899, in the name of the judgment debtor; neither has the sheriff power to renew a certificate before lapse. Where some of the co-owners of a mineral claim allow their free miners' certificates to lapse, their interests at once vest *pro rata* in their former co-owners. *McNaught v. Van Norman*, 22 Occ. N. 341, 9 Brit. Col. L. R. 131.

7. Grant of gold mining claim—Dominion Lands Act—Order in council—Directory provisions of statute—Royalty—Imposition of tax—Recovery back.—The provisions of s. 91 of the Dominion Lands Act, R. S. C. c. 54, requiring all orders in council under the Act to be laid before Parliament within the first 15 days of the next session, is directory only.—2. The effect of another provision of the same section, that any order under the Act shall, unless otherwise specially provided, have force only after it has been published for four successive weeks in the *Canada Gazette*, is that such order does not come into force until one week after the fourth publication.—3. There is no authority in the Yukon Territory Act, 61 V. c. 6, as amended by 62 & 63 V. c. 11, for changing the date upon which an order under the Dominion Lands Act shall come into force.—4. The suppliant, by right of discovery, under the Dominion Lands Act and the Dominion Mining Regulations, 1899, obtained a grant of a gold mining claim in the Yukon district in December, 1898. His grant gave him for one year the exclusive right to all proceeds; and the rights which it conferred upon him were those laid down in the said regulations, and no more, and were subject to all the provisions thereof, whether expressed in the grant or not. During the currency of this grant an order in council was passed making grants of gold mining claims in the district subject to a royalty. On 7th December, 1897, the grant was renewed on the same terms:—*Held*, that

the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order in council.—5. The operative words of the order in council imposing the royalty were, "a royalty shall be levied and collected:—"*Held*, that the expression contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor.—6. The evidence shewed that the suppliant had paid the amount of the royalty claimed by the Crown under protest, and in the belief that payment was necessary to protect his rights:—*Held*, that he was entitled to recover it back. *Chapelle v. The King*, 7 Ex. C. R. 414.

8. Location of claim—Abandonment—Overlapping—Evidence—Certificate of work—Irregularities.—The Parrot mineral claim, located in February, 1895, lapsed by abandonment in February, 1899. In March, 1895, part of the same ground was located by the plaintiff as the Townsite claim, and certificates of work were recorded in respect of it in 1896, 1897, 1898, and 1899. In December, 1899, the ground covered by the original Parrot claim was re-located as the Defiance No. 1 Fraction, by the defendants' predecessor in title:—*Held*, in adverse proceedings, that so much of the Parrot claim as was overlapped by the Townsite claim was not unoccupied ground at the time of the location of the Townsite, and as such was not open to location. At the trial the plaintiffs attacked the validity of the defendants' location, and the defendants sought to put in evidence a certificate of work issued the day before. *Held*, not admissible, as it was obvious that such certificate was to be used to cure irregularities. *Remmelmeier v. Curtis, Powers v. Curtis*, 8 Brit. Col. L. R. 383.

9. Location of claim—Adverse proceedings—Title—Action.—Adverse proceedings are essentially in ejectment and not in trespass, and the plaintiff must succeed by the strength of his own title: it is, therefore, for the plaintiff to shew affirmatively the due location of his claim. *Clark v. Haney*, 8 Brit. Col. L. R. 130.

10. Location of claim—Approximate bearing—Mistatement—"Minerals in place."—Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other. A prospector, in locating and recording his location line between No. 1 and No. 2, as running in an easterly direction, whereas it was nearly due north, does not

comply with the statute requiring him to state the approximate compass bearing; and his location is void. *Coplen v. Callaghan*, 30 S. C. R. 555, followed. Before a prospector can locate a claim, he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient. Judgment in *S Brit. Col. L. R. 153* reversed. *Colloom v. Manley*, 22 Occ. N. 278, 32 S. C. R. 371.

11. Location of claim—Certificate of work—Evidence to impugn.]—A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent, and can only be impugned by the Crown. *Coplen v. Callaghan*, 30 S. C. R. 555, and *Colloom v. Manley*, 22 Occ. N. 278, 32 S. C. R. 371, followed. C., believing that the statutory work had not been done on mining claims, and that they were therefore vacant, located and recorded them under new names as his own, and brought an action claiming an adverse right thereto:—*Held*, affirming the judgment in *S Brit. Col. L. R. 225*, that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial. *Cleary v. Boscowitz*, 22 Occ. N. 278, 32 S. C. R. 417.

12. Location of claim—Mineral Act—Imperative provisions.]—The Blue Bird mineral claim was located 20th April, 1895, and recorded 3rd May, 1895, and on 21st April, 1896 (before it would have lapsed if duly located), the defendants located the Red Oak claim over the same ground, and after lapse the plaintiffs located over the same ground the Back Pay claim and attacked the defendants' title:—*Held*, that, as the location line of the Blue Bird was not placed as near as possible on the line of the wedge or vein, its location was bad, and the location of the Red Oak was good. The provisions of the Mineral Act as to location are imperative. *Bleekir v. Chisholm*, 8 Brit. Col. L. R. 148.

13. Mining lease—Forfeiture—Notice—Statutory requirements—Compliance with—Construction of statute—Laches.]—The Nova Scotia Mines and Minerals Act of 1892, c. 1, s. 152, requires "all applicants for leases or licenses under this chapter" to furnish the Commissioner of Mines with their address, which shall be registered, and all summonses, notices, &c., which require to be served under the Act, "shall be considered served if sent to such address." By the terms of the amending Act of 1893, c. 2, s. 10, the Commissioner of Mines is not required to send notices of

default of payment to any lessee, unless, previous to such default, such lessee shall have given written notice to the Commissioner of his post office address. A lease of gold mining areas, held by the relator, G., was forfeited for alleged non-compliance with the provisions of s. 152 of the Act of 1892. The forfeiture was entirely *ex parte*, no notice being given to the lessee that rent was overdue, or that any proceedings would be taken to forfeit the lease. The lease was granted in 1890, at which time there was no provision in force requiring an applicant for a lease to give his residence or post office address, but the evidence shewed that, as a matter of fact, the name, address, and occupation of G., were indorsed on his application, and were registered in a book kept in the office of the Commissioner for some time afterwards. No further address was given:—*Held*, that there having been a substantial, if not a literal, compliance with the provisions of the statute on the part of G., the forfeiture of his lease, without notice sent to the address given by him, was illegal and void, and must be set aside. As the Act imposed forfeiture, and affected individual rights, it must be given a strict construction, and the words "after the passage of this Act" could not be read into it so as to require G. to give a second notice, and, in default thereof, to deprive him of the rights given him under his lease. The doctrine of laches, as affecting the application to set aside the forfeiture, had no application, this not being an action invoking the equitable assistance or interference of the Court, but an official information on the relation of G., based upon his legal rights, in which he required no equitable assistance. *Attorney-General v. Waverley Gold Mining Co.*, 35 N. S. Reps. 192.

14. Trespass—Action for—Discovery—Inspection—Order for—Copies of plans—Undertaking for damages—Security.]—This was an action of trespass to extralateral rights appurtenant to a mineral claim located and recorded in 1891, and the point in dispute was as to the terms of an inspection order enabling the plaintiffs to inspect the defendants' workings:—*Held*, affirming the decision of *McCOLL, C.J.*, that the order might allow the inspecting party to make copies of plans, charts, &c., of the other party's workings.—2. That the order should contain an undertaking for damages, and the practice does not require security to be given. *Star Mining and Milling Co. v. Byron N. White Co.*, 22 Occ. N. 104, 9 Brit. Col. L. R. 9.

See COMPANY, I. 3—CONTRACT, I. 3, VII. 2—DISCOVERY, I. 3—ESTOPPEL—

MASTER AND SERVANT, II. 7-10—MECHANICS' LIENS, III. 3—RAILWAY, X. 1—TRUSTS AND TRUSTEES, 8—WATER AND WATERCOURSES, 3-6.

MINING COMPANY.

See COMPANY, I. 3.

MISREPRESENTATIONS.

See CONTRACT, VI. 4, VII. 2—FRAUD—SOLICITOR, 2.

MISTAKE.

Recovery of money paid under mistake of fact—Mortgage—Account—Acknowledgment—Laches—Estoppel—Statute of Limitations—Costs.—Action by mortgagors against the executors of the mortgagee and the assignee of the mortgage from the executors to recover overpayments on the mortgage made under a mistake of fact. The action was begun against the assignee only, but the plaintiff afterwards added the executors as defendants, and claimed an account and to surcharge, &c.:—*Held*, that the money paid in excess of the amount due, having been paid in ignorance of the facts, was recoverable, notwithstanding the acknowledgment and notwithstanding laches, the mortgagors not having waived all inquiry, because it would be unconscionable for the assignee to retain it. *Marriott v. Hampton*, 2 Sm. L. C., 10th ed., p. 431, *Kelly v. Solari*, 9 M. & W. 54, and *Townsend v. Croudy*, 8 C. B. N. S. 493, followed. *Held*, also, that there was no estoppel, neither the assignee nor the estate of the mortgagee having been placed in a worse position than if the overpayment had not been made. *Held*, further, that the plaintiff's claim was not barred by the Statute of Limitations, because no cause of action arose until the 23rd February, 1901, when the mortgagors paid a sum in excess of what was really due. *Held*, lastly, that the plaintiff should have only such costs as he would be entitled to had he commenced his action in the first place against the executors. *McDermott v. Hickling*, 22 Occ. N. 50. (Reversed by C. A., 24th Nov., 1902, 1 O. W. R. 768.)

See ARCHITECT, 2—ASSESSMENT AND TAXES, III. 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, I, 2—CONTRACT, IV. 1—IMPROVEMENTS—LIMITATION OF ACTIONS, I. 2—MORTGAGE, 6—MUNICIPAL ELECTIONS, 9—PARTIES, II. 4—PLEADING, X. 1.

MODEL SCHOOL.

See SCHOOLS, I. 4.

MONEY HAD AND RECEIVED.

See WRIT OF SUMMONS, II. 4.

MONEY IN COURT.

Attachment of debts—Claimants—Priorities.—Moneys paid into a County Court by garnishees were distributed among claimants according to priorities, the claimants who observed the first charging order being first entitled. *Wilson v. Robertson*, 9 Brit. Col. L. R. 30.

See APPEAL, IV. 11—ATTACHMENT OF DEBTS, III. 1—INSURANCE, IV. 4, 12—PLEADING, X. 1, XI. 2.

MONOPOLY.

See CONSTITUTIONAL LAW, 5—MUNICIPAL CORPORATIONS, I. 2, III. 11.

MORTGAGE.

1. Amount due—Waiver or dispensation of tender—Rate of interest post mortem—Costs.—Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest due, amounting to \$396.48, and, on the mortgagee's solicitor failing to call, he wrote to the mortgagee that he was prepared to pay the said sum; this was answered by the mortgagee's solicitor sending a statement claiming, in addition, certain disputed costs:—*Held*, that what took place did not amount to a waiver or dispensation of a tender of the amount due under the mortgage. The payment of the principal money was to be made at the expiration of a named period, with interest at a specified rate, as well before as after maturity, until the said principal was fully paid and satisfied:—*Held*, that the interest at the rate specified was payable after as well as before the expiration of such period. *People's Loan and Deposit Co. v. Grant*, 18 S. C. R. 262, distinguished. In an action for redemption brought by the mortgagor, in which a tender was set up, the judgment was for a reference to a Master to ascertain the amount due, to make all neces-

sary inquiries for redemption or foreclosure, and to report: the provision for costs being that if the mortgagor had made default in payment of the amount, if any, found to be due, he should pay the costs; and, if no greater sum than \$380.48 were found to be due, the defendant should pay the costs. Further directions were not reserved; nor were there any further directions as to costs:—*Held*, that the defendant was entitled to the costs of the action. Judgment in 22 Occ. N. 28, 3 O. L. R. 26, varied. *Middleton v. Scott*, 22 Occ. N. 369, 4 O. L. R. 459.

2. Building society—Monthly payments—Maturity of shares—Depreciation—Discharge—Novation—Interest—Premium.—The plaintiff became a member of, and mortgaged his land to, a building society incorporated under R. S. O. 1887 c. 169, as collateral security for repayment of the value of his stock, which had been advanced to him, which stock he covenanted to assign forthwith to the company, and to repay its par value in 96 monthly payments, "as per rules, &c., of the company;" and he signed 96 promissory notes, which included interest at 6 per cent. and 40 cents per share per month, bonus or premium. Afterwards the company sold out to another company, and the plaintiff accepted shares in the latter in lieu of his shares in the former, contracting at the same time to observe the by-laws of the latter company, one of which provided that "the monthly dues under mortgages must continue to be paid "until maturity of the pledged shares." Having paid the 96 notes, he claimed a discharge. Owing to a depreciation in the value of the assets of the vendor company, 38 per cent. was deducted from the amount credited on the plaintiff's shares, and a discharge was refused:—*Held*, that there had been a complete novation and change of membership by the plaintiff from one company to the other; and the plaintiff was not entitled to a discharge till he had paid his proportion of the deficiency arising from the depreciation.—2. That R. S. C. c. 127, s. 3, relating to interest on mortgages, and embodied in R. S. O. 1897 c. 205, s. 21, had no application to this mortgage; and moreover the rate of interest was only 6 per cent., the bonus (authorized by R. S. O. 1887 c. 169, s. 38), not being considered to be interest. *Lee v. Canadian Mutual L. and I. Co.*, 22 Occ. N. 60, 3 O. L. R. 191.

3. Construction—Interest.—The proviso for payment in a mortgage, given to secure an indebtedness, provided for the payment of "said overdrawn account and all promissory notes or bills of ex-

change (and interest upon the same) then due and payable:—*Held*, that the overdrawn account was made chargeable with interest. *Bank of Montreal v. Dunlop*, 22 Occ. N. 327, 2 N. B. Eq. Reps. 388.

4. Foreclosure—Assignment of mortgage—Advances, subsequent to—Report—Varying, on motion for foreclosure—Interest.—H. assigned to the plaintiff a mortgage of certain property of which F. was owner, subject to the mortgage to H. The assignment, to which F. was a party, and which was made at his request, contained, among other things, an agreement on his part that any future advances which he might require, if made by the assignee, should also be a lien or charge upon the property. After the death of F. foreclosure proceedings were commenced by the plaintiff, who, in addition to the amount secured by the mortgage, made a claim for subsequent advances. The defendant H. was appointed to represent the heirs of F. in the proceedings, but, subsequently, C. F., who claimed to be one of the legal representatives of F., was permitted to appear, and entered an appearance by her attorney. Plaintiff's claim was sent to a referee to ascertain and report the amount due, and after a hearing, at which C. F. was represented, the referee reported as due the sum of \$808.45, including \$338.96 for subsequent advances. On application for order for foreclosure and sale, the Judge reduced the amount of the plaintiff's claim to \$435.25, with interest to the date of the sale:—*Held*, that the Judge had authority to open up the question as to the correctness of the referee's report, but was wrong in his conclusion, the recital in the assignment being sufficient as between the parties to make the subsequent advances a charge upon the property, and there being sufficient evidence to support the finding that the advances claimed were actually made:—*Held*, also, that plaintiff was entitled to recover interest up to the date of payment by the sheriff, and not, as allowed, only to the date of sale. *Wallace v. Harrington*, 34 N. S. Reps. 1.

5. Foreclosure—Rate of interest—Loan company—Pledge of shares by mortgagor—Forfeiture—Separate action.—The defendant, having certain shares in the plaintiff company, obtained a loan of \$600. The shares were allotted and the loan granted upon certain conditions, which included the payment of a membership fee, and certain monthly dues, and the execution, as collateral security, of a mortgage, which was to continue until the maturity of the shares, or until payment of the loan was made. Under

the by-laws of the company the rate of interest on loans was declared to be 6 per cent., but under the provisions of the mortgage executed by the defendant, the rate of interest payable where the stock payments, dues, and interest were not promptly paid, was 15 per cent.:—*Held*, that, the defendant having made default in her payments, the company were entitled to payment of the amount due them, with interest at the latter rate. The contract of membership as a shareholder was distinct from the mortgage contract, and was not to be considered in the foreclosure suit. If her shares were wrongly forfeited, the defendant's rights as a shareholder were to be sought in a separate action, and afforded no defence to the foreclosure suit. *Canadian Mutual Loan Co. v. Burns*, 34 N. S. Reps. 308.

6. Foreclosure—Tax title defence—Conveyance of equity to purchaser at tax sale—Onus of proof of arrears—Improvements under mistake of title.—In an action for foreclosure, in which a defendant set up a purchase at a tax sale prior to 1899, and a conveyance of the equity of redemption from the mortgagor, but did not prove the regularity of the sale, or that taxes were in arrear, and relied upon 58 V. c. 90, s. 13 (O.), and 63 V. c. 103, s. 11 (O.), and also claimed for improvements as made under a mistake of title:—*Held*, following *Stevenson v. Traynor*, 12 O. R. 804, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale for taxes, and had not been satisfied. *Held*, also, that the words "sales . . . for taxes" in s. 11 of 63 V. c. 103, mean sales for taxes for which the lands might rightly be sold. *Held*, also, under the circumstances here, that the defendant had made no improvements as under a mistake of title—there was no mistake—he had simply improved his own land which he took subject to the mortgage. *Hislop v. Joss*, 22 Occ. N. 144, 3 O. L. R. 281.

7. Mortgagee dealing with property—Power to reconvey—Action on covenant—Right of way.—A mortgagee, being compellable under his mortgage to discharge at any time any portion of the land described in it, having not less than 20 feet frontage, upon payment of a certain sum per foot frontage, not only discharged a certain portion of the land upon payment of a certain sum, but also assented to a right of way across the whole of the property, which right of way had been granted by the owners of the equity of redemption to the purchaser of a portion of the mortgaged lands, and released the right of way from

his mortgage:—*Held*, that the mortgagee having debarred herself from restoring the estate covered by the mortgage, unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, owing to the right of way, an assignee of the mortgage could not claim under the covenant therein in an administration of the mortgagor's estate. It is proper, however, in such a case that the mortgagee claiming under the covenant should have an opportunity within a limited time to put himself in a position to restore the estate upon payment of the mortgage money; and so twenty days were allowed for that purpose. *In re Thuresson, McKenzie v. Thuresson*, 22 Occ. N. 51, 3 O. L. R. 271.

8. Priorities—Payment by sale of other property—Improvements—Security.—Action for a declaration of hypothec of immovables. The defendant moved for security that the immovables should be sold for an amount sufficient to pay him the whole of his claim, which he alleged was prior to the claim of the plaintiff, and that his hypothec was also prior. The plaintiff replied that the defendant had been paid his privileged or prior claim by the sale of other immovables hypothecated for the same debt. The defendant rejoined that he had not been paid his entire debt, and that a certain sum received by him had been expended in improvements on the property. The plaintiff denied the improvements, and alleged that, in any event, they were off-set by the rents and profits. Finally, the defendant denied the off-set:—*Held*, that the defendant had not proved his improvements; that he had received from the sale of the other immovables a sum exceeding his claim; that his debt was therefore extinguished, and he was not entitled to security. *Desjardins v. Bueton*, 4 Q. P. R. 264.

9. Proposal for mortgage—Liability for expenses—Agreement—Solicitor's costs—Expenses of appraisement—Commission to agent.—The defendant applied to the plaintiffs for a loan on mortgage, but the loan was not completed, through no fault of the plaintiffs. They sued the defendant for solicitor's costs, costs of appraisement, and brokerage at 1 per cent. on the sum they were ready to advance, and they relied on the following clause in the written proposal made to them: "If the loan for any cause should not be completed, I agree to pay all expenses incurred:—"*Held*, as to the solicitor's costs and expenses of appraisement, the charges being reasonable, and being for services rendered to the defendant at his request, that the plaintiffs were entitled to recover, but as to the

item of commission at 1 per cent. on the gross amount of the loan, that this could not be properly included under the word "expenses," because the money was not earned, and the plaintiffs would not be legally justified in paying it unless it were an expense properly incurred; the brokerage or commission, under the circumstances of the case, being only payable on completion of the loan to the plaintiff's agents. *British Columbia Provincial Loan Assn. v. Charnock*, 22 Occ. N. 155.

10. Sale—Deficiency—Personal order for—Notice of motion—Service by filing.—A mortgage made by the defendant to the plaintiffs to secure payment of \$500, contained a covenant that the defendant would pay, or cause to be paid, the said mortgage money, to wit, \$500, with interest. On sale under order for foreclosure and sale, the mortgaged property realized only \$110, and the plaintiffs applied for an order for judgment against the defendant, with costs, for the balance due on the mortgage, after deducting the proceeds of the sale. The defendant did not appear to the action, and as he was a seafaring man, and it was impossible to effect personal service, the notice of motion was served by filing with the prothonotary, pursuant to O. 65, r. 4:—*Held*, that the plaintiffs were entitled to the order applied for. *Reliance Savings and Loan Co. v. Curry*, 34 N. S. Reps. 665.

11. Sale under power—Pretended sale—Fraud—Purchasers for value without notice—Knowledge of agent—Redemption—Acts of parties to fraud—Damage by.—On an appeal from the judgment of MEREDITH, C.J., 2 O. L. R. 134, 21 Occ. N. 438:—*Held*, that the defendant D. was not personally liable, as he committed no wrong in taking the assignment of the mortgage, and in exercising the power of sale wrought no change in the plaintiffs' rights, as the property in the hands of H., the purchaser, who became trustee for R., was redeemable unaffected by the sale. But the defendant H. was personally liable, as he was possessed of the legal title and had the legal power and control, and it was his sale and his act that prejudiced the plaintiff. Judgment below varied. *Smith v. Hunt*, 22 Occ. N. 429, 4 O. L. R. 653.

12. Sale under power—Service of notice—Fraudulent scheme—Exchange—Notice by solicitor's knowledge.—In April, 1900, plaintiff mortgaged land to defendant McK. to secure \$140 and interest; the whole to become due in the following December. The mortgage provided for sale on one month's notice, after one month's default. Shortly after the

mortgage was made, plaintiff paid McK. \$2.50 for interest. In January, 1901, plaintiff left the Province, and returned in August, 1901. Until two weeks before leaving, plaintiff lived on the mortgaged land. Shortly after plaintiff left, his brother paid McK. \$32 on the mortgage. About 25th February, 1901, McK. took proceedings to sell under the power of sale; a notice of intention to sell was fastened to the door of the house on the property, but not served on plaintiff personally. The property was advertised for sale by auction on 9th April, 1901. Before the sale McK. arranged with D. to bid as if for himself, but in reality for McK. D. bid, and the property was knocked down to him. A deed, purporting to be in pursuance of the power of sale, was executed by McK. to D., for the expressed consideration of \$195, and a quit claim deed by D. to McK.'s wife, for the expressed consideration of \$200. McK. paid for the drawing of both deeds; D. was paid \$5, but otherwise no money was paid by or to him. Afterwards an exchange of properties was effected with one B., McK.'s wife executing a quit claim of the plaintiff's land in favour of B.:—*Held*, that the pretended sale to D. and the deed by D. to McK.'s wife were in pursuance of a fraudulent scheme by McK. to become the owner of plaintiff's land for much less than it was worth; and the sale was declared void.—2. That the service of the notice of sale was good.—3. It was contended that B. had notice of the fraud by having employed the same solicitor who had conducted the sale proceedings:—*Held*, that there was no presumption that the solicitor would communicate his knowledge to B., as it would be against his interest to tell.—4. The fact that on the day of the alleged mortgaged sale, B. found that the mortgagee or his wife claimed to absolutely own the land, was notice enough to put B. on inquiry. As she did not make such inquiry, she could not avail herself of her ignorance. The best position she could hold was that of an assignee of the mortgage.—5. A power of sale could not be exercised by an exchange of the land instead of by a sale for a price. *Smith v. Spears*, 22 O. R. 286, dissented from. *Winters v. McKinstry*, 22 Occ. N. 213.

See **BILLS OF SALE AND CHATTEL MORTGAGES—COMPANY, I. 2, V. 9—COURTS, V. 2—DEBENTURES—HUSBAND AND WIFE, IV. 3—INSURANCE, II. 4, 9—JUDGMENT DEBTOR—LIMITATION OF ACTIONS, I. 1, 3—MISTAKE—PLEADING, X. 4—RAILWAY, II.—SALE OF LAND—SOLICITOR, 3—TRUSTS AND TRUSTEES, 3, 7—VENDOR AND PURCHASER, 8, 15—WILL, I. 5, II. 3.**

MORTMAIN.

See WILL, II. 4.

MUNICIPAL CORPORATIONS.

- I. BONUS.
- II. BOUNDARIES.
- III. BY-LAWS.
- IV. CONTRACTS.
- V. DRAINAGE.
- VI. EXPROPRIATION.
- VII. HIGHWAYS.
- VIII. MEMBERS OF COUNCIL.
- IX. OFFICERS, SERVANTS, AND OTHERS
—LIABILITY FOR ACTS OF.
- X. OTHER CASES.

See ASSESSMENT AND TAXES—CANADA TEMPERANCE ACT, 3—CONSTITUTIONAL LAW, 8—COSTS, VI. 4—COURTS, III.—FINES—LANDLORD AND TENANT, I. 2—LIQUOR LICENSE ACT—MALICIOUS PROCEDURE, 3—MANDAMUS, 2—NEGLIGENCE, 4—PENALTIES AND PENAL ACTIONS, 3—PLEDGE, 1—RAILWAY, III. 2, X. 3—SCHOOLS—STREET RAILWAYS—SURVEY—WAX.

I. BONUS.

1. *By-law—Promotion of manufactures—Removal of industry "already established"—Motion to quash registered by-law—Delay.*—By s. 9 of the Municipal Amendment Act, 1900, a new subsection, 12, is added to s. 591 of the Municipal Act, R. S. O. 1897 c. 223, which new section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality, but (e) "no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the Province."—*Held*, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under cl. (e), notwithstanding that these persons had determined, before negotiating with the town, to remove their business from the village at all events, and to such other place as should offer the largest inducement. The by-laws were quashed,

upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over to the manufacturers. *In re Village of Markham and Town of Aurora*, 22 Occ. N. 205, 3 O. L. R. 609.

2. *Res judicata—Exclusive privilege—Monopoly.*—To an action brought to recover a bonus of \$3,000 voted for the construction of an aqueduct, a municipal corporation cannot plead matters which it has already invoked and which have been pronounced against in an action which has been finally dismissed by the Supreme Court of Canada, and which was instituted by such corporation to set aside the contract in pursuance of which the bonus was voted.—2. A municipal corporation may pass a by-law granting a bonus to persons who undertake to construct an aqueduct within the limits of the municipality.—3. A municipal corporation, by virtue of Art. 637, C. M., may grant an exclusive privilege for not more than 25 years to persons who undertake to construct an aqueduct within the limits of the municipality. Such privilege, if it is limited to the exclusive right to lay pipes in the streets, is not unconstitutional and does not constitute an illegal monopoly.—4. Even if the terms in which such privilege has been granted are of such a nature as to extend this privilege to a period exceeding 25 years, that would not make the contract and by-law totally void, and the bonus granted by such contract and by-law for the construction and working of the aqueduct can always be claimed. *Lorier v. Town of Richmond*, Q. R. 21 S. C 37.

II. BOUNDARIES.

1. *Assessment of inland—Shore or coast line.*—Itala or Eagle Island is within the boundaries of the municipality of North Vancouver. The meaning of "coast" line and "shore" line considered. *Mowat v. Municipality of North Vancouver*, 9 Brit. Col. L. R. 205.

2. *Charter—Title to fisheries.*—By the charter of the city of St. John the land granted to the city is defined, together with "all the lands and waters thereto adjoining or running in, by, or through the same," and part of the city's boundaries is "and from thence along the north shore of the said river at low water mark to," &c. By 26 Geo. III. c. 46, the fisheries between high and low

water marks on the east side of the river bounding the city are vested in the city:—*Held*, that the title to the fisheries between high and low water mark in fishing lots 3 and 4 is not in the city. *City of St. John v. Wilson*, 22 Occ. N. 209.

See III. 10.

III. BY-LAWS.

1. Application to quash—Countermand—Substitution of another ratepayer.—A summary application to quash a municipal by-law was made at the instance and upon the behalf of nine interested ratepayers, who combined to make the necessary deposit, and put forward R., one of their number, as applicant. R. duly launched the application, but afterwards gave the respondents notice of discontinuing it. After the three months allowed by the Municipal Act for making such an application had expired, the application of R. not, however, having been dismissed, one of the remaining ratepayers applied to be added or substituted as an applicant:—*Held*, that he should be allowed to continue the proceedings in R.'s name, on the usual terms of indemnifying him against costs. *In re Ritz and Village of New Hamburg*, 22 Occ. N. 410, 4 O. L. R. 639.

2. Application to quash—Vacation.—The court has no jurisdiction, during vacation, to hear a petition to annul a by-law of the city of Montreal. *Franklin v. City of Montreal*, 5 Q. P. R. 76.

3. Closing of saloons—Bar-rooms—Sunday closing—Powers of municipality—Liquor Traffic Regulation Act.—Appeal by way of case stated from a conviction by the police magistrate for Nanaimo, whereby the appellant was convicted under a Sunday observance by-law, the offence being that of being found in the bar-room of the Crescent Hotel between 10 and 12 p.m. on Sunday, contrary to the provisions of the by-law. By the Liquor Traffic Regulation Act, liquor is prohibited from being sold between 11 p.m. on Saturday and 1 a.m. of the Monday following, and also during any other days or hours during which the place is to be kept closed by order of municipal by-law:—*Held*, setting aside the conviction, that a municipality has no power under s. 50, s.-ss. 109 and 110, of the Municipal Clauses Act, to pass a by-law closing any kind of licensed premises except saloons.—2. A municipality is not empowered, by s. 7 of the Liquor Traffic Regulation Act, to pass any closing by-law, the intention of the section

being to prohibit the sale during, *inter alia*, such hours as may be prescribed by the municipality under the authority of some other statute.—3. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad. *Hayes v. Thompson*, 22 Occ. N. 422, 9 Brit. Col. L. R. 249.

4. Debentures—Form of—Sinking fund—Assent of Lieutenant-Governor.—A by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures are to run, and for the same being met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is not in accordance with the Municipal Ordinance, (C. O. 1898 c. 70), and for that reason the Lieutenant-Governor in Council is warranted in withholding his assent thereto. *In re Edmonton By-law*, 21 Occ. N. 100, 4 Terr. L. R. 450.

5. Debentures—Guaranteeing—Approval of ratepayers.—*Held*, following *Corporation de la Pointe Gatineau v. Hanson*, Q. R. 10 Q. B. 346, that a by-law authorizing a municipal corporation to guarantee debentures issued by a company, is not valid until it has been approved by a vote of the ratepayers, and by the Lieutenant-Governor in Council. And compliance with these conditions is not affected or dispensed with by s. 27 of 60 V. c. 78 (Q.) *Hanson v. Village of Grand'mère*, Q. R. 11 K. B. 77.

6. Explosives—Statutes—Construction—Ejusdem generis rule—Constitutional Law—Petroleum Inspection Act.—The defendant was convicted for a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or "other combustible or dangerous materials," should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under s.-s. 17 of s. 542 of the Municipal Act, R. S. O. c. 223, such section being headed, "Storing and Transportation of Gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and being one of a group of sections under division VI. of the Act, headed, "Protection of Life and Property," sub-division 3 of said division, which included s. 542, being under the heading "Prevention of Fires":—*Held*, that s.-s.

17 authorized the passing of the by-law, and that the conviction could be supported thereunder, for that the words "other combustible or dangerous materials" were not limited by the *ejusdem generis* rule to gunpowder or other similar substances, but would include the substances set out in the by-law; and that such legislation was not superseded by Dominion legislation, for the Petroleum Inspection Act, 1899, 62 & 63 V. c. 27 (D.), dealing with the subject, was expressly made conformable thereto. *Rea v. McGregor*, 22 Occ. N. 290, 4 O. L. R. 198.

7. Illegality—Limit of time for attacking—Meeting of council—Notice—Minutes — Time for by-law going into operation.]—The right to attack a municipal by-law for illegality is prescribed after 30 days, counting from its coming into force: Art. 708 of the Municipal Code.—2. The absence of any mention in the minutes of the meeting of a municipal council at which a by-law had been attacked, that notice of the meeting has been sent to absent councillors, is without effect upon the validity of the by-law, if in fact the notice has been given.—3. By-laws, unless the contrary is expressed, come into force 15 days after their promulgation; and a notice given by the secretary-treasurer of a corporation that a by-law would come into force 30 days after the notice, has not the effect of retarding the coming into force of the by-law. *Filiatrault v. Corporation of Coteau Landing*, Q. R. 21 S. C. 302.

8. Licensing powers — Hawkers—License fee — Statutes — Effect on by-laws.]—The authority granted to the city of Montreal by 52 V. c. 79 (Art. 140, s. 36), to empower any person to sell elsewhere provisions usually bought and sold on public markets, by granting him a license upon payment of such sum as shall be fixed by by-law, is equivalent to authority to levy a special tax, and justifies the exaction of a license fee or tax of \$50 from such person.—2. By-laws of the city of Montreal validly passed in virtue of 52 V. c. 79, remain in force until formally repealed, notwithstanding the passing of the new charter, 62 V. c. 58. *City of Montreal v. Hatton*, Q. R. 21 S. C. 68.

9. Local option — Directions to voters—Motion to quash—Electors' status to oppose.]—A local option by-law named as one of the polling places a small unincorporated village, without specifying any house, hall, or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could

be easily found:—*Held*, following *In re Huson and South Norwich*, 19 A. R. 343, that the polling place was sufficiently defined. But *held*, also, that, as directions to voters had not been, as required by the Municipal Act, ss. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up under the direction of the council of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by s. 204, and the fact that no harm had, as far as shewn, resulted, being no answer. The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name. *Re Mace and Frontenac*, 42 U. C. R. at p. 76, followed. *In re Salter and Township of Beckwith*, 22 Occ. N. 182, 4 O. L. R. 51.

10. Local option — Seal and signature — Order to quash — Alteration in boundaries of municipality.]—1. Section 336 of the Municipal Act, R. S. M. c. 100, is imperative, and an instrument not sealed with the seal of a municipal corporation or not signed by its head or the person presiding at the meeting at which the supposed by-law was passed, is no by-law of the corporation.—2. When such alleged by-law purports to be passed in accordance with the local option clauses of the Liquor License Act, R. S. M. c. 90, the applicant is entitled to a definite order quashing it, so that the council of the municipality may know whether to receive license fees or not.—3. The order to quash a by-law should not affect territory detached from the municipality whose council originally passed it, and now forming parts of new municipalities which were not served with notice of the application. *In re Vivian and Rural Municipality of White-water*, 22 Occ. N. 338, 14 Man. L. R. 153.

11. Monopoly — Validating statute — Constitutionality — License—Revocation.]—Under a by-law of the Hull city council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 V. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a license previously granted by the city to the respondents for a similar purpose:—*Held*, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the Provincial Legislature, and none the less so because it excluded for a limited time the competition of rival traders. *Held*, also, that by the

true construction of the by-law the city did not themselves revoke the license to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected. Judgment in Q. R. 10 Q. B. 34 affirmed. *Hull Electric Co. v. Ottawa Electric Co.*, [1902] A. C. 237.

12. Pedlars—Tax on—Ultra vires—License.]—A by-law imposing a tax of \$50 on every pedlar or seller of beer within the municipality is *ultra vires* of a municipal corporation, unless the right is specially given by statute.—2. Arts. 582 and 582a, M. C., do not authorize a tax, but a license. *Hamel v. Parish of St. Jean Deschaillons*, Q. R. 20 S. C. 301.

13. Street nuisance—Neglect to enforce by-law—Injury to person—Liability—Nonfeasance.]—The passing by a municipal corporation, under the powers conferred by the Municipal Act, of a by-law prohibiting the setting off of fire-works, fire-crackers, &c., on the public streets, does not cast any duty on the municipality to see to its enforcement. An action to recover damages from a corporation on account of injuries sustained by the plaintiff by reason of the setting off of fire-works, in alleged contravention of a by-law, will not lie. *Brown v. City of Hamilton*, 22 Occ. N. 324, 4 O. L. R. 249.

14. Telephone company—Regulation of.]—The council of the plaintiff municipality were authorized by 59 V. (Q.) c. 56, s. 18, cl. 10, to order by by-law the painting of all poles then or subsequently erected within the town; and the by-law complained of in this case was not *ultra vires*. *Town of Coaticook v. People's Telephone Co.*, 21 Occ. N. 351, Q. R. 19 S. C. 535.

15. Transient traders—Taking orders for goods.]—There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at an hotel and taking orders for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited. *Rex v. St. Pierre*, 22 Occ. N. 233, 4 O. L. R. 76.

16. Trimming of trees in streets—Resolution—Necessity for by-law.]—Motion to quash resolution of the council of the town of Napanee that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed:"—*Held*, that under s.

574, s.s. 4, of the Municipal Act, R. S. O. 1897 c. 223, municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by s. 575 of the Municipal Act. *In re Allen and Town of Napanee*, 22 Occ. N. 412, 4 O. L. R. 582.

See I. 1, VII. 2, 4.

See, also, APPEAL, IX. 2, X. 13—CONSTITUTIONAL LAW, 5. 7—COSTS, I. 9—CRIMINAL LAW, I. 1—NUISANCE, 3—PAYMENT—RES JUDICATA.

IV. CONTRACTS.

1. Electric lighting—Resolution—Rescission—Statutory confirmation.]—The council of a town has power, by simple resolution, and without the enactment of a by-law, to contract for matters pertaining to the ordinary municipal administration of the town, the cost of which is payable out of ordinary revenue.—2. A contract for the electric lighting of the streets of a town is a matter pertaining to ordinary municipal administration.—3. Where such contract has been executed with reasonable efficiency during several years, with the full acquiescence of the party seeking to set it aside, it cannot subsequently be rescinded by resolution of the town council.—4. In any event, the Act 59 V. (Q.) c. 55, s. 5, had the effect of confirming the contract in question in this case. *Citizens Light and Power Co. v. Town of St. Louis*, Q. R. 21 S. C. 241.

2. Electric lighting—Use of streets—Poles and wires—Rights of rival companies—Injunction.]—The plaintiffs and defendants were respectively companies incorporated to produce and supply electricity for heat, light, and power, and each had authority from the corporation of the city of Ottawa to erect and maintain poles and wires along the sides of, across, and under the streets of the city for certain periods. The plaintiffs had obtained their rights before the defendants, and had erected their poles and wires before the defendants were incorporated. The agreement between the city corporation and the defendants provided that the latter should not, without the express permission of the corporation, erect additional poles on certain streets:—*Held*, that, as the plaintiffs and defendants were both electric light companies, and therefore on an equal footing in regard to the business they were re-

spectively chartered to carry on, the fact that the plaintiffs were in prior occupation of the streets gave them no exclusive right or privilege to use such streets or the particular sides of such streets occupied by their poles and wires. But, being first in occupation and using the streets under an authority conferred by the municipality, they were entitled to protection against a company subsequently using the street under a like authority in such a manner as would be likely to injure the property of the plaintiffs or endanger their workmen or servants. *Seem*, that the plaintiffs could not by extending cross-arms on their poles occupy space not required for the present or immediate future service. *Held*, that danger apprehended by the plaintiffs from the use by the defendants of their wires in the condition in which they were strung or threatened to be strung, was ground for moving for an interim injunction. *Ottawa Electric Co. v. Consumers Electric Co.*, 22 Occ. N. 140.

3. Execution by mayor—Authorization by council—Want of consensus ad idem.—A municipal corporation can be bound only by the acts of those who have the right to represent it, and if, in a case in which it can only be represented by its council, the mayor should execute an instrument other than that which the council has authorized him to sign, such instrument is void as against the corporation.—2. If by reason of a misunderstanding one of the parties to a contract supposes that he is to undertake a certain work, while the other party wishes him to execute another work, there is no contract between them. (Reversed by the King's Bench.) *Canadian Pacific R. W. Co. v. City of Montreal*, Q. R. 21 S. C. 225.

See V. 3, VIII., X. 10.

V. DRAINAGE.

1. Artificial obstruction—Failure of scheme—Report of engineer.—In 1884 a petition was presented to the plaintiffs' council asking for the removal of a dam and other obstructions to Mud Creek, into which the drainage of the township and of Augusta, adjoining, emptied. The council had the creek examined by an engineer, who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done, which was after-

wards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886 the Act was amended, and a fresh petition was presented to the council, which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval), but presented to the council his former report, plans, specifications, and assessment, and another by-law was passed, under which the work was done. In an action to recover from Augusta its proportion of the assessment:—*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 4, 21 Occ. N. 375, *Strong, C.J.*, dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the plaintiffs' council to cause the work to be done, and claim from Augusta its proportion of the cost. *Held*, further, reversing the judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment. *Township of Elizabethtown v. Township of Augusta*, 22 Occ. N. 191, 32 S. C. R. 295.

2. Injury to land—Trespass—Officer of corporation—Limitation of action—Continuing trespass.—Action for trespass by the municipal corporation constructing and maintaining a drain through the plaintiffs' land. The jury found that the drain had been constructed in 1886 "by virtue of the street commissioner's power of office." The plaintiff, although aware of the existence of the drain at the time, made no objection till 1896, when the land caved in. The judgment in 33 N. S. Reps. 401, holding that the defendants having constructed the drain by their agent, the trespass, being a continuing one, was not barred by the Towns Incorporation Act, 1895, was affirmed. *Town of Truro v. Archibald*, 31 S. C. R. 380.

3. Inter-municipal works—Contract—Damages—Guaranty—Continuing liability.—The city of Montreal, having a sewer sufficient for all its purposes within its limits through lands lying on a lower level than those of three adjoining municipalities, entered into an agreement in writing with one of them, St. C., by which it was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and, by the same agreement, Montreal consented that the two other municipalities should make connections with St. C.'s sewers, so connected, in such manner that waters coming from such three higher municipalities should be drained

through the Montreal sewer, on condition that the connection should be made by St. C. at its own cost and to the satisfaction of the Montreal engineers; and that Montreal should be guaranteed against damages:—*Held*, that the guaranty bound the several higher municipalities not only for all damages resulting from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from user. *Held*, also, that, as Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by Montreal. *Held*, further, that the judgment awarding damages against Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, Montreal was only entitled to recover from St. C. such damages as might be shewn to have resulted from the connection and user of the sewers under the agreement; that Montreal, when sued, was not obliged to summon its warrantor into the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not a condition precedent to action by Montreal, by the terms of the contract, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between St. C. and the *arrière garants*, their contracts bound them to pay damages in proportion to the areas drained by them into the Montreal sewers. *City of Montreal v. City of Ste. Cuneonde*, 22 Occ. N. 251, 32 S. C. R. 135.

4. Watercourse traversing two counties—Naming of special superintendent—Request—Quashing — Costs—*Res judicata*.]—The defendants had presented a petition to the county council of Hochelaga for the authorization of the opening and maintenance of a watercourse crossing the counties of Hochelaga and Jacques Cartier. The council granted the request and named a special superintendent, who, after having visited the *locus* and heard the parties, drew up a report in favour of the proposal. This report was submitted for homologation to the board of delegates of the two counties, who, after consideration, quashed it with costs of the report against the defendants, the petitioners. These costs were forthwith taxed and paid by the plaintiffs, who now claimed payment of them from the defendants:—*Held*, that the decision of the board of delegates had the force of *res judicata* against the defendants, and could not

be incidentally reformed in a suit for the costs.—2. That the council of Hochelaga had, in this case, the power to name a special superintendent, and even supposing such nomination to be illegal, the corporation would not be responsible for errors in procedure induced and accepted by interested parties. *County of Hochelaga v. Laplaine*, Q. R. 20 S. C. 165.

See IX. 3.

See REFEREES AND REFERENCES, 2.

VII. EXPROPRIATION.

1. Compensation — Vancouver Incorporation Act, 1900, s. 133—Award—Jurisdiction—Enforcement.]—The right to compensation cannot be determined by arbitrators appointed under s. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation. An award of such arbitrators cannot be enforced summarily under s. 13 of the Arbitration Act. *In re Northern Counties Investment Trust, Limited, and City of Vancouver*, 22 Occ. N. 127, 8 Brit. Col. L. R. 338.

2. Construction of sidewalk on private property—Act of possession—Compensation.]—The plaintiff owned a building which did not extend to the street line. The city having authorized the construction of a permanent sidewalk in the street, it was laid close to the plaintiff's house wall, occupying a small strip of his land. The plaintiff having sued the city for the value of this land:—*Held*, that the only act of possession being the construction of the sidewalk up to the wall of the plaintiff's house, and the placing of the sidewalk in this position not having been authorized by the city, which prayed *acte* of its willingness to surrender to the plaintiff possession of any property which might belong to him, his action to recover the value of the strip of land could not be maintained. *Burland v. City of Montreal*, Q. R. 19 S. C. 574.

VII. HIGHWAYS.

1. County road—Board of delegates—Highway between counties—Proceedings—Jurisdiction.]—In the absence of a declaration in pursuance of Arts. 758 and 759 of the Municipal Code, it is competent for the board of delegates to take all the proceedings in reference to

a road, such as that of the Grande Ligne, situated between two local municipalities belonging to two different counties, such as those of St. Jean and Chambly.—2. The board of delegates is a municipal authority quite distinct from the county corporation, although it has *ex officio* for secretary the secretary of the corporation of one of the counties interested. *Arbec v. Lussier*, Q. R. 21 S. C. 204.

2. County road—By-law declaring it local—Amendment—Notice—Restoration as county road—Maintenance—Land-owners.]—A notice given by a municipal body to amend a by-law or to passing another relating to a public road, without in any way mentioning the amendment or amendments to be made, or the nature of the by-law to be passed, is not sufficient, especially when those who complain of it are prejudiced. 2. By virtue of Art. 755, C. M., a road situated between two local municipalities is a county road, and when, by virtue of Art. 758, C. M., the county council has declared it a local road under the direction of one of such municipalities, it has no jurisdiction afterwards to amend such by-law so as to declare it again to be a local road, but at the charges of the two municipalities separated by it; but it has the right to restore the road as a county road, and then, in accordance with Art. 758 (3), C. M., it may re-apportion the work by specially indicating the property of the owners in each municipality liable for the maintenance of such road. *Corporation de St. André Avelin v. Corporation de Ripon*, Q. R. 4 Q. B. 167, followed. *Corporation du Canton de Nelson v. County of Mégantic*, Q. R. 20 S. C. 334.

3. County road—Parish council—Ratepayers—Liability for work on road—Inspector of roads—County council—Board of delegates—Circuit Court—Removal of action to Superior Court—Pleading.]—A parish council (St. Joseph de Chambly) is incompetent, *ratione materiae*, to have made and homologated a *procès-verbal* of a road situated between two counties (the Grande Ligne between the county of Chambly and that of St. Jean).—2. Such incompetence is *d'ordre public*, having for its object the maintenance of the administrative hierarchy, and makes the *procès-verbal* (1867) absolutely void, and it may be invoked notwithstanding acquiescence at any time, even in 1895, by one of the ratepayers who is sued for contribution to the cost of fencing works undertaken by the parish, pursuant to such *procès-verbal*, on the refusal of such ratepayer to do them himself.—3. It

is for the inspector of roads, and not for the agrarian inspector, in all cases to cause the fencing works called for by such *procès-verbal* to be constructed, such works not being *mitoyens*; the incompetence of such officer is also *d'ordre public*.—4. The road in question, according to the municipal statutes in force prior to the Municipal Code, came under the jurisdiction of the county council of Chambly, and then of the board of delegates of the counties of Chambly and St. Jean: such board alone can exercise such jurisdiction.—5. An action begun in the Circuit Court against a ratepayer for such contribution may be removed to the Superior Court.—6. The corporation ought to allege payment by it for these works in order to sustain an action against such ratepayer. *Parish of St. Joseph de Chambly v. Arbec*, Q. R. 21 S. C. 80.

4. Establishment of highway—Assessing lands not benefited—By-law—Action to set aside—Appeal to county council—Petition to quash.]—Held, that the defendants, a municipal corporation, could not subject the lands of the plaintiff, which had a road in front of them at a distance of less than 30 arpents, to a contribution, in proportion to their area, to the expense of opening up and maintaining a road which was of no use to such lands and was projected only for the benefit of other lands; and a by-law passed by the defendants for this purpose, thereby causing a grave injustice to the plaintiff, was set aside in an action brought in the ordinary way in the Superior Court.—2. The fact that the plaintiff had first appealed to the county council, who had confirmed the by-law, did not deprive him of his right of action.—3. The remedy given by the Municipal Code by way of petition to quash did not exclude the proceeding by action. *Therriault v. Parish of St. Alexandre*. Q. R. 20 S. C. 45.

5. Report of special superintendent—Invalidity—Oath administered without jurisdiction.]—The report prepared by a special superintendent as to a new road petitioned for, is void, where the officer (a justice of the peace for a neighbouring district) who has administered the oath to the superintendent, had not jurisdiction in the place where the oath was administered. *Pinsonneault v. County of Laprairie*, Q. R. 20 S. C. 525.

VIII. MEMBERS OF COUNCIL.

1. Disqualification—Contract.]—The only contracts which, according to

Art. 4215, R. S. Q., render the contractor incapable of sitting in the council of a town, are those which establish permanent relations between the contractor and the town corporation.—2. The fact that a man has sold to a town corporation a quarry and plant does not render him incapable of being a member of the council of such town. *Leonard v. Mariel*, 4 Q. P. R. 320.

2. Disqualification — Contract — Professional services — Resolution — (Creditor—Election of councillor — Agent — Corrupt practice—Personation.)—Art. 4215, R. S. Q., renders ineligible for municipal offices only those who receive from the municipality remuneration for services which they render to it by virtue of a contract, express or implied, effecting between them and it a connection for a certain period, and not professional men who, without being bound in advance by any contract, render professional services to the municipality for which they receive only the remuneration fixed by the tariff of their profession. 2. A resolution of a municipal council to the effect that a certain person shall be for the future the advocate or the notary of the corporation, even if it is communicated to the person whom it concerns, and acted under for several years, is only an instruction to the officers of the corporation to address themselves to such person when they need the professional services which he can render, and does not constitute a contract which renders him incapable of being elected a member of the council. 3. The fact that a person is a creditor of a corporation does not render him ineligible to be elected a member of the council. 4. An agent of a candidate for a municipal office in whose presence an act of personation is committed without his endeavouring to hinder it is not guilty of a corrupt practice, and the election of a candidate cannot be affected. *Chausse v. Olivier*, Q. R. 21 S. C. 387.

3. Disqualification — Interest in contract — Solicitor for prosecutor appointed by town.]—The Towns' Incorporation Act, R. S. N. S. c. 71, s. 54, disqualifies for the office of mayor "any person who directly or indirectly, by himself or by or with any other person as co-partner or otherwise, enters into or is directly or indirectly interested in any contract, express or implied, for the supply of any goods or materials or for the performance of any work or labour to or for the town." R. S. N. S. c. 100, s. 181, enacts that the town shall annually appoint an inspector to enforce and carry out the provisions of the Canada Temperance Act, and authorizes the

town to pay out of its funds the expenses of enforcing the Act. On the 19th December, 1900, W. was appointed prosecutor under the Canada Temperance Act, and his salary was by resolution fixed at one-half the net proceeds of the fines, after deducting expenses. It was also resolved that the prosecutor should engage his own solicitor, whose fees were not to exceed \$5 for any one case. The defendant, a solicitor, acted for W. in four cases before his election as mayor, and his fees were paid on the 6th March, 1901. On the 8th February, 1901, the defendant was elected mayor, and thereafter he acted gratuitously for W. in a number of cases:—*Held*, that the direct relation of agency was constituted between the town and the defendant, and that the defendant could recover directly from the town his fees: *Tison v. Warwick Gas Light Co.*, 4 B. & C. 962. *Held*, also, that the defendant had a direct interest in the contract with W. *Rea v. Robertson*, 22 Occ. N. 240.

4. Disqualification — Proceeding against municipality.]—At a municipal election the respondent C. was elected mayor, and the other respondents were elected councillors, of a town, and subsequently took the declarations of office, and sat as members of the municipal council. The relator complained that at the time of such election, each one of the respondents had "a claim, action, or proceeding" against the municipality. The respondents were members of "The Good Citizens' League" of the town, and they subscribed money to pay the expenses of a summary proceeding taken at the instance of the league to quash a by-law of the town. The respondents were not the applicants in the application to quash the by-law:—*Held*, that the proceeding to quash the by-law was a proceeding against the municipality, within the meaning of s. 80 (1) of the Municipal Act, R. S. O. c. 223; and, upon the evidence and findings of the County Court Judge, that it was a proceeding taken by the respondents "through another." Something more than membership in the organization was necessary to render the members answerable for expenditures or acts done in the name of the association; but their assent to and participation in the proceedings were shewn by the evidence. *Rea ex rel. Davis v. Campbell*, 22 Occ. N. 118.

5. Payment for services—Recovery back.]—A municipal council which has knowingly and voluntarily paid a councillor the value of his services as inspector of roads has no right to recover back from him the sum paid. *Corporation of New Rockland v. Torrance*, Q. R. 21 S. C. 165.

6. Presence at meetings—Mandamus—Penalty—Nonfeasance—Discretion of Court.]—A municipal councillor is a person occupying an office in a corporation, within the meaning of Art. 992, C. P. 2. One of the duties attached to such office is that of being present at the sittings of the council. 3. A councillor who, while he retains his office, conspires with others not to be present at the sittings of the council in order to prevent a quorum being present, and thereby to prevent the council from exercising rights or powers or functions which it is obliged to exercise within a certain time, is held to be a person occupying an office in a corporation who omits and neglects to perform a duty attached to such office, and, according to the terms of Art. 992, he may be ordered by mandamus to be present at the sittings of the council.—4. The fact that a penalty is given for the non-fulfilment of such duty does not prevent the issue of the mandamus. *Semble*, that a municipal councillor is one of the persons aimed at by Art. 50, C. P., subject to the rights of surveillance and direction under the orders and control of the Superior Court and its Judges. *Semble*, that, without a by-law therefor passed by the council, there is no penalty upon a councillor who is not present at the sittings of the council. *Semble*, that there is nonfeasance of office on the part of a councillor who conspires for the purpose aforesaid. *Semble*, that the writ of mandamus is a matter largely in the discretion of the court or Judge. *Legacé v. Olivier*, Q. R. 21 S. C. 285.

See IV. 3.

IX. OFFICERS, SERVANTS, AND OTHERS— LIABILITY FOR ACTS OF.

1. Constable—Negligence—Principal and agent.]—A police officer is not the agent of the municipal corporation which appoints him to the position, and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. *McCleave v. City of Moncton*, 22 Occ. N. 199, 32 S. C. R. 106.

2. Secretary - treasurer — Illegal assessment—Execution for—Imprisonment.]—A municipal corporation is liable to respond in damages for the act of its secretary-treasurer in sending to a collecting justice the name of the plaintiff as having made default in the payment of a rate, which had been illegally imposed upon him, at the same time instructing the justice to enforce payment of the same, which the justice did by issuing an execution against the plaintiff, under

which, for want of goods and chattels whereon to levy, he was lodged in prison. *Mellon v. King's County*, 35 N. B. Reps. 153.

3. Superintendent—Negligence—Personal injuries—Drains and sewers.]—The Act incorporating the town of St. Louis, Quebec, gives power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation."—*Held*, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control. Judgment in *Q. R. 11 K. B. 117* affirmed. *Dallas v. Town of St. Louis*, 22 Occ. N. 194, 32 S. C. R. 120.

4. Treasurer—Tax sale—Power of treasurer to pledge credit of corporation.]—A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R. S. O. 1897 c. 224, s. 224, he is only *persona designata* to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of his defined duties. A creditor in respect to the publication of such advertisements must look to him personally. *Warwick v. County of Simcoe*, 36 C. L. J. 461, approved of and followed. *Canadian Bank of Commerce v. Town of Toronto Junction*, 22 Occ. N. 97, 3 O. L. R. 309.

See V. 2.

X. OTHER CASES.

1. Bond—Form of—Statute authorizing—Parish commissioners—Liability.—An Act of the New Brunswick Legislature authorized the county council of Gloucester county to appoint alms-house commissioners for the parish of Bathurst in that county, who might build or repair premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality were empowered to issue bonds, to be wholly charged on the parish, under their corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed, and headed as follows:

"Alms House Bond—Parish of Bathurst." It went on to state that "this certifies that the parish of Bathurst, in the county of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer . . . pursuant to an Act of Assembly" (the above-mentioned Act.) In an action by G. on the bond:—*Held*, reversing the judgment of the Supreme Court of New Brunswick, that, notwithstanding the above declaration that the parish was the debtor, the county corporation were liable to pay the amount due on the bond. *Grimmer v. County of Gloucester*, 22 Occ. N. 276, 32 S. C. R. 305.

2. Control of streets—Railway crossing—Regulation requiring gates—Resolution of council—Injunction—Attorney-General—Parties—Assent of Governor-in-Council.—By the Act amending the Act of incorporation of the defendant company, they were given the right to lay their tracks across the streets of the plaintiffs provided that before doing so the consent of the town council should first have been obtained. On application by defendants to the town council for permission to cross one of the streets of the town, a resolution was passed granting the application, "subject to such regulations as the town council may, from time to time, make to secure the safety either of persons or property." Subsequently, the town council passed a resolution requiring the company to forthwith erect and maintain two gates, of the latest approved pattern of railway gates, on and across the street on either side of the track. The defendants failed to comply with the regulations so made, and this action was brought to restrain them from running trains across the street until they should comply with the regulation:—*Held*, that the regulation was one within the powers of the town council to make. The town council having a special interest in the subject matter, the action could be brought in the name of the town, without joining the Attorney-General. The regulation in question, being made by virtue of a power given by a special Act, was not, in the absence of express words to that effect, a by-law of the town which required the assent of the Governor-in-Council before going into operation. Such assent was required only in connection with the cases specially mentioned in the Act: *Towns Incorporation Act*, R. S. N. S. 1900 c. 71, ss. 263, 264. *Town of Liverpool v. Liverpool, &c., R. W. Co.*, 35 N. S. Reps. 233.

3. Debentures—Borrowing powers—Condition imposed by statute—Purchaser—"Provided."]—Under the N. S. Acts

of 1898, c. 65, s. 13, the city of Halifax was authorized to borrow certain sums of money, including "the sum of \$8,500 for the extension north of the Esplanade, provided the owners of the property north of the contemplated extension give and convey to the city the necessary land required for such extension." The work was required for the abatement of a nuisance of which the property owners in the vicinity had been complaining for some time, and, it being understood that the property owners would convey to the city the land required for the purpose, the city treasurer recommended to the council that all sums required during the year 1898-99, including that required for the carrying on of the work at the Esplanade, be borrowed at the same time, as, by doing so, the expense would be lessened, and a better price obtained for the debentures. This recommendation was adopted by the city council, and the amount in question was included with other amounts to be borrowed, and debentures issued for the whole. The plaintiff, a ratepayer, whose rates were increased by the amount of 84 cents annually for interest on the loan, applied for a writ of *certiorari* to remove into the Supreme Court the record of proceedings of the committee on public accounts, the tenders committee, and of the city council relative to the borrowing of the amount represented by the loan, as part of the consolidated fund of the city, and the estimates of income and expenditure of the city for the year 1902, the principal ground being that the rate which was made upon the basis of the estimates included interest on the sum of \$8,500:—*Held*, that, with respect to the issue of bonds for the amount in question, there was not merely a defective execution of a power, but a total want of it; that the word "provided" in the Act was intended to create a condition precedent to the exercise of the borrowing power; that the purchaser of the debentures was bound to examine the statute under the authority of which they were issued, and, had he done so, would have been made aware of the fact that the terms of the statute had not been satisfied, there being nothing on the face of the debentures, or in any of the proceedings of the council, so far as disclosed, to convey any intimation that the condition subject to which the power was to be exercised had been performed; that the word "provided," as used in the Act, was an apt word to create a condition, being synonymous with "if," "when," and "as soon as." *Hart v. City of Halifax*, 35 N. S. Reps. 1.

4. Expenses of criminal justice—Liability for—Certificate—Powers of Provincial Legislatures.]—A municipality is liable for the fees and expenses of

a justice of the peace or a constable, payable in relation to the prosecution of indictable offences, only where they have been certified to be correct by the Attorney-General or other counsel acting for the Crown, and have been ordered to be paid by the Judge presiding at the Court in which the indictment is presented. The Act of Assembly 57 V. c. 19, s. 1, whereby certain expenses in criminal prosecutions are made chargeable upon the municipalities, is not *ultra vires* of the Provincial Legislature. *McLeod v. Municipality of Kings*, *Morison v. Municipality of Kings*, 35 N. B. Repts. 163.

5. Formation of village municipality—*Petition for*—*Withdrawal of signatures*—*Jurisdiction*.]—After two-thirds of the residents of a locality have signed a petition demanding the formation of their territory into a village municipality, the county council is sufficiently seized of such petition, and the fact that certain of the signers withdraw their signatures, so that there no longer remain two-thirds of the residents upon the petition, does not take away the jurisdiction of the council; and the proceedings which it subsequently takes are not in excess of its jurisdiction. Judgment in *Q. R. 20 S. C. 329* reversed. *Martin v. County of Arthabaska*, *Q. R. 21 S. C. 119*.

6. Illegal payments—*Action by ratepayer*—*Defence of action brought against constable*—*Resolution of council*—*Ratification*—*Parties*—*Costs*.]—A constable appointed by by-law of a town arrested a man as a vagrant, and for so doing was sued for false arrest and imprisonment:—*Held*, that he was not acting as the servant of the corporation, and "respondent superior" did not apply; that the corporation were not liable to the person arrested; that a resolution of the council retaining an advocate to defend the constable and agreeing to indemnify him, was *ultra vires*, and payment by the corporation to such advocate of his costs and to the advocate for the person arrested his costs of such action, was illegal.—2. That the payment by the corporation of a fee to an advocate for his opinion as to the liability of the council and councillors was a legal payment.—3. That, though the resolution of the council and the payments thereunder might amount to a ratification of the act of the constable so as to render the corporation liable to the person arrested, the payment could not be so made legal as against a complaining ratepayer.—4. That the constable was a proper party to an action by a ratepayer.—5. That ss. 268 and 269 of the Municipal Ordinance of 1898, c. 70, are merely per-

missive, and do not oust the general jurisdiction of the Court, in an action, to quash by-laws, resolutions, &c.—6. That s. 273 affords protection for acts done under a by-law or resolution, but does not bar an action to restrain the corporation from enforcing it.—7. That a ratepayer, on behalf of himself and all other ratepayers, has a right to bring an action for a refund of the moneys illegally paid.—8. That the corporation not having paid the moneys under mistake, and having no right to recover them from the constable as moneys paid to his use, the plaintiff had no greater right. *Pease v. Town of Moosomin*, 5 Terr. L. R. 207.

7. Lists of municipal electors—*Quashing*—*Injunction*—*Other remedy*.]—Lists of municipal electors made under the provisions of Art. 4515 *et seq.*, R. S. Q., may be quashed on the ground of illegality, under the provisions of Art. 4376, as provided by Art. 4522.—2. A writ of injunction will not be granted when the law provides a special remedy for the grievances complained of. *Wallace v. Languedoc*, 4 Q. P. R. 361.

8. Local improvements—*Petition for*—*Majority of petitioners*—*Exempt property*—*Value*—*Land*—*Buildings*.]—A petition for local improvements is sufficiently signed under s. 668 of the Municipal Act when signed by six out of nine owners to be benefited, who appear on the assessment roll, notwithstanding that the city within which the improvement is to be made also appears as an owner of property on the roll in respect to property which is exempt from taxation; and the value of the buildings as well as the land is properly taken into consideration in ascertaining the requisite one-half in value. *Macdonell v. City of Toronto*, 22 Occ. N. 294, 4 O. L. R. 315.

9. Public works—*Procès-verbal*—*Ratepayer*—*Mandamus*.]—A municipal corporation, in an action by a ratepayer regularly brought, will be ordered to construct works, fences, &c., prescribed by a *procès-verbal*, and such ratepayer is not obliged to proceed against each one of the owners or occupants of the lands liable for such works; but in default of the corporation performing such works within a certain time, the Court will authorize such ratepayer to do them or cause them to be done at the expense of the corporation. *Rousseau v. Corporation of Blandford*, *Q. R. 21 S. C. 464*.

10. Purchase of gas works—*Works, plant, appliances, and property* of company—*Arbitration*—*Franchise and goodwill*—*Voluntary agreement*—*Ten per cent. addition*.]—By

agreement between the city and the company, the former was to have the option of purchasing and acquiring "the works, plant, appliances, and property of the company used for light, heat, and power purposes," upon giving to the company notice as therein provided, at a price to be fixed by arbitration under the Municipal Act. The majority of the three arbitrators, in fixing the value of the works, plant, appliances, and property, included nothing for the earning power or franchise and rights of the company:—*Held*, that they were right, for by the fair interpretation of the agreement "property" must be limited by the preceding words, the rule of *ejusdem generis* applying. *Held*, also, that there being here no expropriation, but a voluntary agreement and submission, s. 99 of R. S. O. 1887 c. 164, as to adding ten per cent. to the amount ascertained by the arbitrators as the value, had no application. *In re City of Kingston and Kingston Light, Heat, and Power Co.*, 22 Occ. N. 181, 3 O. L. R. 637.

11. Quashing proceedings of — Powers of Superior Court — Petition of ratepayers — Withdrawal of signatures.]

—The Superior Court may always quash the proceedings of a municipal body when they are unjust, arbitrary, or not in the public interest, nor in that of the taxpayers for whose benefit the proceedings are intended. *Nemble*, that by virtue of Art. 52, C. M., the county council must have before it, during the whole time that it is proceeding upon a petition, at least two-thirds of those interested, in order to have jurisdiction; the taxpayers who have signed such petition in error or under false representations have the right to withdraw their signatures from the said petition. *Martin v. County of Athabaska*, Q. R. 20 S. C. 329. Reversed; see *ante* 5.

MUNICIPAL ELECTIONS.

1. Conduct of presiding officer — Fraudulent practices — Closing poll.]

—In a municipal election, the facts that the presiding officer has given to a supporter of the candidate elected, privately and in a low voice, advice as to the election law; that shortly before four o'clock on the first day of the voting certain supporters of the candidate elected, who have not voted, withdraw from the hall in which the voting is going on, in order that, by reason of their presence in the hall, the voting may not be adjourned to the next day; that the presiding officer said to an elector, who afterwards entered the hall, "if you do not wish to have the poll go on to-morrow, vote immediately or go

out," after which the elector, who swore that he did not wish to vote, retired without having voted; did not constitute fraudulent practices justifying the setting aside of the election. *Théoret v. Boileau*, Q. R. 21 S. C. 209.

2. Illegal voting — Electors voting more than once — Presumption — Affecting result of election — Corrupt practices — Illegal voting by respondent and relator.]

—At a municipal election for reeve, at which upon a large vote the successful candidate obtained a majority of six, it was shewn that a widespread belief prevailed among the electors of the right to vote at each sub-division in which the name of the elector appeared; that four electors had in fact voted twice; and that several others had received ballot papers within a polling booth, after having already voted for reeve:—*Held*, that the statutory presumption arising under the Municipal Act, R. S. O. 1897 c. 223, s. 162, s.-s. 3, did not apply in proceedings to set aside an election, and that as, owing to the destruction by the clerk of the ballot papers pursuant to the provisions of the Act, it was impossible to tell whether more than four voters had voted twice, the election should not be set aside, the voting twice by four electors not having, in the opinion of the Court, affected the result. *Held*, also, that if, as alleged, the respondent had himself voted twice, this was not a cause for setting aside the election; voting twice not being in itself a corrupt practice, and the commission of that offence not being, under the statute, a disqualification for office during the current year. *Held*, also, that, there being strong reasons to believe that the relator had himself voted more than once, and there being undoubted evidence that he had advised other electors to vote more than once, he could not successfully urge this objection against the validity of the election. *Re ex rel. Tolmie v. Campbell*, 22 Occ. N. 236, 4 O. L. R. 25.

3. Petition to set aside election — Particulars of corrupt practices.]

—Upon motion of the defendant respondent, the petitioner in a petition to set aside a municipal action was ordered to declare:—(a) At what date, at what places, and in what circumstances, by whom, and in what ways, certain funds, of which a named person was the depositary, had been employed for purposes of corruption. (b) Where, when, and how persons named had employed funds, of which they were the depositaries, for purposes of corruption. (c) What persons were intended to be designated under the names of "friends and agents of the defendant or duly authorized agents of the defendant, or his agents." (d) Where, when,

and how drivers of conveyances, among whom were some electors, had been engaged and paid, and to distinguish the drivers to whom allusion was made. (e) Where, when, and how professional politicians had been engaged and paid to work on behalf of the defendant, which of such politicians were electors of the district in question, and which had voted for the defendant. (f) Who were the persons intended to be designated by the words "agents duly authorized of the defendant," and who were the persons to whom the defendant and his agents had paid out different sums of money. (g) At what dates, at what places, and in what circumstances, the defendant and his agents had induced divers persons to commit the offence known as "personation."—That part of the motion seeking to obtain the names of the friends who had furnished money to the defendant, was not granted, because it was not important to know the names of such friends. *Levy v. Lamarche*, 5 Q. P. R. 16.

4. Petition to set aside election—*Security*.]—By virtue of the Act respecting town corporations, applicable to the town of Maisonneuve, a petition to avoid a municipal election, filed by a single elector, and not preceded by security, is illegal and will be dismissed upon exception to the form. *Dufresne v. Fortin*, 5 Q. P. R. 57.

5. Petition to set aside election—*Security*—*Particulars*—*Notice*—*Amendment*—*Signature of attorney*.]—A security failed under Art. 352 of the Municipal Code, in support of a petition against the election of a councillor, must set forth the name, Christian names, quality, occupation, and residence of the surety, and in default thereof the surety is void. 2. The want of such particulars cannot be supplied by mentioning them in the notice in respect to which the security was given. 3. The security cannot, after the expiry of the time mentioned in Art. 352 of the Municipal Code, be amended by adding the necessary particulars which are wanting. *Scmble*, that a petition in contestation of a municipal election can be signed only by the attorney himself, and that a signature by another person, with the authorization of such attorney, is void. *Parizeau v. Thémens*, Q. R. 21 N. C. 222.

6. Petition to set aside election—*Trial*—*Procedure*—*Absence of Rules of Court*.]—A Judge has jurisdiction to fix a time and place for the trial of an election petition under the Municipal Elections Act, notwithstanding no rules

for regulating such a trial have ever been made as provided by s. 86 (d) of the Act. Remarks as to the procedure to be followed at such a trial. It is not necessary that Judges should exercise power to make rules regulating the trial of election petitions, if the ordinary machinery of the Court is sufficient for that purpose. *In re Slovan Municipal Election*, 9 Brit. Col. L. R. 113.

7. Quo warranto proceeding—*Affidavits*—*Cross-examination on Discretion—Refusal*.]—In a proceeding to set aside a municipal election it is in the discretion of the Judge or Master to allow or refuse to allow the parties to cross-examine deponents on their affidavits. And in this case permission was refused by the Master in Chambers, who was of opinion that a cross-examination would not be helpful. *Rea ex rel. Ross v. Taylor*, 22 Occ. N. 183.

8. Quo warranto proceeding—*Appeal*—*To Judge of High Court*—*Order of County Court Judge quashing proceedings—Right of appeal—Power to make order*.]—In a quo warranto proceeding, in which the fiat giving leave to serve a notice of motion to set aside the election of a township reeve had been granted by a County Court Judge, and the proceedings were intitled in his County Court, a motion was made before him to set aside all the proceedings upon the relation, and he made an order setting them aside and quashing them with costs:—*Held*, that no appeal from such an order lies to a Judge in Chambers, as appeals from the County Courts in ordinary cases are to a Divisional Court, and the appeal from the decision of a County Court Judge to a Judge of the High Court given by 55 V. c. 42, s. 187, s.s. 3 (O.), "under this section," is from the decision of the County Court Judge upon the merits on the trial of the contested election, and not the quashing without a trial of the fiat upon which the proceedings were founded. *Querr*, whether the County Court Judge had power to make such an order. *Regias ex rel. Grant v. Coleman*, 7 A. R. 619, referred to. *Rea ex rel. McFarlane v. Coulter*, 22 Occ. N. 414, 4 O. L. R. 530.

9. Quo warranto proceeding—*Notice of Motion—Time—Wrong day of the week—Mistake—Amendment*.]—A notice of motion in the nature of a quo warranto to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under s. 220 of the Municipal Act, R. S. O. 1897 c. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required

by s. 221) for "Tuesday the 24th day of February"—the 24th February being in fact a Monday. Afterwards the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday the 25th February, but this notice was not a seven clear days' notice:—*Held*, that the notice of motion was good and sufficient notice for Tuesday the 25th February, and that the sureties upon the relator's recognizance, as required by s. 220, would have no ground of objection because of the proceedings not being properly prosecuted. *Eldon v. Haig*, 1 Chit. 11. followed. *Scmble*, that the practice in actions in the High Court is applicable to these *quo warranto* proceedings. *Rea ex rel. Roberts v. Ponsford*, 22 Occ. N. 146, 3 O. L. R. 410.

10. Quo warranto proceeding—Tampering with ballots—Delivery of ballot box to clerk—Evidence—Affidavits—How voters voted—Cross-examination.—Where in a *quo warranto* proceeding under the Municipal Act, R. S. c. 223, before a County Judge, to set aside the election of a town councillor, it was found by the Judge upon a scrutiny of the ballot papers, having regard to the character of the evidence, both *viva voce* and by affidavit, that such ballot papers had been tampered with, and that there was also a breach of the Act in the deputy returning officer taking the ballot box to his own house, instead of directly to the town clerk, and it was impossible to say that the result of the election was not affected thereby, an order of the Judge setting aside the election was affirmed. Affidavit evidence may be supported at the trial by *viva voce* evidence, although not mentioned in the notice of motion. *Regina ex rel. Mangan v. Fleming*, 14 P. R. 458, referred to. The provision of s. 200 of the Act that "no person who has voted at an election shall in any legal proceeding to question the election or return, be required to state for whom he voted," must be construed, in furtherance of the object of the Act, as absolutely excluding such testimony. After the trial of such proceeding has commenced, it is discretionary with the Judge to allow a person who has made an affidavit to be cross-examined, though before the commencement of the trial cross-examination may properly be had. *Rea ex rel. Ivison v. Irwin*, 22 Occ. N. 299, 4 O. L. R. 192.

11. Voters' lists—Revision—Abuse of certificate—Injunction.—Where it appears that the lists of municipal electors of a town corporation have not been certified and signed by the secretary-treasurer, as required by Art.

4516, R. S. Q., and that the board of revisors is proceeding to the revision and amendment of the lists without the same being so certified, there is sufficient ground for granting an interlocutory injunction, on the petition of a municipal elector, to prohibit the board of revisors from revising or homologating the lists, until the final hearing upon the petition, or until the interlocutory order be further judicially dealt with. *Wallace v. Languedoc*, Q. R. 21 S. C. 115.

12. Voters' lists—Revision—Injunction to restrain—Remedy by motion to quash—Costs—Defendants severing.—There is no ground for an injunction when the law gives a special remedy for the grievances complained of, and, therefore, recourse cannot be had to an injunction to prevent the revisors of a town corporation from revising and homologating a list of municipal electors on the ground that such list has not been prepared according to law; Arts. 4376 and 4522, R. S. Q., allowing such list to be quashed on the ground of illegality.—2. Each of the revisors defendants, having filed a separate defence invoking the same grounds, the costs should be taxed against the petitioner as if the revisors had filed only a single defence. *Wallace v. Languedoc*, Q. R. 21 S. C. 298.

See CRIMINAL LAW, III. 1, 5, 9, VIII. 2, X. 7.

MURDER.

See CRIMINAL LAW, III. 13—EXTRADITION, 1—INJUNCTION, 2—INSURANCE, IV. 3.

NECESSARIES.

See CRIMINAL LAW, III. 10.

NEGLIGENCE.

1. Injury to infant in factory—Liability of owner—Contributory negligence of infant.—A boy of eight years, the appellant's son, was in the habit of playing in the respondent's factory. In consequence of an accident which happened to the boy in the winter of 1899-1900, the respondent instructed his foreman to prevent all persons who had no business in the factory from entering, and particularly this boy. For a certain time these orders were obeyed, but

later the boy began to frequent the factory as in the past, including a room in which was a dangerous machine, and that to the knowledge of the foreman. In August, 1900, the boy entered the factory by the office door. The bookkeeper was not there at the moment; the boy crossed the office and seeing the bookkeeper, with whom he was in the habit of playing, threw himself into his arms, and the bookkeeper began to throw the boy into the air and catch him in his arms. In playing thus the boy's foot was caught in a pulley and seriously injured:—*Held*, that, in these circumstances, the owner of the factory was liable, and in order to relieve himself of liability he should not have confined himself to giving orders, but should have seen that they were executed.—2. There cannot be on the part of a child of eight years liability for his own negligence, the presumption being that at such age he is incompetent to know the consequence of his conduct. *Delage v. Desile*, Q. R. 10 K. B. 481.

2. Injury to passenger in elevator—Contributory negligence.—H. entered an elevator in a public building, after inquiring of the boy in charge if a certain tenant was in his office, and being told he was not. He remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minutes when a call came from the fifth floor. The elevator went up, and the passenger who had rung entered, H. at first making no attempt to get out. The operator then shoved to the door of the elevator, and at the same time started the wheel, which had to be completely turned round to move the elevator. The turning of the wheel would also close the door. While it was being turned H., without giving warning, tried to get out through the door, and, the elevator being then descending, he was caught between it and the floor and injured, so that he died soon after. In an action by his administrator against the owner of the building:—*Held*, that the accident was entirely due to the conduct of H. himself, and the owner was not liable. Judgment in 34 N. S. Reps. 365 affirmed. *Hauley v. Wright*, 22 Occ. N. 198, 32 S. C. R. 40.

3. Injury to passer-by—Electric company—Operations of a dangerous nature—Insulation of electric wires.—The defendants, a company engaged in supplying electric light to consumers in the city of Montreal, under special charter for that purpose, placed a secondary wire, by which electric light was supplied to G.'s premises, in close proximity to a guy-wire used to brace primary wires of another electric company,

which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire. While attempting to turn on the light of an incandescent electric lamp on his premises, on a wet and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury:—*Held*, affirming the judgment in 21 Occ. N. 442, Q. R. 11 K. B. 436, that the defendants were liable for actionable negligence, as they had failed to exercise the high degree of skill, care, and foresight required of persons engaging in operations of a dangerous nature. *Hevi v. Royal Electric Co.*, 22 Occ. N. 358, 32 S. C. R. 462.

4. Injury to passer-by—Municipal corporation—Dangerous operations—Neglect of precautions—Personal injuries.—Dangerous operations, such as blasting for the purpose of excavation, should be carried on with due regard to the safety of the public; and where it appeared that a person, at a distance of about 250 yards from the works, was seriously injured by a stone hurled through the air by a blast, and that the accident occurred through the fault and negligence of the defendants' employees in not sufficiently covering the blast, the defendants were held responsible. *Lacroque v. City of Montreal*, Q. R. 19 S. C. 527.

5. Injury to pedestrian—Street railway—Findings of jury—Contributory negligence.—In an action founded on personal injuries caused by a street car, the jury found that the defendants' negligence was the cause of the accident, and also that the plaintiff had been negligent in not looking out for the car:—*Held*, reversing the judgment of the Court of Appeal, 2 O. L. R. 53, 21 Occ. N. 369, that, as the charge to the jury had properly explained the law as to contributory negligence, the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence; and he could not recover. *Brown v. London Street R. W. Co.*, 22 Occ. N. 78, 31 S. C. R. 642.

6. Injury to person coming on premises—Dangerous premises—Want of screen or guard.—While a teamster was delivering a load of coke on the premises of the defendants, an iron

foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard; or, in the absence of a screen or guard, by the workman stopping work during the delivery of the coke:—*Held*, that the defendants were liable for the injuries sustained. *Fallis v. Gartshore-Thompson Pipe Foundry Co.*, 22 Occ. N. 283, 4 O. L. R. 176.

See BAILMENT—CRIMINAL LAW, III. 12—DAMAGES—FIRE — LANDLORD AND TENANT, IV. 4—MASTER AND SERVANT, II.—MUNICIPAL CORPORATIONS, IX. 1, 3—PLEADING, VII. 18—RAILWAY, V., VI., VII., VIII.—SOLICITOR, 6—STREET RAILWAYS—TRIAL, II. 8, 14—WAY, II.

NEW TRIAL.

Jury—Verdict—Setting aside—Powers of Court in banc—Nonsuit.—Where the Court in banc set aside the verdict of the jury in favour of the plaintiffs:—*Held*, that the court could not, under any of the Rules in the King's Bench Act, 58 & 59 V. c. 6, dismiss the action or enter a nonsuit or verdict for defendants in the face of the verdict of the jury. Rules 639, 640, and 642 discussed. *Connecticut Mutual, &c., Co. v. Moore*, 6 App. Cas. 644, and *British Columbia Towing, &c., Co. v. Sewell*, 9 S. C. R. 527, followed. New trial ordered without costs of former trial. Costs of the application to be costs in the cause to the defendants in any event. *Davidson v. Stuart*, 14 Man. L. R. 74.

See APPEAL II. 2, V. 1, X. 14—BOUNDARIES—CRIMINAL LAW, III. 18—DAMAGES, 2—DEFAMATION, I. 2, II. 6—MASTER AND SERVANT, II. 5—TRIAL, II. 8, 9, 12, IV. 3.

NONFEASANCE

See MUNICIPAL CORPORATIONS, III. 13, VIII. 6.

NONSUIT.

See MASTER AND SERVANT, II. 1, 12—NEW TRIAL.

NOTARY.

1. **Authentic acts** — *Signatures—Conventional hypothec.* — Notaries are

appointed to take all the acts to which parties ought or wish to give authenticity, and therefore they must be present during the whole of the execution of the act.—2. An act which is not signed in the presence of a notary, or the signature to which is not acknowledged before him, is not an authentic act, and has not the effect of creating a conventional hypothec. *Léveillé v. Kauntz*, 4 Q. P. R. 358.

2. **Witness—Production of draft deed—Costs.**—A notary when called as a witness may be ordered to produce for inspection a draft of an instrument prepared by him, and cannot exact, in advance, payment of costs due him for the preparations of such draft. *Sorignet v. Henry*, 5 Q. P. R. 95.

NOTICE.

See BANKRUPTCY AND INSOLVENCY, IV. 6—BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 8 — CHOSE IN ACTION, ASSIGNMENT OF, 2, 3, 7—MECHANICS' LIENS, II. 2—MINES AND MINERALS, 1—MORTGAGE, II. 12—PRINCIPAL AND SURETY, 1, 2, 4—REGISTRY LAWS, 1—TRUSTS AND TRUSTEES, 7.

NOTICE OF ACTION.

See MALICIOUS PROCEDURE, 4—SHERIFF—STREET RAILWAYS, 3.

NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4, 12, 15.

NOTICE OF INJURY.

See MASTER AND SERVANT, II. 16.

NOTICE OF PROTEST.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

NOTICE OF SALE.

See VENDOR AND PURCHASER, 8.

NOTICE OF TRIAL.

See TRIAL, IV.

NOTICE TO PRODUCE.

See EVIDENCE, III. 2.

NOTICE TO QUIT.

See LANDLORD AND TENANT, IV. 5.

NOVATION.

See CONTRACT, VIII. 1—MORTGAGE, 2.

NUISANCE.

1. Electric light company—Works—Vibration—Injury to adjoining property—Injunction—Damages—Powers of company—Alienation of land—Private Act of incorporation.]—Judgment of STREET, J., 2 O. L. R. 240, 21 Occ. N. 440, affirmed. *Hopkin v. Hamilton Electric Light and Cataract Power Co.*, 22 Occ. N. 284, 4 O. L. R. 258.

2. Electric railway — Vibration, smoke, and noise — Injury to adjoining property—Evidence—Assessment of damages — Reversal on questions of fact—Appeal.]—Notwithstanding the privileges conferred upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city by its Act of incorporation, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. *Drysdale v. Dugas*, 28 S. C. R. 20, followed. In an action by the owner of adjoining property for damages thus caused, the evidence was contradictory, and the Courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality:—*Held*, TASCHEREAU, J., dissenting, that, notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. In reversing the judgment appealed from the Supreme Court deemed it expedient, in the interest of both parties, to assess damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present, and future, resulting from the nuisance complained of, should she elect to accept the

amount so estimated in full satisfaction thereof; otherwise the record to be transmitted to the trial Court to have the amount of damages determined. *Gareau v. Montreal Street R. W. Co.*, 22 Occ. N. 4, 31 S. C. R. 463.

3. Erection of building—Obstruction of view—Enforcement of fire by-law—Injunction.]—The plaintiff by injunction sought to prevent the completion of a warehouse which the defendant was erecting on ground leased by him from a railway company, being part of their right of way adjoining the lawn of a property owned and occupied by the plaintiff as a dwelling in the city of Winnipeg. On the other side of the right of way was a strip of land, owned by the defendant, sloping down to the Red river. The warehouse was situated directly between the plaintiff's house and the river and would obstruct the plaintiff's view of the river. It was being constructed of wood in contravention of the fire limit by-law of the city:—*Held*, that the plaintiff had no right to the unobstructed view of the river.—2. That the plaintiff had no right to enforce the fire limit by-law by injunction, as it was a by-law passed for the protection of the general public and providing for a penalty in case of its infringement, and there was no evidence to shew that the risk of fire to the plaintiff's property would be specially increased by the construction of the warehouse. *Atkinson v. Newcastle*, 2 Ex. D. 441, followed. The plaintiff further urged that the construction and intended use of the warehouse would create a nuisance to her, which she was entitled to have prevented by an injunction, and gave some evidence as to the use by tramps and others of the vacant ground on the side of the warehouse next her property, causing unpleasant smells, but it was not shewn that the defendant was lessor or occupant of that vacant ground:—*Held*, that there was not sufficient evidence to entitle the plaintiff to an injunction on the ground of nuisance. *McBee v. Wyllie*, 22 Occ. N. 270, 14 Man. L. R. 135.

See MUNICIPAL CORPORATIONS, III. 13—WAY, I. 3.

OATHS.

Allegiance — Commissioner of Superior Court—Public officer—Failure to take oath — Effect on proceedings.]—A commissioner of the Superior Court is not a public officer within the meaning of Arts. 599 *et seq.* R. S. Q., and is not obliged to take the oath of allegiance: and if he were, his failure to take the

oath would not invalidate proceedings signed by him. *Lamalice v. Electric Printing Co.*, 4 Q. P. R. 286.

See DISCOVERY, I. 1—MUNICIPAL CORPORATIONS, VII. 5 — PARLIAMENTARY ELECTIONS, VI. 1—WRIT OF SUMMONS, II. 13.

OCCUPATION RENT.

See IMPROVEMENTS.

OFFICIAL REFEREES.

See REFEREES AND REFERENCES, 2.

OPPOSITION.

1. **Amendment — Affidavit.**] — An amendment to an opposition will not be allowed, because, the opposition being sworn to, the amendment would have the effect of introducing into the opposition a new allegation which would not be supported by affidavit. *Farand v. Emond*, 4 Q. P. R. 312.

2. **Sale of land—Unregistered lease for a year.**]—A lease for a year, not registered, affords no ground for an *opposition d'ân de charge* by the lessee with respect to a sale of the demised premises. *Lantaigne v. Kelling*, 5 Q. P. R. 101.

See ATTACHMENT OF DEBTS, III. 4—BANKRUPTCY AND INSOLVENCY, V. 3—COMPANY, V.—EXECUTION, III.—HUSBAND AND WIFE, I. 2—JUDGMENT, IV. 6—PARTICULARS, 3.

OPTION.

See CONTRACT, IV. 3 — COSTS, I. 5 — LANDLORD AND TENANT, I. 5—SPECIFIC PERFORMANCE, 1.

OUSTER.

See TENANTS IN COMMON.

OVERHOLDING TENANTS.

See LANDLORD AND TENANT, III.

PARENT AND CHILD.

Duty of son to support father—Alimentary allowance—Offer to receive at home—Asylum.]—When a father is in need of support, and his son is in a condition to furnish it to him, the latter cannot refuse to do so on the ground that his father lives with persons whom the son does not consider respectable.—2. A son who is liable to furnish support for his father has no right to offer, in place of such support, to receive him in his house and at his table, or to place him in an asylum, when he has not been declared a lunatic. *Quimet v. Quimet*, Q. R. 21 S. C. 479.

See BASTARD — CRIMINAL LAW, III. 10—EXTRADITION, 3 — GIFT, 1 — HUSBAND AND WIFE, IV. 3, VI. 6—LIMITATION OF ACTIONS, I. 2—LUNATIC, 3.

PARISH COMMISSIONERS.

See MUNICIPAL CORPORATIONS, X. 1.

PARLIAMENT.

See CONSTITUTIONAL LAW.

PARLIAMENTARY ELECTIONS.

I. AGENCY.

II. CORRUPT PRACTICES.

III. PETITION TO AVOID ELECTION.

IV. RECOUNT.

V. VOTERS' LISTS.

VI. OTHER CASES.

I. AGENCY.

What constitutes agency.]—As to the nature of agency in the abstract, in election law there does not now seem to be any room for doubt. In election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction, or employment, or request, or it may be by recognition and adoption of the services of one assuming to act without prior authority or request. It may be directly shewn or it may be inferred from circumstances.

It may proceed directly from the supposed principal, or it may be created indirectly through one or more authorized agents. The fact that a person is a delegate to or member of the convention or body which selects a candidate does not of itself make such person an agent of the chosen candidate. Canvassing or other work in the promotion of an election does not *per se* establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency. The respondent was nominated at a meeting of delegates from different portions of the constituency. The respondent did not appear to have definitely requested the assistance of these delegates in the contest, but at a general public meeting, after the close of the convention, he expressed the hope "that all his friends would go to work with a good will;" the respondent further stated that he wished it understood that he expected the delegates to assist at the election:—*Held*, that these and other general remarks did not seem sufficient to constitute all supporters of the Government or all Liberals, or even all such in the constituency, agents of the candidate. Accompanying a candidate in his canvass is not sufficient in itself to constitute agency. *In re Liagar Dominion Election*, 22 Occ. N. 433.

II. CORRUPT PRACTICES.

1. **Bribery—Evidence.**—In Bureau's case the evidence was that he purchased a dress and gave it to the daughter of Labossière, a hotel keeper. Bureau was working in the respondent's interest and stayed at Labossière's hotel; the daughter gave up her room to Bureau and he said he wanted to make her a nice present:—*Held*, that it was impossible to infer with any certainty that the present was made for the purpose of affecting the father's vote. *In re Liagar Dominion Election*, 22 Occ. N. 433.

2. **Treating—Evidence.**—In Jobin's case the treating was on polling day. He lived in a locality where there was no licensed tavern. He was accustomed, according to his own account, to keep considerable quantities of wine and spirits on hand and to supply them quite freely to others in the way of hospitality, or as a matter of business:—*Held*, that under the circumstances the Court would not infer the intent necessary to create an offence under either s. 110 or s. 111 of the Dominion Election Act. *In re Liagar Dominion Election*, 22 Occ. N. 433.

3. **Treating — Evidence.**—In the cases of Ami and Foley the charges were

of treating in bars. The evidence of Ami's treating was of a very general and vague character. He stayed for some time at Labossière's hotel and treated considerably, even including, at times, all in the bar-room. The circumstances of the different occasions, or who were present, were not shewn:—*Held*, impossible, upon such evidence, to find the corrupt intent proved. In Foley's case the charge in the particulars was of treating all of the voters—a large number present in the bar of Tremblay's hotel on a particular evening—and that Foley then announced "that although he was not the Government candidate, he had his money to spend." The evidence shewed that Foley was at Labossière's, not Tremblay's hotel, and gave an invitation to all in the house to drink, and that what he said was that "if he wasn't a candidate, he had money to spend." Foley's name was one of those brought before the convention which nominated the respondent in the Government interest:—*Held*, that the evidence of the part taken by Foley in the contest was very vague and seemed in no way to support the view that this treating was done in the respondent's interest or for the purpose of influencing electors. *In re Liagar Dominion Election*, 22 Occ. N. 433.

4. **Treating — Evidence.**—In the case of Watson, the charge against him and others associated with him, was of furnishing food for a meal at the house of an elector, to him and other electors, on the occasion of a meeting the night before polling day. It might be inferred that the refreshments were supplied with intent to influence the electors, and that, in that sense, it was done corruptly. The suggestion, after the votes had been polled, of a further "treat" for the night of polling day was not without importance. That suggestion fell through:—*Held*, that the case could not be brought within s. 111 of the Dominion Election Act, for which it seems necessary that either the meat or drink, or the money or a ticket to procure them, should be actually supplied. *In re Liagar Dominion Election*, 22 Occ. N. 433.

5. **Treating—Evidence—Particulars.**—In Fiset's case it was charged in general terms in the particulars that he travelled about in the constituency and canvassed a large number of voters in certain specified polling districts, and "corruptly treated them, to induce them to vote for the respondent." The evidence shewed that Fiset did go about canvassing and was driven by Jean Moreau. It was sought by the petitioners to shew that in so going about Fiset treated various electors, but objection was made to

the allowance of such evidence on the ground that the particulars did not give the details required by the order, and the Court refused to hear evidence of treating in that way, not more definitely specified, or to allow the examination of Moreau for the purpose of obtaining information only. About a week before polling day Fiset spent an evening at Moreau's house; he had with him whisky and gin and gave a drink to one Cardinal, telling him it was "election whisky." The meeting was not arranged, but the neighbours just happened to come in. It was not shewn that Cardinal had a vote. Cardinal's evidence was given without objection, and he was cross-examined upon it:—*Held*, that the Court was not prevented from considering the charge on account of its not being specified in the particulars, but the way in which the evidence was brought out was to be taken into consideration. If such meetings were frequent or intentionally brought about, the inference of the corrupt intent would be almost irresistible. As it was, it could not be taken as absolutely clear. *In re Lisgar Dominion Election*, 22 Occ. N. 433.

III. PETITION TO AVOID ELECTION.

1. Affidavit—Commissioner—Agent of solicitor.—The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof, and of the affidavit of *bona fides* and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioner's solicitors, the petition was presented:—*Held*, that the commissioner was not disqualified. *In re Lennox Provincial Election, Perry v. Caracallen*, 22 Occ. N. 407, 4 O. L. R. 647.

2. Copy—Service—Amendment.—In the printed copy of the petition served upon the respondent the concluding prayer had, by mistake of a clerk, a pen stroke drawn through it:—*Held*, that, though the copy was not strictly a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given. *In re Centre Bruce Provincial Election, Stewart v. Clarke*, 22 Occ. N. 286, 4 O. L. R. 263.

3. Deposit of copy—Preliminary objections.—Where a copy of an election petition was not left with the prothonotary when the petition was filed, and,

when deposited later, the forty days within which the petition had to be filed had expired:—*Held*, Gwynne, J., dissenting, that the petition was properly dismissed on preliminary objections [8 Brit. Col. L. R. 65, 21 Occ. N. 252]. *Lisgar Election Case*, 20 S. C. R. 1, followed. *Per Gwynne, J.*—The Supreme Court is competent to overrule a judgment of the Court differently constituted, if it clearly appears to be erroneous. *In re Burrard Dominion Election*, 22 Occ. N. 10, 31 S. C. R. 459.

4. Misdescription of electoral district—Surplusage—Amendment.—The petition and other papers in an election case were headed in the proper Court and purported to be under the Ontario Controverted Elections Act, as to "the election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral district as Lincoln and Niagara existed, but there was an electoral district of Lincoln, being the district intended:—*Held*, that the misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment. *In re Lincoln Provincial Election, McKinnon v. Jessop*, 22 Occ. N. 362, 4 O. L. R. 456.

5. Preliminary objections—Particulars—Examination of petitioner.—A respondent to a controverted election petition under the Quebec Act has no right to examine the petitioner before filing particulars of preliminary objections.—2. The respondent will be ordered to declare the names of the agents and friends of the defeated candidate who have committed in regard to the petitioner, and of those in regard to whom the petitioner has committed, acts of corruption, corrupt practices, and election frauds, mentioned in the preliminary objections, with the places and dates, and describing the acts committed, and in what they consist. *Giroux v. Bergevin*, 5 Q. P. R. 45.

6. Preliminary objections—Status of petitioner—Corrupt practices by Voter—Discovery—Facts et articles.—In contesting a Dominion election, the fact that the petitioner has been guilty of electoral corruption, other than that mentioned in Art. 113 of the Dominion Elections Act, does not make him incapable of contesting the election, such corruption not taking away from him *ipso facto* his right to vote at the election.—2. The Controverted Elections Act not having authorized the administration to the parties of interrogatories *sur faits et*

articles, the default of the petitioner to answer such interrogatories is no evidence against him. *Poirier v. Loy*, Q. R. 19 S. C. 489, 4 Q. P. R. 412.

7. Presentation of—Time—Computation.]—An election petition under R. S. B. C. 1897 c. 67, s. 214, must be filed within 21 days of the exact time of the return. Decision in 22 Occ. N. 43, 8 Brit. Col. L. R. 273, affirmed; *IRVING, J.*, dissenting. *In re New Westminster Provincial Election, Ree v. Gifford*, 9 Brit. Col. L. R. 192.

8. Service—Irregularity—Extending time—Re-service—Preliminary objections.]—The petitioner in a controverted election petition under the Dominion Act, after the appearance of the respondent, and the filing by him of preliminary exceptions in which he complains of the irregularity of the service effected upon him, may obtain *ex parte* an order of a Judge extending the time for service, and that before having desisted from the first service. *Labelle v. Leonard*, 5 Q. P. R. 77.

9. Service—Personal—At domicile—Abandonment—Time—Extension of—Motion to dismiss petition.]—An election petition under the provisions of s. 10 of c. 9, R. S. C., as amended by s. 8 of c. 20 of the statutes of 1891, should, unless otherwise ordered by a Judge, be personally served. —2. Service made on the respondent of a copy of the election petition by leaving such copy for him at his domicile with his wife, without having previously stated the impossibility of making a personal service within the time described, and without the order of a Judge, is not good service according to the provisions of s. 8 of c. 20.—3. As in ordinary actions, a petitioner may abandon, at his own expense, the service of an election petition made as above, without the authorization of the Court or a Judge, which is necessary under s. 56 of c. 9.—4. Within the time allowed by law for the service of an election petition, a Judge of the Superior Court may, under s. 10 of c. 9, extend the time for such service, and a personal service, such as is required by s. 8 of c. 20, is a good and valid service of such petition.—5. A motion for the dismissal of an election petition, made before the time allowed by law or by a Judge has expired, is premature and will be dismissed with costs. *Labelle v. Leonard*, 4 Q. P. R. 420.

10. Service of notice of presentation—Security for costs—Deposit—Moneys of solicitor.]—The statute of Canada 54 & 55 V. c. 20, s. 8, allows three modes of service of the notice of presenta-

tion of an election petition:—(a) If service is made within ten days of the presentation, it may be made in the same way as in the case of a writ of summons in a civil cause.—(b) If, by reason of special circumstances of difficulty in service, the petition has not been served within the ten days, the Court or Judge may allow further time, and in such case the service must be personal.—(c) If it has not been possible to serve the defendant personally within the time allowed by the Court or Judge, then the Court or Judge may order another mode of service.—2. Rule 12 of the Rules of Practice of the Superior Court does not apply to a deposit, made in the matter of a contested Dominion election, of the moneys of the solicitor for the petitioner. *Belanger v. Carbonneau*, 5 Q. P. R. 8.

11. Status of petitioner—Franchise Acts.]—The principal contention raised on preliminary objections to an election petition was, that the petitioner had been guilty of corrupt practices before, during, and after the election, and that, by the effect of 61 V. c. 14 and 63 & 64 V. c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act regulating the franchise in the Province of Quebec substituted therefor, so as thereby to deprive the petitioner of a right to vote under s. 272 of the Quebec Elections Act, 59 V. c. 9, and being so deprived of a vote, that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—*Held*, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise. *Per* GWYNNE, J.—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by Provincial legislation. *In re Beauharnois Dominion Election*, 22 Occ. N. 6, 31 S. C. R. 447.

12. Status of petitioner—Voters' list—Affidavit—Preliminary objection.]—A list appearing on its face to be an imprint emanating from the Queen's printer, certified by the clerk of the Crown in Chancery to be a copy of the voters' list used at an election, and upon which the name of the petitioner against the return at such election appeared as a person having a right to vote thereat, is sufficient proof of his status. The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne." — *Held*, *per*

GWYNNE, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition. *In re Two Mountains Dominion Election, Ethier v. Legault*, 22 Occ. N. 5, 31 S. C. R. 437.

13. Trial—Extension of time—Appeal—Jurisdiction.—On the 25th May, 1901, an order was made by BELANGER, J., for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois, thirty days after judgment should be given on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on the 29th October, and on the 19th November, on application of the petitioner for instructions, another order was made by the same Judge which directed that judicial days only should be counted in computing the thirty days, and stating that such was the meaning of the order of the 25th May, and that the 6th December would be the date of trial. On the petition coming on for trial on the 6th December, the appellant moved for peremption on the ground that the six months' limitation for hearing had expired. The motion was refused, and on the merits the election was declared void. On appeal to the Supreme Court:—*Held*, DAVIES, J., dissenting, that an appeal would not lie from the order of the 19th November; that the Judge had power to make such order, and its effect was to extend the time for trial to the 6th December; and that the order for peremption was, therefore, rightly refused. *In re Beauharnois Dominion Election, Loy v. Poirier*, 22 Occ. N. 193, 32 S. C. R. 111.

See APPEAL, X. 10, 11—STATUTES, 3,

IV. RECOUNT.

1. Appeal—Notice of—Signature—Result of appeal—Majority.—The notice of appeal from the decision of a County Court Judge upon a recount of votes under s. 129 (1) of the Election Act, R. S. O. 1897 c. 9, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf. Where both candidates appeal from the decision of the County Court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority. Neither appeal having been limited to particular bal-

lots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to. *In re North Grey Provincial Election, McKay v. Boyd*, 22 Occ. N. 237, 4 O. L. R. 286.

2. Ballots—Absence of candidates' numbers.—Recount of votes cast at a Provincial election:—*Held*, that the candidate's number, mentioned in s. 69 (3) of the Ontario Election Act, R. S. O. 1897 c. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the counterfoils, did so in such a manner that the candidate's numbers were left on the counterfoils, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected. *In re Prince Edward Provincial Election, Williams v. Currie*, 22 Occ. N. 285, 4 O. L. R. 255.

3. Ballots—Irregular marking.—Upon the recount of ballots cast at the election of a member for the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted V, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke; the error in the head-note in *In re West Huron*, 2 Ont. Elec. Cas. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments. Ballots marked in due form but with an indelible coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer. *In re Halton Provincial Election, Nison v. Barber*, 22 Occ. N. 362, 4 O. L. R. 345.

4. Ballots—Irregular marking.—Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by

the County Court Judge on a recount, in consequence of each being marked with a cross in the division of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot after the counting by the deputy returning officer. A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first. But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected. The following ballots were rejected:—Marked for one candidate and having the name of that candidate written on the back. Having, instead of a cross, a perpendicular, horizontal, or straight slanting line. Having a cross on the back only. The following were allowed:—Properly marked, but having on the back words written by the deputy returning officer. Having several connected tremulous marks in one division. Having a strongly marked cross in one division, and a thin, faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Having a distinct cross, and in the same division a slight irregular pencil marking, or a series of slight, cloudy, formless pencil markings. Having a mark consisting of two lines lying very close to each other, both distinctly visible, in one division, shewing an intention to make a cross. *In re North Grey Provincial Election, Boyd v. McKay*, 22 Occ. N. 286, 4 O. L. R. 286.

5. Ballots — Irregular marking — *Ballots not objected to before deputy returning officer.*]—A County Court Judge is not confined, on a recount, to the consideration of cases in which an objection was made before the deputy returning officer when counting the votes at the close of the poll. Where a ballot was marked with a cross outside, but near the upper line of, the top division:—*Held*, that it should be allowed. It is not essential to have a line on a ballot paper at all. Similarly all votes below the lower division must be counted for the candidate whose name is in it. Where a ballot was marked with a circle, not a cross, nor any apparent attempt to make a cross:—*Held*, bad. Where a ballot was well marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross or any attempt to make a cross, nor a mark by which the voter could be identified:—*Held*, a good vote for the candidate for whom the paper was well marked. Where a ballot, though well marked, had, in the same

division, the initials S. A. in small but legible capitals:—*Held*, bad. Any written word or name upon a ballot presumably written by the voter, ought to vitiate the vote as being a means by which he may be identified. Where ballot papers had a cross or crosses in the division of both candidates:—*Held*, bad. *In re Lennox Provincial Election, Cerswell v. Madole*, 22 Occ. N. 363, 4 O. L. R. 378.

6. Ballots — Irregular marking— *Initiailling.*]—Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with what might be taken for a "c," are properly marked and should be counted. In initiailling the ballots a deputy returning officer at one sub-division put as his initials H. G., instead of his full initials H. C. G., and a deputy returning officer at another polling sub-division put McN., instead of his full initials, W. D. McN.:—*Held*, that such ballots were sufficiently initiailled within the meaning of the Act, the object of such initiailling being merely the identification of the voter, which was effected, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and *semble*, that under these circumstances the ballots should not be rejected, even if not initiailled at all. *In re Muskoka Provincial Election, Mahaffy v. Bridgland*, 22 Occ. N. 322, 4 O. L. R. 253.

7. Jurisdiction of junior County Court Judge.]—A junior Judge of a County Court has jurisdiction under the Ontario Election Act, R. S. O. 1897 c. 9 ss. 124-131, to recount votes. *In re North Grey Provincial Election, Boyd v. McKay*, 22 Occ. N. 286, 4 O. L. R. 286.

V. VOTERS' LISTS.

1. Collector of votes—Jurisdiction— *Time—Prohibition.*]—After the collector of votes under the British Columbia Elections Act, 1897, as amended in 1898, has placed on the register of voters the names of persons objected to, an application for prohibition on the ground that the collector proceeded without jurisdiction is too late. *Semble*, in any event prohibition is not the proper remedy. *Quære*, whether the Crown Office Rules have any application in civil matters. *In re O'Driscoll and Wright*, 8 Brit. Col. L. R. 424.

2. Notice of complaint—Form of—Grounds of objection—Subjoined lists—Amendment of notice.]—In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, the names of persons wrongfully omitted from the voters' list were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M. F. and" appeared:—*Held*, having regard to the provisions of s. 6 (1) and (7), and Form 6 (list 1) of the Voters' Lists Act, and of ss. 1 (12), 13, and 56 of the Assessment Act, and of s. 4 of the Manhood Suffrage Registration Act, that the letters "M. F." could be properly read as meaning "Manhood Franchise," and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage.—2. The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3, and 4 being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the "subjoined lists":—*Held*, that the lists were part of the complaint, and it was sufficient in that regard.—3. *Held*, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under s. 32. *In re Voters' Lists of Carleton Place*, 22 Occ. N. 108, 3 O. L. R. 223.

VI. OTHER CASES.

1. Dominion Elections Act—Deputy returning officer—Conditional refusal to vote—Non-resident's oath—Damages—Malice.]—Plaintiff, who resided at St. John in the Province of New Brunswick, was a property owner and entitled to vote at Dalhousie, in the county of Annapolis and Province of Nova Scotia, where his name appeared on the list of voters as a non-resident. Plaintiff presented himself before the deputy returning officer at Dalhousie at an election and demanded a ballot paper, but the officer refused to deliver a ballot paper or to permit plaintiff to vote unless he took the non-resident's oath:—*Held*, that the oath proposed was not applicable to the case of a property owner residing in another Province, and that the

officer was wrong in his refusal to permit plaintiff to vote. *Per* McDONALD, C.J., and RITCHIE, J., that plaintiff's right to vote being clear, defendant was responsible in damages for his refusal to permit him to do so; that defendant, in undertaking to determine plaintiff's right to vote, was not acting in a judicial capacity, but was merely a ministerial officer to carry out the provisions of the Act; and that, even assuming that defendant was acting in any respect in a judicial capacity, his action in refusing the ballot paper not being *bona fide*, but being wilful and corrupt, the action was maintainable even on the theory that proof of malice was necessary. *Per* WEATHERBE, J., and GRAHAM, E.J., that defendant was a public officer having a quasi judicial duty to perform and that he could not be made liable for an error of judgment; that, in order to make defendant liable, malice must be shewn, that the burden of shewing malice was on plaintiff, and that the evidence adduced was not sufficient for that purpose. *Anderson v. Hicks*, 35 N. S. Reps. 161.

2. Telegrams—Action for price—Illegality—Pleading.]—To an action begun by a telegraph company to recover the price of a certain number of telegrams, the defendant will not be allowed to plead simply that such telegrams were sent in the course of a parliamentary election; in order to defeat the action in such a case, it is necessary to allege that such telegrams were sent for the purpose of illegally influencing the election. *Great North-Western Telegraph Co. v. Dalby*, 5 Q. P. R. 92.

PART PERFORMANCE.

See ASSESSMENT AND TAXES, I. 2.

PARTICULARS.

1. Action by advocate for bill of costs—Fees and disbursements—Procurator—Copies of proceedings—Demand of particulars—Default of plea—Opening pleadings closed—Terms.]—The defendant in default for a plea will be relieved from his foreclosure and be allowed to demand particulars of the plaintiff's account, upon payment of the costs, occasioned by his default.—2. The advocate in an action for fees and disbursements in a former suit in which he acted for the present defendant's opponent, must state when the proceedings for which he claims fees were taken by him.—3. He must also indicate the object of

his disbursements made in Court or at the sheriff's office.—4. He should also file the procuration of his client authorizing him to sue when he alleges such procuration.—5. *Semble*, that he is not obliged to file copies of the proceedings which he has taken nor of the acts which he has had made by a notary on behalf of his client. *Desjardins v. Lamoureux*, 4 Q. P. R. 338.

2. Action of ejectment — Defence of encroachment.]—A general allegation of encroachment in the defence to an action for possession of land may be the object of a motion for particulars shewing when, how, and to what extent the plaintiff has encroached upon the land of the defendant. *Vallée v. Prescott*, 4 Q. P. R. 279.

3. Contestation of opposition — Illegality of debentures of railway company.]—Particulars will be ordered to be given of a paragraph in a contestation, alleging generally the illegality of an issue of debentures of the execution debtors, a railway company, without averring in what the illegality in question consists of an opposition to a seizure. *Connolly v. Baie des Chaleurs R. W. Co.*, 4 Q. P. R. 178.

4. Default — Dismissal of action.]—If a plaintiff neglects to give the particulars which he has been ordered to give, and if the allegations which he has thus neglected to supplement constitute the whole action, the other allegations being general and simply introductory, his action will be dismissed upon motion. *Gravel v. Lafontaine*, 5 Q. P. R. 82.

5. Motion for—Damages for injury to property.]—In an action for damages for injury caused to his property, the plaintiff will be ordered, upon motion, to furnish a statement indicating separately each item of damages making up the whole sum claimed. *Hertel v. Foley*, 4 Q. P. R. 334.

6. Motion for—Time.]—A motion for particulars, not being in its nature a preliminary plea, may be made after the lapse of the time prescribed for the filing of such a plea. *Neven v. People's Telephone Co.*, Q. R. 20 S. C. 538.

7. Patent for invention — Action for infringement — Defence — Want of novelty—Specifications.]—Action for infringement of a patent giving the exclusive right within Canada of making and selling a certain improved machine. Paragraph 3 of the defence: That the appliances making up the machine are all well known mechanical appliances in use for many years prior to the date of the plain-

tiffs' patent. 4. That there is no specification in the plaintiffs' patent covering a graduated series of fixed chisels or cutters, and that such a series was not, at the date of the patent, either novel or the subject of a patent under the Patent Act of Canada. 5. That the mechanical devices in the plaintiffs' machine alleged to have been infringed, are not covered by the specifications set out in the plaintiffs' patent:—*Held*, that a greater degree of particularity was required in respect of the defences set up in paragraphs 3 and 4 than in the plaintiffs' particulars of breaches, the object being to limit the expense to the parties, and to prevent patents being upset by some unexpected turn of the evidence.—2. Particulars of the allegation of want of novelty must be given, as they might not be within the knowledge of the patentee.—3. If the defendants knew a particular defect in the specification as to the nature of the invention, and the specification did not sufficiently describe the invention in that regard, they should point it out in order that the plaintiffs might not be taken by surprise. *Jones v. Galbraith*, 22 Occ. N. 78.

8. Statement of defence—Assault — Wrongful dismissal—Justification.]—Where in an action by a clerk against his former employer, an hotel keeper, for an alleged assault and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff was *held*, entitled to particulars of the names of such guests. *Scott v. Mowbray*, 22 Occ. N. 122, 3 O. L. R. 252.

See APPEAL, I. 4—COMPANY, V. 4—COSTS, V. 4—DEFAMATION, II. 1—DISCOVERY, III. 7—EXECUTION, III. 5—LIMITATION OF ACTIONS, II. 3—MUNICIPAL ELECTIONS, 3, 5—PARLIAMENTARY ELECTIONS, II. 5, III. 5—PLEADING, IX. 3—SHIP, III. 2.

PARTIES.

I. ADDITION OF.

II. JOINDER, MISJOINDER, AND NON-JOINDER.

III. THIRD PARTIES.

IV. OTHER CASES.

See ALIMENTARY ALLOWANCES — BANKRUPTCY AND INSOLVENCY, II. 2—CHOSE IN ACTION, ASSIGNMENT OF, 5. 7—CRIMINAL LAW, V. 1—DISCOVERY—EVIDENCE, I. 4—HUSBAND AND WIFE, I.

VI. 1—INFANT, 3, 4—INSURANCE, II. 9
—INTERDICT—MECHANICS' LIENS, III.
5—MINES AND MINERALS, 5—MUNICI-
PAL CORPORATIONS, III. 1, X. 2, 6—
PENALTIES AND PENAL ACTIONS, 1—
PRINCIPAL AND AGENT, 8—TRIAL, II. 11
—TRUSTS AND TRUSTEES, 8—WILL, III.
2—WRIT OF SUMMONS, I. 4, II. 10.

I. ADDITION OF.

1. **Fraud—Partners—Company name—Affidavit—Information and belief—Pleadings.**—The plaintiff, having recovered judgment against an incorporated company for an amount claimed for services rendered, under a contract, but not having been able to realize anything upon the judgment, brought this action against the person who had signed the contract as president, for damages for fraud, and alleged that at the time the contract was made, the company had ceased to do business as such, but that the defendant had formed a partnership with L. and C. and the partnership had acquired the property of the company, and was doing business under the company's name, and had obtained the benefit of the plaintiff's services by fraudulent concealment:—*Held*, that the plaintiff was entitled to add L. and C. as defendants, but not the company. *Semble*, that affidavits must state the source on which belief is founded, but here the statement of claim shewed the facts, and it was not necessary to look at the affidavit. *Chong v. McMorran*, 8 Brit. Col. L. R. 261.

2. **Litigation between agents—Principals added.**—T. sued McM. as the drawer of a bill of exchange payable to T.'s order, with an alternative claim against McM. on a guaranty that the bill would be paid. T. was the manager of the P. C. line, of Seattle, which owned the steamer Mexico, and the defendant was the agent of the D. and W. H. N. Co., and these two principals had through T. and McM. entered into a charterparty providing that the steamer Mexico should carry certain freight, for which the D. and W. H. N. Co. agreed to pay. McM. alleged that he gave the bill of exchange sued on along with the guaranty to T. as the balance of the freight moneys due under the charterparty, and the company set up a claim for demurrage, and advised McM. to pay. On an application made by McM. and the company, an order was made adding the company as a defendant, and giving leave to counterclaim against the P. C. line:—*Held*, on appeal, that the order was properly made, as the real parties in interest should be

brought before the Court. *Trowbridge v. McMillan*, 22 Occ. N. 421, 9 Brit. Col. L. R. 171.

3. **Separate causes of action—Joinder—Rules 185, 186, 187, 192—Third party notice—Indemnity.**—The plaintiff sued to recover the amount of a book debt assigned to him. The defendants admitted nothing, and pleaded payment and set-off:—*Held*, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him, in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration. Rules 185, 186, 187, 192 discussed. *Tate v. Natural Gas and Oil Co.*, 18 P. R. 82, and *Evans v. Jaffray*, 1 O. L. R. 614, followed. *Smurthwaite v. Hannay*, [1894] A. C. 494. *Thompson v. London County Council*, [1899] 1 Q. B. 840, and *Quigley v. Waterloo Manufacturing Co.*, 1 O. L. R. 608, distinguished. *Held*, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt. *Confederation Life Association v. Labatt*, 18 P. R. 268, followed. *Langley v. Law Society of Upper Canada*, 22 Occ. N. 99, 3 O. L. R. 245.

II. JOINDER, MISJOINDER, AND NON-JOINDER.

1. **Application to strike out—Matter of substance.**—An objection that one joined as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by Rule 259, and is not a proper subject for an application to strike out parties under Rule 185. *Morang v. Rose*, 22 Occ. N. 168, 3 O. L. R. 354.

2. **Exception for want of—Time for presentation.**—A dilatory exception, based upon the fact that all the parties interested and whose presence is necessary are not before the Court, must be presented within three days after a judgment maintaining an exception to the form, and dismissing the action as to one of the defendants, saving recourse. *Soucy v. Industrial Printing Co.*, 5 Q. P. R. 121.

3. **Nullity of action—Dilatory exception.**—The default of a plaintiff to bring before the Court a person who is a necessary party to the action does not render the action void as a matter of

law, and such default should be invoked by a dilatory exception, and not by way of exception to the form. *McNally v. Préfontaine*, Q. R. 11 K. B. 370.

4. Recovery of moneys paid by mistake.]—M. brought three separate actions against three insurance companies on three policies of insurance, two on the hull of defendant's vessel, and the third on freight. The three actions were tried together before a jury, but were not consolidated. Upon the findings of the jury judgment was entered for the plaintiff in each action separately with costs. The defendants moved in each action for a new trial, and these motions were dismissed, separate orders being issued. The defendants appealed in each action to the Supreme Court of Canada; and the three appeals were all heard together, but not consolidated. The appeals were allowed on payment by the defendants of the costs of the former trial within thirty days after taxation. There being some uncertainty as to the exact terms of this judgment, the defendants paid the plaintiff's solicitors, under protest, the amount which the latter considered was payable to them as costs under such judgment, the defendants reserving the right to require repayment of any part of the amount paid. In an action on behalf of the three companies jointly to recover part of the money paid as having been paid by mistake:—*Held*, that the claims made against the three companies and their supposed liability being several, and the money to pay the costs having been contributed severally, the implied promise to pay back was several, and the title to the moneys was several, and therefore the companies could not be joined as plaintiffs in one action; but they should have leave, on terms, to amend by striking out two of the companies and leave to tax the costs of the trial severally against each company. *Insurance Company of North America v. Borden*, 34 N. S. Reps. 47.

III. THIRD PARTIES.

1. Defective construction of building—Builders — Privity.]—A defendant sued for damages for injury to the plaintiff by reason of the defective construction of a roof, may bring in as third parties *en garantie* the persons whom he has employed to construct the roof and who have done it badly.—2. An inscription in law by the third parties brought in, alleging want of privity, will, in these circumstances, be dismissed with costs. *Dagenais v. Caron*, 5 Q. P. R. 42.

2. Notice — Time — Enlarging — Rules 209, 353.]—In an action for damages for trespasses to land and cutting down and removing timber and wood, the defendants in their statements of defence justified the acts complained of under agreements which, they alleged, authorized those acts, and to which the plaintiff's rights in the land were subject. The defendants served notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under whom the plaintiff derived his title:—*Held*, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances, the time should not be enlarged by virtue of the provisions of Rule 353. *Semble*, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209. *Perrot v. Cook*, 22 Occ. N. 31, 110, 2 O. L. R. 709, 3 O. L. R. 350.

3. Right to contribution or indemnity—Application for directions as to trial—Warranty of title.]—The plaintiff brought action against the defendants for breach of warranty of title to a horse sold by the defendants to the plaintiff. The defendants, in pursuance of leave given, served a third party notice on G., from whom they had bought the horse, claiming to be indemnified by him to the extent of any damages recovered against them by the plaintiff, on the ground of breach of warranty of title by G.:—*Held*, that upon the application for directions as to trial, the Court should consider the defendants' right to contribution or indemnity, and if satisfied that they were not so entitled should refuse to give directions, which refusal will be tantamount to a dismissal of the third party from the action. *Held*, also, that in the circumstances the defendant's claim against G. was not properly one for contribution or indemnity, and that no direction as to trial should be given. *Bolduc v. Larose*, 5 Terr. L. R. 6.

4. Settlement of action.]—After a third party had been brought in and the usual directions as to trial given, the action was settled as between the plaintiff and the defendants:—*Held*, that the defendants could not proceed to trial as against the third party, and the action was dismissed as against the third party

with costs, without prejudice to the right of the defendants to bring an action against the third party. *Wheeler v. Town of Cornwall*, 22 Occ. N. 260, 4 O. L. R. 120.

See I. 3.

IV. OTHER CASES.

1. Action en faux—Persons profiting.]—In a principal action to declare null a false document, just as in the case of an incidental inscription for the same purpose, it is not necessary to bring before the Court all the parties to the document alleged to be false, but it is sufficient to make a demand against the one who profits or is in a position to profit by such document. *Avoide v. Chaurest*, 5 Q. P. R. 6.

2. Action to cancel registration of document—Registrar—Person procuring registration.]—In a suit to set aside the registration of a document affecting real property, it is proper to make the registrar a party, especially when it is alleged that he has treated as a right to real property that which was not in fact one. The neglect to make the one who has procured the registration a party is no ground for a defence in law. *Roches v. Champagne*, 5 Q. P. R. 19.

3. Fraudulent preference—Action to set aside—Insolvent debtor—Costs of examination of, for discovery.]—A fiat will not be granted under Rule 932 of the King's Bench Act to tax to a plaintiff the costs of the examination of a defendant who was not a necessary or proper party to the action, although no objection on that ground was taken prior to the application for the fiat. An insolvent debtor who has made an assignment for the benefit of his creditors is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him. *Weise v. Wardell*, L. R. 19 Eq. 171, and *Bank of Montreal v. Black*, 9 Man. L. R. 439, followed. *Gibbons v. Darvill*, 12 P. R. 478, distinguished. *Schwartz v. Winkler*, 22 Occ. N. 401, 14 Man. L. R. 197.

4. Numerous defendants in the same interest—Appointment of solicitor to defend.]—The object of Rule 200, which provides that, where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all so interested, is to avoid

the expense and inconvenience of bringing before the Court a numerous body of persons, all having the same interest; but does not authorize the making of an order by the Court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest who are already defendants to the action. *Ward v. Benson*, 22 Occ. N. 117, 3 O. L. R. 199.

5. Partnership—Individual partners—Multiplicity of actions—Writ of summons—Election—Appeal—Costs.]—S., G., and H. P. were residents of England and members of the firm of S. & Co., which carried on business in England only. The plaintiffs issued two writs of summons (neither of which was for service out of the jurisdiction) in respect of the same cause of action, the defendants named in one being the firm and S., G., and H. P. individually, and in the other the three individuals only. The writs were served on H.-P. while on a visit to British Columbia, and he entered conditional appearances, and applied to have both writs set aside, and (in the alternative) as to the second action, to have it dismissed as vexatious:—*Held*, that the name of the firm was wrongly inserted and should be struck out of the first writ, and that the plaintiffs should elect as to which action they would proceed with. Before the hearing of the appeal, the plaintiffs gave notice that they were content that the name of S. & Co. should be struck out of the writ:—*Held*, that the defendant appellant was entitled to the costs of the appeal up to the time of the service of the notice, and the plaintiffs to the costs subsequent. *Oppenheimer v. Sperling*, 22 Occ. N. 376, 9 Brit. Col. L. R. 166.

6. Stated case—Lieutenant-Governor.]—*Quare*, whether the Lieutenant-Governor in Council can be a proper party to a cause or matter, and therefore whether the Court should entertain a stated case to which the Lieutenant-Governor is a party. *In re Edmonton By-law*, 21 Occ. N. 100, 4 Terr. L. R. 450.

PARTITION.

1. Acquisition of entirety by licitation—Effect on incumbrances upon undivided shares—Preference on shares of price.]—Art. 746, C. C., which declares that the co-partitioner who acquires the entirety of an undivided immovable by licitation, is deemed to have always been the owner of such entirety, establishes a fiction of law in favour of

such co-partitioner, which must be restricted to the party in whose interest alone it was created. One of the effects of this fiction is, that he acquires the entirety free from all incumbrances; but when the price of the property licitated is deposited in the hands of justice for distribution, the fiction has not the effect of nullifying rights of preference on the shares of the price accruing to the other co-partitioners. Art. 2021, C. C., which declares in effect that a hypothec upon an undivided portion of an immovable ceases to subsist when a partition or a licitation conveys the immovable to a person other than the one who constituted the hypothec. extinguishes the right to follow the property in the hands of such person, but does not abolish the right of preference upon the share of the price which represents the undivided portion of the immovable which was hypothecated, and which price has been placed in the hands of justice for distribution. The partition or licitation has the same effect as a sheriff's sale, which discharges the property sold from the hypothecs which existed at the time of the sale, but does not destroy the efficiency of such hypothecs upon the proceeds of the sale which represent the property. *Bruneau v. Banque Jacques-Cartier*, Q. R. 10 K. B. 525.

2. Action for—Plea to — Portion claimed.—It is illegal to plead to an action for partition that the plaintiff's part of the succession is less than that which he claims, his right to demand partition being the same in any case. *Cabana v. Latour*, 5 Q. P. R. 102.

3. Costs—Judgment—Substitution — Sale under execution—Report on distribution — Contestation of — Curator to substitution.—The plaintiff, a stranger to the substitution, was owner of an undivided fourth of certain immovables, of which the defendant had the other three-fourths, but burdened with a substitution, of which the contestant was the curator. In an action for partition the immovables were divided, and the judgment ordered that the taxed costs of all parties should be massed and the defendant should pay three-fourths of them, and the plaintiff one-fourth. The judgment was registered. R., the plaintiff's advocate, having judgment against the defendant for costs, caused to be seized and sold a part of the immovables allotted to the defendant in the partition. The contestant was a party to the seizure and sale. The price obtained at the sale was reported by the sheriff with a certificate of the registrar, which stated the substitution and its registration and a hypothec made, since the partition, by the defendant to P., his

advocate in the action. The debt of R. having been paid out of the purchase money, there remained a balance which the prothonotary awarded to P. The curator contested this, alleging that P. had been paid his debt, which at any rate, was the defendant's own debt, for which the substitution could not be held bound, and asked that the balance should be paid to him (the contestant). P., while not opposing this demand, and submitting his rights to the Court, alleged that the amount of his hypothec included \$45.89 for costs in the partition action, and he said that in case any part of that sum ought to be placed to the charge of the substitution, he was willing to give security for repayment of the portion for which he had no lien. The contestant did not prove that P.'s debt had been paid:—*Held*, that P.'s declaration was an actual plea, which obliged the contestant to proceed as in a contested cause.—2. That the curator had no status to assert that P.'s debt had been paid.—3. That the partition bound the substitution. — 4. That the debt of R. for costs of such partition was preferable to the substitution and was apparent on the record, and the decree had purged the substitution.—5. That R. had a lien on the substituted immovables for his debt.—6. That the defendant and the contestant should, as to costs, join their claims together.—7. That the balance of the purchase money belonged to the substitution, and it was the duty of the curator to see that it was not diverted.—8. That the curator should have proceeded by way of opposition *afin de conserver*, or by an intervention, but the procedure which he had adopted was equivalent, and should be maintained. — 9. That the hypothec made by the defendant, having effect so long as the substitution was not opened, P. had the right to be paid the balance of the purchase money, upon his furnishing security to repay it upon the opening of the substitution.—10. That as to \$26, costs of P. usefully incurred in the partition, he had a lien superior to the substitution, and to this extent he was not obliged to give security.—11. That the costs of the contestation should be paid by P., but to be taxed as the costs of a contestation of collocation in law only. *Pelletier v. Michaud*, Q. R. 20 S. C. 413.

4. Succession or community—Partition of part—Property subject to usufruct—Movables—Account.—One of the several co-owners of an undivided universality, e.g., a succession or a community, is not entitled, in principle, and without alleging special circumstances shewing that some portion of the property comprised in such universality is temporarily or permanently insuscep-

tible of partition,—to demand the partition of part only of the property comprised in such succession or community. The object to be partitioned is the *mass*—composed of all the property, movable and immovable, comprised in the universality, not the particular properties which go to form the *mass*, treated separately.—2. The fact that a property forming part of a succession or community is subject to a right of usufruct does not prevent its partition among those having the *usus propriété*.—3. As regards the movables of a community, the mere fact that they have been converted into money, that the surviving consort has received one-half of the proceeds, and that the other half has been employed by the executor in part payment of debts, is not sufficient to justify the non-accounting for such money by the surviving consort, and by the executor who is one of the co-partitioners, as an incident of the partition. *Mount v. Farrell*, Q. R. 21 S. C. 231.

See COSTS, I. 7—INFANT, 3.

PARTNERSHIP.

1. Account—Judgment directing—Extension of time—Separate defences of partners.—The Court will not extend the delay, fixed by the judgment, for the defendant to render an account, unless special and sufficient reasons be adduced. The fact that the defendants, co-partners, pleaded separately, and that judgment was rendered against one defendant before the delivery of judgment in the case of the other, is not sufficient ground for extending the delay to account fixed by the first judgment so that the defendants may account together. *Jeannotte v. Pariseau*, Q. R. 20 S. C. 229.

2. Action against firm—Death of one partner—Revivor—Personal representatives.—When an action has been brought against a commercial firm, and one of the members of that firm dies while it is still pending, the defence must be taken up by the heirs and representatives of the deceased partner, in his place, and not by the surviving partners, who have become the only owners of the assets of the firm. *Wilkins v. Eadie*, 4 Q. P. R. 402.

3. Action in name of firm—Demand for names—Sole member—Motion—Costs.—The plaintiff, who carried on business alone in a firm name, brought his action in the firm name. The defendants' solicitor demanded the names and places of residence of all persons constituting the firm, and no answer was

given until four days afterwards, when the plaintiff's solicitor gave the information to the defendants' solicitor in the office of a special examiner; but at the same hour notice of a motion by the defendants for an order for the information was served at the office of the plaintiff's solicitor. On the return of the motion counsel for the defendants asked only that the costs of the application be made costs in the cause:—*Held*, that, as the plaintiff was the cause of the difficulty in using a firm name, he might well have been ordered to pay the costs so occasioned, and an order was made as asked by the defendants. *Cummings v. Ryan*, 22 Occ. N. 150.

4. Dissolution—Account—Profits from portion of assets withdrawn by partner.—Partners owe each other a reciprocal account of everything that arises from the common property, up to the time of the division to be made of the property, and one of them cannot divide the remedy which the law gives him for the liquidation of the partnership affairs. Therefore, an action does not lie for an account of the profits which one of the partners has made, since the dissolution of the partnership, from the use of an article belonging to the assets of the partnership, when no liquidation has been made of the partnership affairs, and while there still remains common property the division of which is not demanded. *Heffernan v. Sheridan*, Q. R. 11 K. B. 3.

See APPEAL, X. 6 — ATTACHMENT OF DEBTS, III. 2—BANKS AND BANKING, 2 — CHOSE IN ACTION, ASSIGNMENT OF 7 COSTS, IV. — PARTIES, I. 1, IV. 5 — PENALTIES AND PENAL ACTIONS, 4.

PARTY WALL.

Raising—Damage to adjoining house—Cause of—Liability—Damages.—The owner of a house who wishes to raise the party wall must give previous notice thereof to the owner of the adjoining house, in order to give him time to prepare for the work, and thus avoid all responsibility other than that proceeding from his negligence or want of care.—2. If the damages incurred by the co-owner of the party wall are the result not of the raising of the wall but of the pulling down of the house adjoining the party wall, the one who has done the work of raising is not responsible for these damages. In other words, the co-owner of the party wall has no recourse against the one who raises the wall, when the damages which he suffers are the result

of faulty construction of his own building. *Demers v. Lemicus*, Q. R. 21 S. C. 26.

See EASEMENT, 3.

PASSENGERS.

See RAILWAY, VI., VIII.

PATENT FOR INVENTION.

1. Action in Superior Court, Quebec—Stay of—Action in Exchequer Court.]—In an action based upon a patent of invention, proceedings will be stayed on the demand of one of the parties, if a like cause between the same parties, based upon the same facts, is upon the point of being fixed for final hearing before the Exchequer Court of Canada. *American Stoker Co. v. General Engineering Co. of Ontario*, 5 Q. P. R. 73.

2. Anticipation—Novelty.]—A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses and shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements. *Semble*, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass, it would fail for want of novelty. *Lusfer Prism Co. v. Webster*, 22 Occ. N. 426.

3. Combination—Novelty—Infringement.]—The judgment of the Supreme Court of British Columbia, 7 Brit. Col. L. R. 197, holding that the plaintiff's patent for a mechanical combination was infringed by the defendant, was affirmed on appeal. *Federation Brand Salmon Canning Co. v. Short*, 31 S. C. R. 378.

4. Expiry of foreign patent—British patent.]—By the true construction of s. 8 of the Canadian Patent Act, R. S. C. c. 61, as amended by 55 & 56 V. c. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act. Judgment in 31 S. C. R. reversed, and that in 20 Occ. N. 274, 6 Ex. C. R. 357, restored. *Dominion Cotton Mills Co. v. General Engineering Co. of Ontario*, [1902] A. C. 570.

5. Importation and non-manufacture—Patent Act, s. 37.]—A patentee is not in default for not manufacturing his invention, unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only, the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum. *Anderson Tire Co. of Toronto v. American Dunlop Tire Co.*, 5 Ex. C. R. 100, referred to.—2. The effect of s. 31 of the Patent Act is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the interest of the owner is concerned.—3. *Semble*, that the importation of an invention made in accordance with a process protected by a patent, is an importation of the invention. But *quære*, whether the provision of s. 37 of the Patent Act, requiring the manufacture in Canada of the invention patented, after the expiry of two years from the date of the patent, applied to the case of a patent for an art or process. *Hambly v. Albright*, 22 Occ. N. 201, 7 Ex. C. R. 363.

6. Infringement—Improvements in car wheels—Combination—Utility.]—The plaintiffs were owners of Canadian letters patent numbered 63,608 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there were a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiffs' abrading shoe, however, was the first in which these two features were combined or used together.—*Held*, that there was invention in the idea or conception of combining these two features for the purpose of truing up car wheels.—2. That the invention was useful. *Griffin v. Toronto R. W. Co.*, 7 Ex. C. R. 411.

7. Infringement—Lantern globe—Want of element of inventiveness.]—In an action for infringement of letters patent for improvements in lanterns, one feature only of the lantern, the globe of which could be lifted vertically for the

purpose of lighting the lamps, came in question; and as to that, one issue was whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lit, or in the working out of that idea or conception, there was invention to sustain a patent:—*Held*, that there was no invention to constitute a valid patent. *Kemp v. Crown*, 22 Occ. N. 89, 7 Ex. C. R. 306.

8. Interpretation of letters patent—Infringement—Combination of old elements.]—The rules of interpretation to be applied to a patent, which is a contract between the Government or the public and the patentee, are those which are applied to all other contracts. The intention of the parties must be found in the contract itself, and the interpretation of its several clauses is a question of law which is left to the Court. In case of doubt, the contract is interpreted against him who has stipulated, i.e., the patentee.—2. In a patent for a combination of old elements, the subject-matter of the patent is the combination itself taken as a whole, which cannot be infringed unless the whole combination be used, without omitting any element which the inventor himself considered material.—3. In the present case, the hinge joint was a material part of a patent for a hose coupler, and as this was not used by the respondent, there was no infringement. Judgment in Q. R. 18 S. C. 44 reversed. *Came v. Consolidated Car Heating Co.*, Q. R. 11 K. B. 103.

9. License—Alterations and improvements—Rights of licensee.]—The plaintiff granted to the defendants a license under seal to use a patented invention of his, being an automatic air brake, and to manufacture and equip their rolling stock with the same. He complained that, though the object of his agreement was that his brake might be advertised by its user on the defendants' road in the form in which he had patented it, the defendants were injuring his invention by substituting in part a different unpatented mechanical device of their own, and using the brake as thus altered to his detriment; and contended that, if the defendants used his invention at all, they must use it in accordance with the form described in his patent, and asked for an injunction:—*Held*, ARMOUR, C.J.O., dissenting, that, in the absence of agreement to the contrary, as here, there is nothing to prevent a licensee from making such changes or alterations as he thinks proper in the patented invention. Judgment of MEREDITH, C.J., 2 O. L. R. 190, 21 Occ.

N. 466, reversed. *MacLaughlin v. Lake Erie and Detroit River R. W. Co.*, 22 Occ. N. 202, 3 O. L. R. 706.

See APPEAL, VI. 3—DISCOVERY, I. 5—EXECUTION, IV. 3—PARTICULARS, 7.

PATENT FOR LAND.

See CROWN—GIFT, 1.

PAUPER.

Leave to appeal in forma pauperis.]—While no precise or definite rule can be laid down as to the proof to be adduced in support of applications for leave to proceed before the Court of King's Bench in *forma pauperis*, the Court will be more exacting in a case, like the present, where the appellant, claiming a share of an estate, is appealing from a unanimous adverse judgment of the Court of Review, and is, moreover, still capable of earning a livelihood, than it would be in an action for an alimentary allowance, or for damages by a person incapacitated for work by an accident, and particularly where the judgment appealed from has been in favour of the party making the application. *Boucher v. Morrison*, Q. R. 11 K. B. 129.

See PLEADING, V. I.

PAYMENT.

Recovery back—Illegal license fee—Municipal corporations—By-law.]—A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at \$10, and the by-law provided that a penalty of not exceeding \$50 might be imposed upon summary prosecution. The plaintiff, after some demur, took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed:—*Held*, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees, having been paid under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back.

Cushen v. City of Hamilton, 22 Occ. N. 282, 4 O. L. R. 265.

See **BANKRUPTCY AND INSOLVENCY**, IV. 2—**BANKS AND BANKING**, 4—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 3, 11—**COMPANY**, IV. 2—**EXECUTORS AND ADMINISTRATORS**, 5—**GIFT**, 1—**INSURANCE**, II. 7—**LIMITATION OF ACTIONS**, I. 1, II. 5, 6—**MORTGAGE**, 8—**PLEADING**, VII. 10—**SALE OF GOODS**, VIII.—**SHIP**, III. 1—**STAY OF PROCEEDINGS**, 2—**WRIT OF SUMMONS**, II. 4.

PAYMENT INTO COURT.

See **APPEAL**, IV. 11—**ATTACHMENT OF DEBTS**, III. 1—**INSURANCE**, IV. 4, 12—**MONEY IN COURT—PLEADING**, X. 1, XI. 2—**VENDOR AND PURCHASER**, 1.

PEDLARS.

See **MUNICIPAL CORPORATIONS**, III. 8, 12.

PENALTIES AND PENAL ACTIONS.

1. Action for penalty — Parties — Association—Crown.]—A suit under s. 12 of 62 V. c. 90 (Q.), which makes liable to a penalty of not more than \$10 every person who, without a license of the barbers' association of the Province of Quebec, shaves or trims the beard or cuts the hair of any person for payment or promise of payment, cannot be begun in the name of the association, but must be in the name of the Crown or of some person suing as well in the name of the Crown as in his own name. *Barbers' Association of the Province of Quebec v. Blanchard*, Q. R. 21 S. C. 201.

2. Informer—Right to sue—Company — "Limited."]—Any person has a right to bring an action to recover the penalty provided by s. 79 of R. S. C. c. 119, for neglecting to have the word "limited" printed after the name of the company on the outside of the company's office. *Lamalice v. Electric Printing Co.*, 4 Q. P. R. 266.

3. Municipal corporation—Right of action against—Resident of municipality.]—By virtue of s. 335 of 54 V. c. 86, a statute incorporating the town of Drummondville, any adult person residing in the said town may begin in his own name a penal action such as is mentioned

in s. 330 of that Act, or such an action as is authorized by s. 4857, R. S. Q., and Art. 1046, C. M. *Poirier v. Cusson*, Q. R. 21 S. C. 407.

4. Non-registration of partnership—Foreign partners—Factor—Firm name.]—In an action for a penalty brought against C., doing business as C. & Son, for failure to register his business as required by law, it was proved that C. was not carrying on business alone, but was in partnership with another person, and that both partners resided in a foreign country:—*Held*, that laws imposing penalties cannot be extended beyond their clear provisions, and that the court cannot extend the scope of the plaintiff's allegation, viz., that the defendant was carrying on business alone under a certain firm name, so as to include the case of the defendant doing business with another person under such name without legal registration.—**2.** The law requiring registration of partnerships does not apply to the case where a business is carried on by a factor in the Province of Quebec in behalf of persons none of whom are domiciled or resident in the Province of Quebec. *Ridgeway v. Collier*, Q. R. 21 S. C. 473.

5. Nova Scotia Towns Incorporation Act—Qui tam action—Right of informer to bring—Stay—Statute of Limitations—Interpretation Act.]—A *qui tam* action for the recovery of the penalties prescribed by the Towns Incorporation Act, R. S. N. S. c. 71, in the case of a person who acts as mayor after becoming disqualified. Section 56, s.-s. 3, of the Act prescribes the penalty, namely, \$20 for each time he so acts. Section 238 provides that "all actions and prosecutions for penalties for breach of any of the provisions of this chapter . . . may, when not otherwise therein provided, be prosecuted by the town or any officer thereof, or any person who prosecutes therefor, and shall be begun by information laid before the stipendiary magistrate of the town." Section 238, s.-s. 2, gives the stipendiary magistrate jurisdiction to enforce such penalties, and s.-s. 3 makes the Summary Convictions Act applicable. Section 242 states that all penalties collected shall form part of the revenue of the town. The plaintiff claimed the right to bring the action as a common informer under s. 23, s.-s. 45, of the Interpretation Act, R. S. N. S. c. 1. The defendant took out a summons to stay the action:—*Held*, that the action must be stayed. The penalty is not given to a person aggrieved. But for the provisions in the Interpretation Act, the Crown alone could sue thereunder: *Bradlaugh v. Clark*, 8 App. Cas. 354. But the Interpretation

Act does not allow the action to be maintained. Another mode of enforcing the penalty is provided in the Towns Incorporation Act, and if that does not apply, the penalty can be recovered under the Summary Convictions Act. *McDonald v. Robertson*, 22 Occ. N. 430.

See BANKRUPTCY AND INSOLVENCY, V. 4.—CONTRACT, V.—FINES—MUNICIPAL CORPORATIONS, VIII. 6—PLEADING, X. 2—RES JUDICATA.

PENSION.

See ATTACHMENT OF DEBTS, I. 1.

PEREMPTION.

1. Action united with another.]—A motion for peremption cannot be granted in a case which has been united with another for the purposes of proof, when the latter is still pending. *Cardinal v. Brodeur*, 4 Q. P. R. 171.

2. Certificate of state of cause—Contradicting.]—A certificate shewing the last step taken in the cause, signed by the prothonotary, is an authentic document, which can only be contradicted by inscription *en faux*. *Donnelly v. Rafter*, 5 Q. P. R. 62.

3. Interruption—Useful proceeding—Premature demand of peremption—Costs—New demand.]—A useful proceeding which may prevent or cover peremption must be a proceeding taken in order to promote the success on the merits of the claim of a party to the suspended cause.—**2.** A premature demand for peremption is not a useful proceeding to a party to the cause to advance his rights, and therefore it has not the effect of preventing or covering peremption.—**3.** A party who makes a demand for peremption, which is dismissed as premature, is not obliged to pay the costs incurred by his opponent upon such motion before making a new motion for peremption. *Clifford v. Beauport Brewery Co.*, 4 Q. P. R. 295, 324.

4. Interruption after time expired—Advocates nominated to other offices—Judicial notice—Defendant's rights.]—The Court, of its own motion, takes judicial notice of the nomination of advocates to offices incompatible with the exercise of their profession.—**2.** Differing from the prescription which gives to a debtor a right acquired from the time that the period has expired, the peremption of a suit does not exist until it is adjudged, and the plaintiff, up to the time of the service of the demand for per-

emption, even after the period set for peremption has expired, may interrupt such peremption by a useful proceeding.—**3.** A defendant who has only appeared may demand peremption of the suit.—**4.** One of several defendants may demand and obtain as to himself alone the peremption of the suit.—**5.** The fact that the defendant has ceased to be represented by his advocates, who have been called to duties incompatible with the exercise of their profession, does not prevent the peremption from running; it is for the plaintiff to signify his wish to proceed by giving notice to the defendant to authorize a new solicitor.—**6.** The fact that, after six years having elapsed since the last proceeding, the attorney of the plaintiffs demands the record from the deputy-clerk, who tells her that it is in the hands of the defendant, is not an incident which arrests the proceeding in such a way as to prevent the peremption from taking place where the defendant had the record temporarily and returned it to the clerk upon the first demand.—**7.** A defendant who has ceased to be represented by his advocates on account of their nomination to positions incompatible with the exercise of their profession, is not obliged to file an appearance, but he may himself sign the demand of peremption, and serve it on the plaintiff, for the demand of peremption is a chief proceeding in itself, having an existence separate and distinct from the action. *People's Bank of Halifax v. Labreque*, Q. R. 20 S. C. 263.

5. Motion—Firm of attorneys—Incapacity of member.]—A motion for peremption of suit, signed by the original attorneys of record, is not invalidated by the fact that one of the attorneys is not now a practising advocate of the Bar of the Province of Quebec. *Ross v. Elliott*, 5 Q. P. R. 47.

6. Retrospective legislation.]—Where the period of peremption commenced after the promulgation of the new Code of Civil Procedure of the Province of Quebec, the exceptions declared by the fourth paragraph of its first Article do not prevent the peremption of a suit pending at the time it came into force under the limitations provided by Art. 279 of the new Code. *Cooke v. Müller*, 3 Rev. Leg. 446, 4 Rev. Leg. 240, referred to. *Schwab v. Farnham*, 22 Occ. N. 4, 31 S. C. R. 471.

7. Suspension—Infant attaining majority—Notice.]—A change of condition by an infant attaining his majority, which has not been notified and which is not legally proved, cannot suspend peremption. *Elliott v. Fraser*, 5 Q. P. R. 5.

See RAILWAY, VI. 7.

PERJURY.

See CRIMINAL LAW, III. 14, 15.

PETITION OF RIGHT.

See WAY, III. 1.

PETROLEUM INSPECTION ACT.

See MUNICIPAL CORPORATIONS, III. 6.

PHYSICIAN.

See MEDICINE AND SURGERY.

PILOTAGE DUES.

See SHIP, III. 3.

PLANS.

See ARCHITECT, 1—MINES AND MINERALS, 2—VENDOR AND PURCHASER, 17—WAY, I. 2, 3, 4.

PLEADING.

I. BILL OF COMPLAINT.

II. COUNTERCLAIM.

III. DECLARATION.

IV. EXCEPTIONS.

V. INCIDENTAL DEMAND.

VI. INTERVENTION.

VII. PLEAS.

VIII. REJOINDER.

IX. REPLY.

X. STATEMENT OF CLAIM.

XI. STATEMENT OF DEFENCE.

See ACTION—ATTACHMENT OF DEBTS, II. 1—BANKS AND BANKING, 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 13—COMPANY, II. 2—COPYRIGHT, 2—COSTS, IV.—COURTS, IX. 2—DEFAMATION, I. 1, 3, II. 2, 3, 4, 6—DISCOVERY, I. 3, II. 2—EXECUTION, II. 5—FALSE ARREST, 1—HUSBAND AND WIFE, I. 2, VI. 6—INSURANCE, II. 4—INTOXICATING LIQUORS—JUDGMENT, II. 2—LIMITATION OF ACTIONS, II. 2—MECHANICS' LIENS, IV. 2—MUNICIPAL CORPORATIONS, VII. 3—PARLIAMENTARY ELECTIONS, VI. 2—PARTICULARS—PARTIES, I. 1—SOLICITOR, 6—VENDOR AND PURCHASER, 11.

I. BILL OF COMPLAINT.

Demurrer.—A bill is not demurrable unless it absolutely appears that on the facts disclosed in the bill being established at the hearing the bill must be dismissed; and where the case for relief contained in the bill depends upon facts admitting of variation in their proof from their statement in the bill, demurrer will not lie, though no relief, or relief in modified form, may be granted at the hearing. *Stewart v. Freeman*, 22 Occ. N. 399.

II. COUNTERCLAIM.

Claim on behalf of defendant and others—Release.—The plaintiff, having under her deceased husband's will a charge on land devised by him to the defendant, brought this action to enforce payment of arrears by a sale of the land and for construction of the will. The defendant delivered a counterclaim alleging that he was one of the next of kin of the testator; that the testator by his will directed the plaintiff, who was executrix, and his executors, to manage a farm for the maintenance of the children until the youngest should reach the age of twenty-four: that the plaintiff received all the profits of the farm for many years, and kept them; that the defendant, as one of the next of kin, was entitled to a share: that the executors of the testator had never had control of the land; and that any remedy against them was barred by statute; and he asked for an account and payment into Court of the amount found due by the plaintiff, to be divided amongst the parties entitled. He further alleged that the plaintiff had executed a release of a part of the charge for which she claimed:—*Held*, that the counterclaim was in effect for a declaration that the plaintiff was a trustee for the defendant and the other next of kin of certain profits of working the testator's farm alleged to have been received by her so many years ago that if she were not a trustee their rights would be barred. The counterclaim was an action brought on behalf of the defendant and the other *cestuis que trust*, who would be necessary parties at the outset but for Rule 203, and who must be made parties in the Master's office; and not being for himself alone, but for himself and others, did not come within Rule 248. *Pender v. Taddei*, [1898] 1 Q. B. 798, followed. The effect of the release was not a matter to be raised by counterclaim, but as a defence. *Hume v. Hume*, 22 Occ. N. 147.

See XI. 2.

See ACTION, 1—APPEAL, X. 8—SOLICITOR, 6—TRIAL, II. 6, 11.

III. DECLARATION.

1. Amendment—New cause of action.—A plaintiff cannot be allowed to amend his declaration for the purpose of alleging a cause of action which did not accrue until after the institution of the action. *Ward v. Merchants Bank of Halifax*, 4 Q. P. R. 407.

2. Claim for relief—Inconsistency—Real action.—A real action in which only personal conclusions are made will be dismissed upon demurrer. *Drouin v. Laurier*, 4 Q. P. R. 343.

3. Interest on promissory note—Particularity.—An allegation in a declaration that the plaintiff claims a certain sum for interest due upon a promissory note, not otherwise described, is sufficient. *Bromwell v. O'Farrell*, 5 Q. P. R. 85.

4. Matters arising after action—Discharge of saisie-revendication—Final judgment.—The plaintiff cannot, by amending his declaration, allege facts arising subsequent to the commencement of the action.—2. In this case the plaintiff could not, in support of his action for damages for the issue without probable cause of a writ of *saisie-revendication*, allege the discharge of this writ by the Court, if the judgment discharging the writ had only become final after the institution of the action for damages and service of process therein. *Kaine v. Matthews*, 4 Q. P. R. 226.

5. Questions of fact and law—Distress for rent—Seizure—Exemption.—Although a party cannot raise questions of fact in an inscription in law, he may, nevertheless, set up grounds of law in an exception or reply based upon facts set up.—2. In an action for rent and damages the plaintiff is not bound to allege in the declaration that the defendant has removed the greater part of his effects and that the effects seized were in fact seizable; this ground, which ought to be contested in law, should be set up by a pleading claiming exemption from seizure. *Beaubien v. Lynch*, 4 Q. P. R. 183.

6. Setting out previous proceedings—Amendment.—The plaintiff in an action en *reddition de compte* will not be allowed to set out at length in his declaration the proceedings in a previous action between himself and the defendant, and such allegations will be struck out upon demurrer. However, as it may be of importance to him to allege such facts in a general way, to justify himself for not having begun his

present action earlier, the Court will, *proprio motu*, permit him to amend his declaration by alleging the previous suit and the judgment therein. *Cheval v. Senecal*, 4 Q. P. R. 241.

See JUDGMENT, I. 3—MEDICINE AND SURGERY, 1.

IV. EXCEPTIONS.

1. Declinatory exception—Deposit.—When a defendant by a declinatory exception demands simply the dismissal of the action, without complying with the terms of Art. 170, C. P., that is to say, without depositing the amount claimed, or the equivalent if it is something else than money which is claimed, his declinatory exception will be considered irregular and will be struck out with costs. *Garneau v. Gaudet*, 4 Q. P. R. 370.

2. Dilatory exception—Beneficiary heir—Action against—Time for inventory.—The beneficiary heir cannot plead a dilatory exception to an action instituted against him in his quality of beneficiary heir, based upon the ground that the term for making inventory and deliberating has not expired. *Standard Drain Pipe Co. v. Robertson*, 5 Q. P. R. 70.

3. Dilatory exception—Hypothecary action—Security—Defence au fonds.—A third party who has taken an immovable in payment of his hypothecary debt and who wishes to demand security, under Art. 2073, C. C., from a subsequent creditor who is suing him as hypothecary, should do so by defence on the merits and not by way of dilatory exception. *Bastien v. Desjardins*, Q. R. 11 K. B. 428.

See VII. 14, 17, IX. 3, 4.

See, also, ACCOUNT, 2—APPEAL, IX. 4—CONCILIATION—COSTS, VII. 4, 12—EXECUTORS AND ADMINISTRATORS, 8—HUSBAND AND WIFE, III. 3—PARTIES, II. 2, 3—PROHIBITION, 2—TRIAL, II. 1—WAY, II. 4—WRIT OF SUMMONS, I. 2, II. 11.

V. INCIDENTAL DEMAND.

1. Leave to present in forma pauperis—Terms.—The authorization to begin an action for a certain sum, *in forma pauperis*, does not extend to a supplementary incidental demand, filed at a later stage in the same cause.—2.

In such case the persons making the incidental demand will be ordered to affix to his demand the necessary stamps, and to obtain permission to proceed *in forma pauperis* upon his incidental demand; upon his default to conform to such order within the time fixed by the judgment, his incidental demand will be dismissed upon exception to the form. *Vitale v. Canadian Pacific R. W. Co.*, 4 Q. P. R. 335.

2. Supplementary answer—Rights arising since action.—An incidental demand does not lie where it claims a right which did not exist at the time of the institution of the action, especially if such right does not constitute an answer to the contentions of the adverse party, but may at the most serve as a basis for a new action on the part of the one who invokes it.—4. The supplementary answer to an action or to a plea, of which Art. 199, C. C. P., speaks, must constitute a good defence to such action or a good reply to such plea, and it must not be founded upon facts subsequent to the institution of the action which do not contribute a reply to the defendant's plea, but which might, at most, support a fresh action by the plaintiff against the defendant. *Dupuis v. Dupuis*, Q. R. 19 S. C. 500.

See ACCOUNT, 3.

VI. INTERVENTION.

Preliminary plea—Time for service of motion to strike out—Defences—Coverture—Absence of deposit.—A motion to strike out certain allegations of an intervention, as being in the nature of a preliminary plea, is itself a preliminary plea, and should be served within three days of the filing of the intervention.—2. An intervener may plead that the plaintiff, being *commune en biens*, is not entitled to the damages which she claims. *Quære*, whether an intervener may set up the want of the deposit required by Art. 793, C. P., when the defendant has not set it up. *Prevost v. Village of Ahunsteic*, 5 Q. P. R. 131.

See VII. 17, IX. 4.

See, also, ATTACHMENT OF DEBTS, I. 2—SET-OFF, 2.

VII. PLEAS.

1. Amendment after judgment—Amount of damages—Petition—Clerical error—Procedure.—The advocate of the

defendant had omitted to deny allegation 4 of the plaintiff, which was, that the damages caused by the defendant amounted to \$200. The Judge, supposing that this allegation had not been denied, awarded the plaintiff the \$200 as damages. Then the defendant's advocate for the first time perceived his omission and made an affidavit to that effect, adding that it was by error and inadvertence that he did not deny such allegation. He then presented, pursuant to notice, a petition to the Court:—*Held*, that the nine cases mentioned in Art. 1177, C. P., in which a petition lies, are not limitative.—2. That the defendant should not suffer from such an inadvertence, which is equivalent to a clerical error and affords ground for a petition.—3. That the petition should be received by the Court, in order that the petitioner might proceed upon it according to the ordinary rules of procedure. *Roy v. Davis*, Q. R. 21 S. C. 184.

2. Amendment—Must be before judgment.—A Judge is invested with a discretionary power, but he ought to exercise it within the limits of justice, and he cannot permit an amendment at the same time that he renders his final judgment; the amendment of any pleading should always be made before judgment: Arts. 516, 518, 520, and 522, C. P.; *HALL, J.*, dissenting. *Guillot v. Garant*, Q. R. 21 S. C. 262.

3. Conversion — Denial—Dates.—The statement of claim alleged that on or about a certain date the plaintiff was the owner of certain goods and chattels described, and that, on or about the date mentioned, the defendant converted them to his own use:—*Held*, that pleas which denied that the plaintiff was the owner of the goods and chattels described, without adding the words "or any of them," and which confined the denial of the plaintiff's ownership of the goods and chattels, and the defendant's conversion of them, to the dates mentioned in the statement of claim, were bad and must be set aside. *McDonald v. Lowe*, 34 N. S. Reps. 531.

4. Default of plea—Non-production of documents—*Ex parte inscription—Striking out—Costs.*—When the actual documents invoked in support of an action are not produced at the time the action is instituted, a defendant can be foreclosed from pleading only under an order of a Judge, even if such documents are produced after the return as to the service of process, and notice duly given of their production.—2. So long as a foreclosure has not been obtained as above, the plaintiff cannot inscribe for

examination and hearing *ex parte*.—3. A motion of the defendant to strike out such an inscription and for permission to plead will be granted with costs against the plaintiff. *St. Aubin v. Lamarche*, 4 Q. P. R. 434.

5. Default of plea—Non-production of documents—*Ex parte* inscription—Striking out—Costs.—Until the actual proofs invoked in support of an action have been produced by the plaintiff, and notice given to the opposite party, the plaintiff cannot foreclose the defendant from pleading and inscribing for judgment *ex parte*. A motion of the defendant to set aside the foreclosure and the inscription will be granted with costs. *Lafontaine v. Choquette*, 4 Q. P. R. 437.

6. Default of plea—Noting pleadings closed—Neglect of plaintiff to produce documents—Irregular inscription—Leave to plead—Costs.—When the documents relied upon in support of the claim in an action are not produced with the return of the writ of summons, the defendant will not be foreclosed from pleading upon default of pleading within the usual time, except by the order of a Judge, even if such documents are afterwards produced.—2. The inscription *ex parte* of the action for examination and hearing under these circumstances is irregular and illegal, and will be struck out of the record.—3. The defendants having declared that they had a good defence and having produced affidavits to that effect with their motion, were allowed to file their defence, the whole with costs against the plaintiff. *St. Aubin v. Lamarche*, 5 Q. P. R. 41.

7. Inconsistent pleas—Denial—Set-off—Election.—A defendant who pleads set-off, however irregularly, is not thereby taken to have admitted the allegations of the declaration.—2. In such case the defendant cannot be placed in the position of having to elect between his denial of the allegations of the declaration and his plea of set-off.—3. The denial of certain allegations of the declaration only does not constitute a general denial, and, consequently, in accordance with the terms of paragraph 2 of Art. 202, C. P., does not exclude every other defence. *Palliser v. Duff*, 5 Q. P. R. 7.

8. Inconsistent pleas—Denial—Special defence.—A special denial of each one of the allegations of the declaration is not a general denial within the meaning of Art. 202, C. P., and does not exclude another special defence. *Beaulac v. Lupien*, Q. R. 21 S. C. 216.

9. Inconsistent pleas—General denial—Exclusion of confession and avoid-

ance.—Where the defendant pleads a denial that the accident alleged by the plaintiff took place, and that if it did take place it occurred by reason of the fault of the person injured, the defendant cannot have the benefit of both pleas: Art. 202, C. C. P. *McLeod v. Montreal Street R. W. Co.*, Q. R. 20 S. C. 8.

10. Inconsistent pleas—General denial—Set-off—Payment.—There is no incompatibility between a plea by which a defendant denies having ever owed the plaintiff the sum demanded, and one by which he pleads set-off of the said sum if the Court is of the opinion that he owes it, or payment; a defendant may plead these three defences by the same pleading. *Lemoine v. LaCaisse Générale*, 5 Q. P. R. 104.

11. Inconsistent pleas—General denial—Special allegations.—Where the defendant, in his plea, begins by denying generally all the allegations of the plaintiff's declaration, he is excluded, under Art. 202 of the Code of Procedure, from proceeding to special allegations upon the facts of the case. *Chapleau v. Town of St. Louis*, Q. R. 20 S. C. 238.

12. Inconsistent pleas—General and special—Election.—When a defendant pleads a general denial in the two first allegations of his plea, and then pleads specially in the remaining paragraphs, on motion of the plaintiff to reject the special allegations of the plea, defendant will be permitted to make option within four days, and if he fails to do so, the special allegations will be struck from the plea. *Routherford v. Macy*, 4 Q. P. R. 326.

13. Inconsistent pleas—Ignorance—Set-off.—A plea in which the defendant commences by saying that he is ignorant of the facts alleged by the plaintiff does not hinder the defendant from pleading set-off at the same time, because the defendant must have a certain latitude in defending himself, and also because everything which prevents the useless multiplication of actions ought to be favoured. *Godbout v. McPeak*, Q. R. 20 S. C. 294, 4 Q. P. R. 190.

14. Inconsistent pleas—Method of attacking—Dilatory exception—Slander—Irrelevant plea.—A dilatory exception, and not an inscription in law, is the proper remedy to compel a party to optate between different paragraphs of his pleading.—2. In a plea to an action in damages for slander, the words, "*et qu'il dit à la prière de son curé*," are irrelevant and in no wise constitute a legal justification in respect of an action of this nature, and, on an inscription in

law, will be struck from the plea with costs. *Bourget v. Lefebvre*, 4 Q. P. R. 325.

15. Inconsistent pleas—Purchase of litigious rights—Deposit of price.]—A defendant, being sued by the assignee of litigious rights, may, in a defence, in which he contests the demand on the merits, also invoke the benefit of Art. 1582, C. C., and deposit the amount which he alleges to be the price of the sale of such rights to the plaintiff, inasmuch as, by such deposit, he offers to take the plaintiff's bargain, and thereby, in effect, ceases to control it. *Crevier v. Evans*, Q. R. 20 S. C. 179.

16. Inconsistent pleas—Striking out—Election.]—Allegations which contradict the preceding allegations of the same plea, containing admissions, will be struck out upon motion of the plaintiff, without allowing the defendant the option of having the preceding allegations struck out. *Destroismaisons v. Dominion Ice Co.*, 4 Q. P. R. 368.

17. Intervention — Time—Service—Exception to form.]—The time for pleading is computed from the day of the service of the intervention, and an exception to the form of the intervention must be filed within three days after the service thereof. *Beauchamp v. Beauchamp*, 4 Q. P. R. 367.

18. Irrelevant plea—Negligence—Fire—Building.]—In an action for damages against an electric light company for loss by fire by reason of defective wiring and excess of electric current, an allegation in the plea which states that the building was refused as a risk by the insurance companies, will be struck from the plea, on an inscription in law, as being irrelevant to the issue and in no wise supporting the conclusions of the plea. *West v. Lachine Rapids Hydraulic and Land Co.*, 4 Q. P. R. 314.

See VI.

See, also, JUDGMENT, I. 2.

VIII. REJOINDER.

Admission or denial—Ignorance—Amendment.]—Each party must reply specially and categorically to the allegations of the opposite party, either by admitting or denying them, or by declaring that he is ignorant of them. But, on a motion to reject an allegation of the replication to the answer to plea, the defendant will be permitted to produce a new allegation. *Vipond v. Kildurn*, 4 Q. P. R. 316.

IX. REPLY.

1. Falsity of quittance pleaded—Inscription en faux.]—To a plea of payment based upon a notarial quittance the plaintiff may reply that the quittance is false, and this although the falsity cannot be proved without an inscription en faux. *McCarthy v. Lavolette*, 5 Q. P. R. 87.

2. Grounds of original claim—Motion—Demurrer.]—The plaintiff in his reply to the plea of the defendant must confine himself to setting up grounds going to shew that the plea is not sustainable, and must not allege grounds tending to augment or reinforce his claim.—2. The fact that allegations necessary to sustain the claim are made in the reply, instead of being in the declaration, must be invoked by motion and not by demurrer.—3. Nevertheless, a demurrer may in certain cases be treated as a motion. *Fos v. Morris*, 4 Q. P. R. 345.

3. Insufficiency of particulars—Exception to form—Demurrer.]—An inscription in law does not lie against a reply to a plea in which the details are insufficient. An *exception à la forme* is the proper recourse.—2. An allegation of a reply, insufficient in itself to displace the plea, but which tends to prove the truth of the plaintiff's action, will not be dismissed on inscription in law. *Vipond v. Kildurn*, 4 Q. P. R. 376.

4. Intervention — Supplementing petition—Exception to form.]—A reply to an intervention containing conclusions which should have been made in the petition for a writ of mandamus, is irregular.—2. Such a reply should be attacked by exception to the form, and not by demurrer. *Grier v. David*, 4 Q. P. R. 373.

5. Joinder — Denial—Fresh allegations.]—A party who, by his reply to a plea, joins issue upon one allegation of such plea, and denies all the others one by one, has the right in such reply also to make new allegations. *Provincie Bank of Canada v. Lacerte*, 4 Q. P. R. 292.

6. New facts — Departure.]—The plaintiff in his reply to the defence must confine himself to what is strictly in reply; he may not add to his original claim nor allege facts which should have been set up in the declaration or which might serve as a basis for another action. *Jobin v. Rainville*, 5 Q. P. R. 83.

7. Settlement of action.]—A settlement of the cause entered into between

the parties thereto cannot be set up by way of a supplementary reply. A motion for leave to file such a reply will be dismissed with costs. *Gilbert v. Tremblay*, 4 Q. P. R. 438.

X. STATEMENT OF CLAIM.

1. Amendment—Increasing amount claimed — Mistake — Money paid into Court—Acceptance by mistake.]—The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant. *Emery v. Webster*, 9 Ex. 242, followed. *Chevalier v. Ross*, 22 Occ. N. 96, 3 O. L. R. 219.

2. Amendment — Writ of summons —Two causes of action—Election to pursue one—Penalty—Discovery—Dominion Elections Act, 1900.]—The writ of summons (issued 30th January, 1901) was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered 27th March, 1901), denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—*Held*, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery. *Regina v. Fox*, 18 P. R. 343, distinguished. The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave

to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused. Sections 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed. *Rose v. Croden*, 22 Occ. N. 135, 3 O. L. R. 383.

3. Malpractice — “Efficient” — Amendment.]—The word “efficient,” as applied to a medical practitioner in a statement of claim for damages for his unskilful treatment of the plaintiff, was held to be ambiguous, inasmuch as it might be taken to mean that the practitioner was merely competent, or that he was not only competent, but would in fact skilfully treat, and the statement of claim was therefore held to be embarrassing. Judge’s order dismissing application to amend by setting up objection in law, varied, and plaintiff given leave to apply to amend, and in default defendant given leave to apply to strike out portion of claim as embarrassing. *Schüller v. Canada North-West Coal and Lumber Syndicate*, 1 Terr. L. R. 421.

4. Mortgage action — Alternative provisos—Embarrassing or unnecessary —Striking out.]—Allegations in a statement of claim unnecessary inasmuch as they merely anticipate a possible defence, are not necessarily embarrassing. The plaintiffs in paragraph 2 of their statement of claim alleged that the defendant by deed dated 13th November, 1888, in consideration of £1,003 lent him by one A. M., mortgaged his reversionary interest in his father’s estate, and that in the said deed it was provided that if the defendant should within ten years after the date of the mortgage become entitled to the said reversionary interest by the death of the tenant for life, and should within 30 days after obtaining possession of the same pay the said A. M. \$2,000, with compound interest at 10 per cent. per annum, then the mortgage should be void. In paragraph 3 it was alleged that it was further provided by the mortgage that if the defendant should at the expiration of 10 years from the date of the mortgage repay to A. M. the said sum of £1,003, with interest compounded yearly at 10 per cent., then the mortgage should be void. In paragraph 4 it was alleged that the defendant covenanted in the said deed to pay the mortgage money and interest and observe the provisos therein contained. In paragraph 5 it was alleged that A. M. had duly assigned the mortgage to the plaintiffs; in paragraph 6, that the defendant did not within 10 years become entitled to the property mortgaged by the death of the life tenant; and in paragraph 7, that the defendant had not paid any sum whatever on

the mortgage. The plaintiff claimed £1,008 and interest at 10 per cent. compounded yearly:—*Held*, on an application to strike out the whole statement of claim, or at any rate either paragraph 2 or paragraph 3 as embarrassing, that the pleading was not embarrassing, and should stand; that so far as any of the allegations might be unnecessary they merely anticipated a possible defence, and were not on that account embarrassing. *Vancouver Land and Securities Co. v. McKinnell*, 5 Terr. L. R. 27.

See MECHANICS' LIENS, III. 1 — VENUE, 2.

XI. STATEMENT OF DEFENCE.

1. Denial of plaintiffs' title—Defendants' title — Laches.] — The statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence:—*Held*, that the defendants were bound to set forth their title in their statement of defence. Decision in 6 Brit. Col. L. R. 306 reversed. *Esquimalt and Nanaimo R. W. Co. v. New Vancouver Coal Co.*, 9 Brit. Col. L. R. 162.

2. Repetition of counterclaim—Tender and payment into Court—Judgment — Costs.] — In an action for the price of goods sold and delivered, the defendant counterclaimed for damages for breach of contract, and, for grounds of defence, repeating the clauses of the counterclaim, pleaded (1) payment into Court of an amount alleged to be sufficient to satisfy the plaintiffs' claim, and (2) tender before action brought of the amount paid into Court. The plaintiffs replied, (1) denying that the amount paid in was sufficient to satisfy their claim, and (2) objecting to the paragraphs of the defence, so far as they incorporated the paragraphs of the counterclaim, as bad in law, on the ground that the counterclaim was no defence to the action, and could not be so pleaded:—*Held*, that the defence was no answer to the action, and the plaintiffs were entitled to recover the amount of their claim. The tender was bad, being pleaded to the whole cause of action, and being insufficient to cover it. The trial Judge having found in favour of the defendant on the counterclaim, and his finding being supported by the evidence, it should not be disturbed. Judgment for the plaintiffs upon their claim with costs, and for the defendant on his counterclaim with costs—the two amounts to be

set off *pro tanto*. No costs of appeal. *Bauld v. Fraser*, 34 N. S. Reps. 178.

PLEDGE.

1. Deposit with tender—Forfeiture—Breach of contract—Municipal corporation—Right of action—Damages—Set-off—Restitution.] — C., on behalf of a firm of contractors of which he was a member, deposited a sum of money with the city of Montreal as a guarantee of the good faith of the firm in tendering to supply gas. After the construction of some works and laying of pipes in the public streets, the firm transferred their rights and privileges under the contract to another company, and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit, which was refused by the city council, which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by the firm of their contract. After the transfer, however, the companies supplying the gas in the city reduced the rates to a price below that mentioned in the tender, so far as the city supply was affected, although the rates charged to citizens were higher than the contract price:—*Held*, that the deposit so made was a pledge subject to the provisions of tit. 16 of the Civil Code of Lower Canada, and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor, and the debtor was entitled to its restitution, although the obligation for which the security had been given had not been executed. As the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city; and the breach of contract in respect to supplying the public did not give the corporation any right of action for damages to individuals. Prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set off against the claim for the return of the deposit. *Finnie v. City of Montreal*, 22 Occ. N. 356, 32 S. C. R. 335.

2. Revendication by true owner. — One who is in possession of a watch pledged to him for advances which he has made to the possessor of such watch, and who does not come within any of the cases mentioned in Arts. 1488 and 1489, C. C., cannot oppose the revendication of such watch by the true owner. *Marcotte v. Fortin*, Q. R. 21 S. C. 102.

POLICE MAGISTRATE.

See CRIMINAL LAW, III. 5.

POSTMASTER.

See CROWN, IV. 3.

POST OFFICE.

See MALICIOUS PROCEDURE, 1 — TRESPASS, 2—WRIT OF SUMMONS, II. 6.

POWER OF ATTORNEY.

See COMPANY, V. 19—COSTS, VII. 12, 13 — PRINCIPAL AND AGENT, 4—SUCCESSION, 3 — WRIT OF SUMMONS, II. 2.

POWER OF SALE.

See MORTGAGE, 11, 12.

PRACTICE.

See ACCOUNT—ACTION—ADMINISTRATOR AD LITEM — ALIMENTARY ALLOWANCES — AMENDMENT — APPEAL — APPEARANCE — ARBITRATION AND AWARD, 4, 5 — ARREST — ATTACHMENT OF DEBTS—BAILIFF—BANKRUPTCY AND INSOLVENCY, I. 2, 3, 4, 5, 8, 11, II., III., IV. 7—CERTIORARI—CHOSE IN ACTION, ASSIGNMENT OF, 7—COMPANY, II. 2, V.—CONCILIATION—CONSERVATORY ATTACHMENT — COPYRIGHT, 2—COSTS — COURTS — CRIMINAL LAW, I. 1, IV., V., VI.—DEFAMATION, I. 1, 3, 4, 5, II. 1, 2, 3, 4, 7—DISCOVERY—DISTRIBUTION — EVIDENCE — EXECUTION—EXECUTORS AND ADMINISTRATORS, 8, 10—EXHIBITS—EXTRADITION, 2—HABEAS CORPUS—HUSBAND AND WIFE—INFANT, 4, 5—INTERDICT — INTERVENTION—JUDGMENT—JUDGMENT DEBTOR — JUSTICE OF THE PEACE, 1—LIS PENDENS—LUNATIC, 2—MANDAMUS—MECHANICS' LIENS, III. 1, 5, IV. 4—MINES AND MINERALS, 2, 3, 4, 5, 14—MONEY IN COURT—MORTGAGE, 4, 10—MUNICIPAL CORPORATIONS, I. 1, III. 1, 2, 9, V. 4, X. 1, 6, 9—MUNICIPAL ELECTIONS, 3, 4, 5, 6, 7, 8, 9, 10, 12—NEW TRIAL — NOTARY, 2—OPPOSITION—PARLIAMENTARY ELECTIONS, III., V.—PARTICULARS—PARTIES—

PARTITION, 2—PARTNERSHIP, 1, 2, 3 — PATENT FOR INVENTION, 1—PAUPER — PENALTIES AND PENAL ACTIONS, 1—PEREMPTION — PLEADING — PRINCIPAL AND AGENT, 4—PRINCIPAL AND SURETY, 6—PROHIBITION — RAILWAY, IX. — REAL PROPERTY ACT, MANITOBA — REFEREES AND REFERENCES — REVIVOR — SEQUESTRATION — SERVICE OF PAPERS — SHIP, III. 2—SOLICITOR—SPECIFIC PERFORMANCE, 1—STATUTES, 1, 3—STAY OF PROCEEDINGS — SUBPOENA — SUMMARY PROCEDURE—SUPREME COURT OF CANADA—TRIAL—TRUSTS AND TRUSTEES, 4, 8, 9 — VENUE—WITNESSES — WRIT OF REVENDICATION—WRIT OF SUMMONS.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, IV. — FRAUDULENT CONVEYANCE—PARTITION, 1.

PREFERENCE SHARES.

See COMPANY, IV. 3, 4, 8.

PREScription.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 11 — CROWN, I. 3—EASEMENT, 1.

PRINCIPAL AND AGENT.

1. *Agent's commission—Exchange of lands — Double commission.*] — An agent acting for and representing the vendor of real estate is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of a property belonging to the latter, which was accepted by and transferred to the vendor in part payment of the price. *Browne v. Gault*, Q. R. 19 S. C. 523.

2. *Execution against agent—Seizure of goods intrusted for sale—Fraud—Sheriff.*] — On the evidence it was found that an arrangement, between merchants and an insolvent person, against whom there were unsatisfied judgments—whereby the former supplied the latter, as their agent, with goods to be exchanged with Indians for furs, which were to be delivered for sale to the merchants, who were to retain from the proceeds of the sale of the furs the invoice price of the goods.

plus 10 per cent. thereon and 2½ per cent. of the selling price of the furs, the agent getting all further profit as his remuneration—was established as against the defence that it was an arrangement in fraud of the agent's creditors; and it was *held*, that such an arrangement was legal, and that therefore the merchants were entitled to damages against the deputy sheriff, who had seized some furs comprised in the agreement under an execution against the agent, *MacDonnell v. Robertson*, 1 Terr. L. R. 438.

3. Insurance agent—Agreement to give notices—Breach—Damages.]—An insurance agent who, in consideration of his being given the right of effecting a firm's insurance in companies represented by him, undertakes to attend to the insurances, to see that the policies are duly made out, and to give the necessary notices required to be given from time to time, but, upon a further insurance being subsequently effected, omits to give any notice thereof, whereby the firm is damaged, is liable to the firm in damages for his default. *Baxter v. Jones*, 22 Occ. N. 372, 4 O. L. R. 541.

4. Power of attorney—Authorization of action—Delay in production.]—1. The attorney appointed by a non-resident plaintiff must be a resident of the Province of Quebec, and not a person only temporarily present therein.—2. It must appear that the plaintiff, or his attorney, has authorized the institution of the suit.—3. An action will not be dismissed on account of plaintiff's failure to produce a proper power of attorney, if he has shewn willingness to comply with the order of the Court, but an additional delay will be granted to him. *Glasgow and Montreal Asbestos Co. v. Canadian Asbestos Co.*, 5 Q. P. R. 20.

5. Sale of goods by agent—Violation of authority—Notice to purchaser—Bona fides—Factors Act.]—D. was intrusted by the plaintiffs with carriages for sale, under an agreement in writing by which he was authorized to sell only to responsible persons, and by which it was provided: "Notes of the purchaser only will be taken for goods in this contract; old machines, horses, or trades of any kind are entirely at the risk of agents, and they will be held strictly responsible for all such notes." D. disposed of two of the carriages to the defendant, taking for one goods to be supplied out of the defendant's shop for the use of his (D.'s) family, and for the other cash and a waggon of the defendant's. In an action by the plaintiffs for a return of the carriages or the value, the jury found that the defendant had no notice or knowledge that D. had no au-

thority to dispose of the carriages in the way he did; that the defendant did not know or believe that D. was merely an agent, but believed he was the owner, and had no reason to suppose he was an agent. The Court directed a new trial:—*Held, inter alia*, that the provisions of the Factors Act were inapplicable. *Macnutt v. Shaffner*, 34 N. S. Repts. 402.

6. Sale of land—Authority of agent—Price of sale—Specific performance.]—M., owner of an undivided three-quarter interest in land at Sault Ste. Marie, telegraphed to her solicitor at that place: "Sell, if possible; writing particulars; will give you good commission." C. agreed to purchase it for \$600, and the solicitor telegraphed M.: "Will you sell three-quarter interest, sixty-seven acre parcel, Korah, for six hundred, hard cash, balance year? Wire stating commission." M. replied: "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor: "Telegram received. I will accept \$600; \$300 cash and \$300 with interest at one year. This payment I may say must be a marked cheque at par for \$300, minus your commission, \$15, and balance \$300 secured." The property was incumbered to the extent of over \$300, and the solicitor deducted this amount from the purchase money, and sent M. the balance, which she refused to accept. He also took a conveyance to himself from the former owner, paying off the mortgage held by the latter. In an action against M. for specific performance of the contract to sell:—*Held*, affirming the judgment of the Court of Appeal (6th November, 1901), that the only authority the solicitor had from M. was to sell her interest for \$585 net, and the attempted sale for a less sum was of no effect. *Held*, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clergy v. Murray*, 22 Occ. N. 354, 32 S. C. R. 450.

7. Sale of land—Commission—Payment promised by purchaser to agent, but never received—Right of deduction by principal.]—The defendants had a quantity of lands for sale, and transacted their business through agents, one of whom, F., agreed with the plaintiff to give him a commission if he would find a purchaser for a certain quantity of land. It was not disputed that F. had authority to do this, and to bind the company to pay a commission. The plaintiff took a proposed purchaser to the company's office, and F. negotiated a sale of the land to such person. The proposed purchaser was not prepared to bind himself at once, but desired time to effect financial arrange-

ments, and, at the same time, to have the opportunity kept open for him. The plaintiff represented to him that such an arrangement would involve some loss of the time allowed him for finding a purchaser, as a result of which he might not find one, and suggested that he should be remunerated therefor; he asked \$200 as a consideration, to which the purchaser agreed, and the plaintiff then agreed to give and did give the time. The plaintiff stated that he reported to F. the agreement to give this time, and F. assented to it, but he did not inform F. that it was made for consideration to himself. The consideration was never paid:—*Held*, that the plaintiff was entitled to judgment for the full commission of \$1,656 and costs. The agreement relied on as a defence was wholly collateral. A stipulation for or receipt of such a collateral advantage, even in fraud of the employer, is not necessarily of itself a bar to recovery for the services: *Boston Deep Sea Fishing Co. v. Ansell*, 39 Ch. D. 339. No deduction could be made from the commission on account of the promise to pay the \$200. *Davidson v. Manitoba and North-West Land Corporation*, 22 Occ. N. 305.

8. Undisclosed principal—Action by agent—Addition of principal as party—Building contract—Guarantee—Breach—Representation as to ownership—Damages.—A husband who was superintending for his wife the erection of a building on her property, after correspondence with contractors in which the building was referred to by them as "your building" and by him as "my building," took a guarantee from them that "your roof . . . will remain water-proof." In the correspondence and contract the expression "your town" was also used. The wife was not mentioned. The roof proved defective. In an action by the husband and wife for damages:—*Held*, that the expressions employed did not necessarily imply that the husband was the owner of the roof or the building, but were used as conveniently descriptive of the matter under discussion, and that it was competent for the wife to shew that he was her agent, and to recover damages for its breach:—*Held*, also, that the husband, not being either a party or privy to the contract, could not recover for its breach. *Lucas v. De la Cour*, 1 M. & S. 249, and *Humble v. Hunter*, 12 Q. B. 310, distinguished. *Abbott v. Atlantic Refining Co.*, 22 Occ. N. 411, 4 O. L. R. 701.

See ACCOUNT, 1—ASSESSMENT AND TAXES, V. 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, 5, 6, 8, 15—CANADA TEMPERANCE ACT 4—COMPANY,

III.—CONTRACT, I. 2, III. 3—COSTS, VII. 13—DISCOVERY, I. 5—INSURANCE, II. 6, V. 2—LIMITATION OF ACTIONS, II. 7—LIQUOR LICENSE ACT, II. 2—MORTGAGE, 9, 11, 12—MUNICIPAL CORPORATIONS, IX. 1—PARLIAMENTARY ELECTIONS, I., III. 1—PARTIES, I. 2—PRINCIPAL AND SURETY, 1, 5—SALE OF GOODS, II. 3—SOLICITOR, 3—VENDOR AND PURCHASER, 3—WRIT OF SUMMONS, II. 2.

PRINCIPAL AND SURETY.

1. Agent for sale of goods—Surety for—Conditions of bond—Giving time—Discharge of surety—Default—Notice.—The plaintiffs entered into an agreement in writing with O. for the sale of carriages, by the terms of which O. was required to obtain from the purchaser of each vehicle, on delivery, his note or cash in settlement, and, in all cases where notes were taken, to guarantee the payment of and indorse the notes. The defendant became surety on a bond given by O. to the plaintiffs that O. would perform the conditions of the agreement, and would pay and satisfy all notes and other securities which remained outstanding on its termination. Some of the notes taken by O. having become overdue during the course of the business, the plaintiffs drew on O. for the amounts; O. accepted but failed to pay:—*Held*, that, as the defendant was not to be liable until after the termination of the agreement, and as the time given had elapsed before his liability accrued, the giving of the time did not prevent the plaintiffs from looking to him as surety. If, in any case, time was given, so as clearly to discharge the surety, the amount as to which he was so discharged was severable from the rest of the transaction, and the discharge would only operate *pro tanto*. As, by the terms of the bond, the taking and renewal of notes was contemplated, the surety was not prejudiced by the drawing of drafts as a means of collecting the notes. As to the taking by O. of notes of a different form from that stipulated, it must be shewn that the plaintiffs, by their conduct, prevented the thing from being done, or connived at its omission, or enabled O. to do what he ought not to do, and but for such conduct on the part of the plaintiff, the omission or commission would not have happened; and the mere reception by the plaintiffs of notes taken by O. in another form than that required was not within this principle. A letter from the plaintiffs' manager to the defendant notifying him that notes indorsed by O. were not being paid when due, and that the amount due the company by O. was large and

growing, was sufficient to have put the defendant upon his guard. *McLaughlin Carriage Co. v. Oland*, 34 N. S. Repts. 195.

2. Discharge of surety—Extending time for payment—Promissory notes—Renewal—Accommodation indorser—Collateral security—Notice.—T. B. L. and A. C. S. being indebted on several promissory notes to the plaintiffs, who demanded security, the defendant H. A. S., the wife of A. C. S., at his request and without knowing of the purpose for which he proposed to use it, indorsed a blank form of note, which was afterwards filled out as a note made by T. B. L., payable to H. A. S., and indorsed by her and A. C. S., and was then given to the plaintiffs. This note was afterwards renewed, H. A. S. again indorsing a blank form, A. C. S. being made payee and indorsing ahead of H. A. S. While the plaintiffs held this latter note, they kept the several notes as security for which they held it renewed, the renewals extending beyond the date of the maturity of the note held as security. In an action on the latter note, H. A. S. pleaded that she was discharged, by reason of the plaintiffs having given time by a binding agreement to T. B. L. and A. C. S., the principal debtors, without her consent:—*Held*, MCGUIRE, J., dissenting, that the renewal of the notes constituted such an agreement and that the rule invoked—that giving time to a principal debtor by a binding agreement without the surety's consent, discharges the surety—was applicable; and that H. A. S. was entitled to a dismissal of the action. *Seem*, that the fact that T. B. L. falsely stated to the plaintiffs, when they demanded security, that H. A. S. was indebted to him, and asked them if they would accept her indorsement, to which they consented, could not bind H. A. S., as T. B. L. had no authority from her to make the statement.—2. That if notice to the plaintiffs that H. A. S. was merely an accommodation indorser were necessary, the mere fact that she was second indorser on the first note, and first indorser on the second note, would be sufficient evidence of such notice.—3. The case was distinguishable from that of a person who, being asked for collateral security, brings paper founded on an actual indebtedness to himself. In that case, giving him time would in no case relieve the parties to the paper given as security. *Le Jeune v. Sparrow*, 1 Terr. L. R. 384.

3. Discharge of surety—Giving time—Prejudice.—A surety, relying on the giving of time by the creditor to the principal debtor as a defence to an action for the debt, must now, under s.-s.

14 of s. 39 of the King's Bench Act, 58 & 59 V. c. 6, shew that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time. The defendant, claiming that he was entitled to be treated as a surety, proved that, relying on the representations of his co-debtor that the debt had been paid and satisfied, he had made a settlement of their partnership affairs and paid a large sum of money to him and given him a formal release, besides handing over to him a large quantity of goods:—*Held*, that this was not evidence to shew that the defendant had been prejudiced by the plaintiffs having given time to the co-debtor, as what the defendant had done was done on the strength of the statements made to him by his co-debtor, and not in reliance on anything the plaintiffs had done or omitted to do. *Blackwood v. Percival*, 22 Occ. N. 268, 331, 14 Man. L. R. 216.

4. Discharge of surety—Wrongful acts of principal—Failure to give notice of—Findings of jury—Setting aside.—The defendants F. W. B. and J. A. K. were sureties on a bond given to the plaintiff association by the defendant B. for the faithful discharge of his duties as an agent of the association. Among such duties were the remittance, at least once in each month, of all moneys or securities collected for or on account of the association, such remittances to be made by bank draft, marked cheque, post office order, or by express. The evidence shewed that B. remitted moneys by his own personal cheques, instead of as directed, and on a number of occasions asked to have such cheques held over for a few days in order to enable him to provide funds to meet them:—*Held*, that these, and other acts of disobedience, under the terms of the agreement, would have justified the dismissal of B.; that it was the duty of the association to have notified the sureties of his derelictions of duty; and that, having failed to do so, and having continued him in their employ with knowledge that he was violating his instructions, they could not recover against the sureties for the default of B. *Held*, that findings of the jury, negating knowledge on the part of the association of the irregularities of B. being against the weight of evidence, must be set aside with costs, and a new trial ordered. *Confederation Life Association v. Brown*, 35 N. S. Repts. 94.

5. Guaranty—Honesty of agent—Notice of default—Proofs of loss—Proposal—Conditions—Expenses of prosecution.—An action upon a guaranty policy to reimburse the plaintiff for pecuniary loss by the fraud or dishonesty

of an agent of the plaintiffs which should amount to embezzlement or larceny. One condition was that on the discovery of fraud or dishonesty the employers should immediately notify the defendants:—*Held*, on the evidence, that the defendants got immediate notice of the fact of loss, and waived exact compliance with the condition as to notice.—2. That, within a reasonable time after discovery of default, the plaintiffs furnished their claim, with such particulars as proved the cause, nature, and extent of the loss.—3. Whether the incorporation of the proposal in the policy (as was provided for) should be construed as constituting a warranty by the plaintiffs that they would adhere to the course indicated by the answers to questions submitted to the plaintiffs, the surety should be considered as discharged by a departure from that course materially contributing to the loss insured against. The plaintiffs did not furnish reasonable verification of the statements made in the written proposal or the compliance therewith. Therefore, the plaintiffs were not entitled to recover for pecuniary loss; but, having prosecuted their agent, as required by a condition of the policy, they were entitled to be paid the expenses so incurred. *Globe Savings and Loan Co. v. Employers' Liability Assurance Corporation*, 21 Occ. N. 512, 13 Man. L. R. 531.

6. Judicial surety — Appeal—Extent of liability.—A judicial security guaranteeing that a party will effectively prosecute an appeal which he has taken to the Court of King's Bench from a judgment of the Superior Court, and will pay the award and all cost and damages which shall be awarded in case the judgment of the Superior Court shall be affirmed, is at an end the moment the judgment of the Superior Court has been reversed by the Court of King's Bench; and the fact that, upon an appeal of the opposite party, the Supreme Court of Canada has subsequently set aside the judgment of the Queen's Bench and restored that of the Superior Court, does not revive the obligation of the surety. *Guertin v. Molleur*, 21 Occ. N. 445, Q. R. 19 S. C. 571.

PRIVILEGE.

See CRIMINAL LAW, II. 3—DEFAMATION, I. 2, II. 4, 5, 7—DISCOVERY, III. 2, 3, 4, 6.

PRIVY COUNCIL

See APPEAL, VI.

PROBATE.

See WILL, III. 2.

PRODUCTION OF DOCUMENTS.

See DISCOVERY, III.

PROHIBITION.

1. Division Court—Order for committal—Previous order for payment—Affidavit.—The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before 61 V. c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—*Held*, that the Court had jurisdiction under s.-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal without a previous order for payment based upon such an examination and default thereunder. Where it appears that the judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under s.-s. 5 of s. 247. *Semble*, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition would not be granted. *In re Hawkins v. Batzold*, 21 Occ. N. 597, 22 Occ. N. 14, 2 O. L. R. 704.

2. Enforcement of judgment—Declinatory exception—Deposit of desistment.—When a defendant pleads by way of declinatory exception and simply demands the dismissal of the action, he must deposit with his exception the amount claimed if it is a sum of money, or a desistment regularly signed and authenticated if the suit, as in this case, is for a writ of prohibition against a judgment. *Garneau v. Gaudet*, Q. R. 21 S. C. 437.

3. Justice of the peace—Qualification—De facto justice—Grounds for application—Taking before justice.—The grounds alleged upon application for a writ of prohibition, based upon excess of jurisdiction in the inferior Court, must have been raised before that Court.—2. A

justice of the peace who exercises his functions in good faith is competent to act *de facto*, although he has not complied with all the formalities relating to his qualification. *Hogle v. Rockwell*, Q. R. 20 S. C. 309.

See COURTS, IV., V. 2, 4 — PARLIAMENTARY ELECTIONS, V. 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW.

PUBLIC INSTRUCTION ACT.

See COSTS, V. 1.

PUBLIC MORALS.

See CRIMINAL LAW, III. 6.

PUBLIC POLICY.

See WILL, V.

PUBLIC SCHOOLS.

See SCHOOLS, I.

PUBLIC SLANDER.

See CRIMINAL LAW, III. 16.

PUBLIC WORKS.

See CROWN, III. — MUNICIPAL CORPORATIONS, X. 9.

PURCHASER.

See VENDOR AND PURCHASER.

QUO WARRANTO.

See APPEAL, V. 3 — MUNICIPAL ELECTIONS.

RAILWAY.

- I. BONDS.
- II. CARRIAGE OF GOODS.
- III. CROSSINGS.
- IV. EXPROPRIATION OF LAND.
- V. FENCES.
- VI. INJURY TO PERSONS.
- VII. INJURY TO PROPERTY.
- VIII. PASSENGERS.
- IX. SERVICE OF PROCESS.
- X. OTHER CASES.

See ARBITRATION AND AWARD, 4—ASSESSMENT AND TAXES, III. 1, 5, VII. 4—DISCOVERY, I. 4, III. 6—EXECUTION, IV. 6—INJUNCTION, 1—LANDLORD AND TENANT, I. 2 — MASTER AND SERVANT, II. 11-16 — MUNICIPAL CORPORATIONS, X. 2—PARTICULARS, 3—STREET RAILWAYS—WAY, III. 4.

I. BONDS.

Mortgage—Foreclosure — Receivers. —A railway company issued bonds secured by mortgage of the company's property. In a suit by the mortgagee for foreclosure, receivers and managers of the property and business of the company were appointed, with liberty to operate the railway and to maintain the road and property in good and sufficient repair, either by credit or by cash out of the earnings of the road. Repairs being necessary, and the earnings being insufficient, the receivers were empowered to issue receivers' certificates, made a first charge on the company's property, and on the money to be realized from the sale of the company's property, in priority to the bondholders. *Sage v. Shore Line R. W. Co.*, 22 Oct. N. 38, 2 N. B. Eq. Reps. 321.

II. CARRIAGE OF GOODS.

Claim for non-delivery—Place of delivery—Consignees—Refusal to accept—Termination of transitus—Position of carriers—Bailees—Damages. —Action for breach of contract to carry and deliver five car loads of scrap iron which the plaintiffs had sold to a rolling mill company. The contract of sale provided for delivery at the purchasers' mill at Sunnyside, Toronto, and in the shipping bills the property was addressed to the plaintiffs or the mill company, Sunnyside. The mill was situated near the defendants' main track. There was no station there, but there was a siding leading off the track into the mill. The station nearest

to the mill was Swansea, and the cars containing the scrap iron arrived there, and notice of their arrival was sent to the plaintiffs and to the mill company. The station agent had previously been instructed by the plaintiffs to deliver all cars addressed to the plaintiffs at Swansea or Sunnyside, to the mill company. The mill company, after inspection of the goods at Swansea, refused to accept them. The cars were not sent on to Sunnyside, but remained at Swansea, and, being in the way of the traffic, had been, before the refusal to accept, run up a side line and left in a cutting. This was early in February, and, while the cars were in the cutting, the wheels became covered with clay by reason of a thaw, and then were frozen fast, and the cars were not got out until the end of April. The trial Judge found in favour of the plaintiffs, and assessed the damages at \$1,000:—*Held*, OSLER, J.A., dissenting, that the mill company were the consignees of the scrap iron, and had a right to put an end to the transitus at Swansea by refusing to receive it, and there was no necessity for the defendants to tender the goods at Sunnyside. *Held*, however, MACLENNAN, J.A., dissenting, that the defendants were liable to the plaintiffs in damages for not keeping the cars, after the refusal, in such a position that the plaintiffs could unload them and remove their property. *Frankel v. Grand Trunk R. W. Co.*, 22 Occ. N. 176.

III. CROSSINGS.

1. Farm crossing—Compensation in lieu of.]—When the value of a piece of land enclosed by a line of railway is so small as to be disproportionate to the cost of a farm crossing; and is of no utility to the farm from which it is so separated, the Court has the power and the discretion to grant to the proprietor a pecuniary compensation in lieu of a crossing. *Martin v. Maine Central R. W. Co.*, Q. R. 19 S. C. 561.

2. Highway crossing—Compensation to municipality—Private ownership—"At or near" city—Power to take through county.]—The plaintiffs were authorized by 47 V. c. 84 (D.) to lay out, construct, and finish a railway, from a point on the Grand Trunk Railway in the parish of Vaudreuil, in the Province of Quebec, to a point at or near the city of Ottawa, in the Province of Ontario, passing through the counties of Vaudreuil, Prescott, and Russell, and also to connect their railway with any other railway having a terminus at or near the city of Ottawa:—*Held*, that "at or near the city of Ottawa" should be read as "in or near the

city of Ottawa," and the plaintiffs were authorized to carry their line to a point in the city and to connect it with the line of the Canadian Pacific Railway Company in the city.—2. That the plaintiffs had power, by implication, to take their line into the county of Carleton.—3. That the portion of the Richmond road (or Wellington street) within the limits of the city of Ottawa which the plaintiffs' line crossed, was not the private property of the defendants.—4. That the plaintiffs, having taken the proper proceedings under the Railway Act of Canada, and being duly authorized to cross that highway, were not bound to make compensation to the defendants for crossing it. Judgment of BORD, C., 2 O. L. R. 336, affirmed. *Montreal and Ottawa R. W. Co. v. City of Ottawa*, 22 Occ. N. 224, 4 O. L. R. 56.

See VI.

IV. EXPROPRIATION OF LAND.

1. Arbitration and award—Appeal from award—Forum—Petition—Modifying award.]—In an expropriation matter, pursuant to the Railway Act of Canada, a single Judge of the Superior Court has jurisdiction to hear an appeal from the award, in spite of the fact that such appeal is taken not by way of an action but by way of a simple petition, and that even in the absence of special rules of practice to that effect, seeing that such rules of practice are not necessary to give him jurisdiction. Thus it follows that such appeal may be taken without an action and by means of a petition.—2. The appeal in such case comes on as a case of original jurisdiction upon all questions of law or of fact and upon the evidence taken before the arbitrators.—3. The Judge cannot modify the award except when it is clear that it is the result of a gross error upon the part of the arbitrators in law or in appreciation of the facts. *Nelson v. Quebec Bridge Co.*, Q. R. 21 S. C. 329.

2. Award of compensation—Appeal—Damages—New evidence—Discretion—Costs—Injurious affection.]—On an appeal from an award of arbitrators, under the Railway Act of Canada, so far as the appreciation of damages is concerned no new evidence can be adduced, and no objection based upon the admission of illegal evidence, or the exclusion of legal evidence, can be considered, unless the illegalities complained of appear of record.—2. The award cannot be explained or varied by extrinsic evidence of the intention of the party making it. Error of law or fact on the part of the arbitrators, or excess of jurisdiction, must appear on the

face of the award, or from the evidence or documents of record.—3. The Court will not interfere with the discretion of the arbitrators as to the amount of the award, unless it be as a check upon possible fraud, accidental error, or gross incompetence.—4. The award of costs by the arbitrators does not invalidate the award, where it simply follows the rule established by the Railway Act itself, for in such case the party has no grievance.—5. The award of a block sum is valid, the law not requiring the arbitrators to distinguish between the amount awarded for value of land taken, and that awarded for damages to other lands. *Pontiac Pacific Junction R. W. Co. v. Sisters of Charity at Ottawa*, Q. R. 20 S. C. 367.

3. Compensation—Set-off—Increased value.—If, by reason of advantages, however problematical or uncertain, the value of a parcel of land (part of which has been expropriated for the construction of a railway) has been increased by reason of the railway, the arbitrators may take into consideration such increase in value as a set-off to the damages resulting from the expropriation of a part. *Chateaugay and Northern R. W. Co. v. Trenholme*, Q. R. 11 K. B. 45.

V. FENCES.

1. Culvert — Negligence — Cattle on track.—A railway company are under no obligation to erect and maintain a fence on each side of a culvert across a watercourse. Where cattle went through a culvert into a field and thence to the highway and straying on to the railway track were killed, the company were held, not liable to their owner; *TASCHEREAU*, J., dissenting. Judgment of Court of Appeal, 1 O. L. R. 127, 21 Occ. N. 110, affirming the decision at the trial, 31 O. R. 672, 20 Occ. N. 278, reversed. *James v. Grand Trunk R. W. Co.*, 22 Occ. N. 2, 31 S. C. R. 420.

2. Duty to maintain — Opening in fence—Cattle.—As the law obliges railway companies to maintain fences on both sides of the track in a good condition, it follows that they are responsible for damage caused to an animal in consequence of their having in one of such fences left an opening of such a size as to permit of an animal getting through, and that even where such opening is at a spot where there is a ditch used for the purpose of draining the lands on each side of the track. *Huot v. Quebec R. W., Light, and Power Co.*, Q. R. 21 S. C. 427.

VI. INJURY TO PERSONS.

1. Crossing—Absence of protection—Negligence.—Where the railway traffic at the crossing of a highway was very great, and there was no gate, guardian, lamp, or other protection for the public, although the railway company had been notified of the dangerous condition of the crossing, the company was held responsible, under s. 288 of the Railway Act of Canada, for a collision of an engine with a vehicle crossing the track, which caused the death of the plaintiff's son, and which occurred without any fault on his part. *Girouard v. Canadian Pacific R. W. Co.*, Q. R. 19 S. C. 529.

2. Crossing—Negligence — Contributory negligence — Excessive speed.—Where all the usual signals and warnings were given by the railway company, and the proximate and determining cause of the accident of which the plaintiff complained was the imprudence and recklessness of her deceased husband and his brother, the plaintiff was held not entitled to recover. It was unnecessary to decide whether s. 259 of the Railway Act prohibiting a rate of speed, through a thickly peopled portion of a city, exceeding six miles an hour, applies to highway crossings, because, in the opinion of the Court of Review, the accident would have happened even if the rate of speed had been less than six miles an hour. *Tanguay v. Grand Trunk R. W. Co.*, Q. R. 20 S. C. 90.

3. Passenger — Negligence — Opportunity to alight.—A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops, and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that, when the passenger jumps off, the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence. *Keith v. Ottawa and New York R. W. Co.*, 22 Occ. N. 114, 3 O. L. R. 265.

4. Passenger in sleeping berth—Negligence.—The plaintiff was a passenger by a night train on the defendants' railway. After retiring to the berth assigned to her—an upper one—she endeavoured to make some change in the manner in which the berth was made up. She next tried to reach the other end of the berth from the inside, but, just as she leaned to the inside of the car, there was a

violent lurch and jerk which threw her into the middle of the passage way, on her back, inflicting severe injuries:—*Held*, that there was evidence of negligence to go to the jury; and a nonsuit was set aside, and a new trial directed. *Smith v. Canadian Pacific R. W. Co.*, 34 N. S. Reps. 22. Reversed and nonsuit restored: *S. C.*, 21 Occ. N. 427, 31 S. C. R. 367.

5. Precautions—Negligence.—From the moment that a railway company, by itself or its servants, has taken all possible and reasonable precautions, it is thereby relieved from all responsibility which might rest upon it in consequence of accidents happening under such circumstances as are mentioned in the report of this case. *Villeneuve v. Canadian Pacific R. W. Co.*, Q. R. 21 S. C. 422.

6. Servant—Limitation of actions.—“*By reason of the railway*”—*Amendment—Vented right.*—The provisions of the Railway Act, 1888, s. 287 (as to limitations of actions for damages or injury sustained by reason of the railway) apply to actions founded on the commission of acts, not to those founded on the omission of acts, which it was the company's duty to perform. *Kelly v. Ottawa R. W. Co.*, 3 A. R. 616, *McWillie v. North Shore R. W. Co.*, 17 S. C. R. 571, and *Zimmer v. Grand Trunk R. W. Co.*, 19 A. R. 693, considered. If, in an action against a railway company, an amendment of the statement of claim is asked for, it should not be allowed if s. 287 applies, and the amendment sets up a new cause of action. *Findlay v. Canadian Pacific R. W. Co.*, 21 Occ. N. 461, 5 Terr. L. R. 143.

7. Stipulation for immunity.—*Action by widow of person killed—Verdict of jury—Motion for judgment—Peremption.*—The provisions of Art. 494, C. C. P., are not on pain of nullity, and a failure to move for judgment in accordance with the verdict of a special jury until after the lapse of the time prescribed by this article, does not deprive the party of the right to a judgment, unless the action itself has been declared preempted for failure to proceed therein during two years.—2. A railway company cannot stipulate for immunity from damages caused by neglect and failure on its part to comply with a duty imposed on it by law for the safety of passengers and employees, e.g., equipment of the cars with efficient brakes, such stipulation being void under s. 243 of the Railway Act of Canada, 51 V. c. 29. *Per* PAGNUELO and CURRAN, JJ., that the action of the widow under Art. 1056, C. C., is not a representative one, but independent of that of the injured person; and, therefore, even if an agreement stipu-

lating for immunity from responsibility for damages caused by negligence were valid as regards the injured person, it would not bind his widow or other persons having rights under the Article above mentioned. *Müller v. Grand Trunk R. W. Co.*, Q. R. 21 S. C. 346.

VII. INJURY TO PROPERTY.

1. Fire—Sparks from engine—Evidence—Verdict.—See *Jackson v. Grand Trunk R. W. Co.*, 22 Occ. N. 12, 249, 2 O. L. R. 689, 32 S. C. R. 245.

2. Fire—Sparks from engine—Negligence—Statutory powers—Costs.—A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or, in other words, by the proper execution of the power conferred by the statute. *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430, 438, and *Hammersmith R. W. Co. v. Brand*, L. R. 4 H. L. 215, followed. The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, Art. 356, nor the Dominion Railway Act, ss. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers. So *held*, where the respondent had suffered damage caused by sparks escaping from one of the appellants' locomotive engines while employed in the ordinary use of its railway. Judgment in 20 Occ. N. 441, Q. R. 9 Q. B. 551, reversed. Appeal allowed, appellants to pay respondent's costs in accordance with the terms on which special leave to appeal was granted. *Canadian Pacific R. W. Co. v. Roy*, [1902] A. C. 220.

VIII. PASSENGERS.

Return ticket—Condition of identification—Neglect to comply with—Removal from train.—The plaintiff purchased an excursion ticket from Indian Head to Toronto and return, one of the conditions (which he signed) being that he should identify himself to an agent in Toronto before he set out on his return journey and obtain the agent's signature. On production of his ticket at Toronto, he secured his sleeping berth, had his luggage checked, was admitted to the train, and started on his return journey, but neglected to identify himself, and was

put off the train by the conductor after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages:—*Held*, that he could not recover. *Taylor v. Grand Trunk R. W. Co.*, 22 Occ. N. 361, 4 O. L. R. 357.

See VI.

IX. SERVICE OF PROCESS.

Place of service—Special Act—General Rules—Conflict.]—The defendants having, pursuant to s. 9 of sched. A. of "An Act respecting the Canadian Pacific Railway," 44 V. c. 1 (D.), appointed their office at Regina as the place where service of process might be made on them in respect of any cause of action arising within the North-West Territories, a service of process effected on a station agent of the defendants, pursuant to Rule 14 (3) of the Judicature Ordinance, was *held*, bad, because s. 9 was special legislation, and Rule 14 (3), *quoad* the defendants, was overridden by it. *Lamont v. Canadian Pacific R. W. Co.*, 21 Occ. N. 262, 5 Terr. L. R. 60.

X. OTHER CASES.

1. Land subsidy—Mines and minerals—Reservation in grant—Dominion Lands Act.]—By 53 V. c. 4, the suppliant railway company, among others, were authorized to receive a grant of Dominion lands of 6,400 acres for each mile of their railway, when constructed. Under the provisions of s. 2, the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees respectively of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of the Dominion Lands Act, which provided that all patents for lands in Manitoba and the North-West Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with full power to work the same. Orders in council authorizing the issue of patents for the lands in question to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in those orders to the regulations respecting the reservation of mines and minerals

of 17th September, 1889:—*Held*, that the regulation reserving mines and minerals applied to all grants of lands made under the provisions of 53 V. c. 54, and that the omission of reference to such regulations in the orders in council authorizing patents to be issued did not alter the position of the suppliant railway company under the law. *Semble*, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands. *Calgary and Edmonton R. W. Co. v. The King*, 22 Occ. N. 426.

2. Provincial incorporation—Legislative authority of Dominion—Branch lines—Warrant of possession.]—The railway company was incorporated in 1881, by the Provincial Legislature, one of the powers given it being to build branch lines, and on 13th June, 1898, by an Act of the Dominion Parliament its objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Dominion Parliament and to the provisions of the Railway Act:—*Held*, on an application for a warrant of possession, that the company's power to acquire land for branch lines after 13th June, 1898, must be exercised in accordance with the Dominion Railway Act. *In re Columbia and Western R. W. Co.*, 8 Brit. Col. L. R. 415.

3. Statutory obligation—Enforcement by municipality—Prohibition against removal of "workshops"—Breach—Damages.]—Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O. L. R. 491, 21 Occ. N. 226, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in s. 37 of 45 V. c. 67 (O.), providing that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town:—*Held*, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 V. c. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Company before the amalgamation or by the defendants since amalgamation; and

the plaintiffs should be allowed to amend and to have judgment for such damages as they were entitled to:—*Held*, also, that "the workshops now existing" meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops. *Town of Whitby v. Grand Trunk R. W. Co.*, 22 Occ. N. 173, 3 O. L. R. 536.

RAPE.

See CRIMINAL LAW, III. 17.

RATIFICATION.

See COMPANY, I. 2, III.—FRAUD—INFANT, I. 2 — JUDGMENT, IV. 4 — MUNICIPAL CORPORATIONS, X. 6 — TRIAL, IV. 2.

REAL PROPERTY ACT, MANITOBA.

1. Caveator out of jurisdiction—Security for costs. — In May, 1893, the caveator executed a mortgage to the caveatee, which was registered in the proper land titles office. The caveatee afterwards applied for a certificate of title under the Real Property Act of the land mortgaged and other lands, and the caveator was served with notice of the application. He thereupon filed a caveat and a petition asking that his mortgage might be declared to be a subsisting security on the land mortgaged for the sum secured, interest, and costs. The caveator was resident out of the jurisdiction, and *prima facie* the caveatee was entitled to security for costs; he took out a *praecipe* order, and the caveator applied to set it aside:—*Held*, that it must be assumed that the district registrar had good reason for causing the notice of the application to be served on the caveator, and it could not be said that it was the caveatee who had compelled the caveator to come into Court to litigate. The caveator was the actor in the proceedings in Court, and, as he resided out of the jurisdiction, he was subject to the general rule as to security for costs: *Apollinaris Co. v. Wilson*, 31 Ch. D. 632. *In re Lang and Smith*, 22 Occ. N. 212.

2. Petition of caveator—Objections to tax sale—Statement of—Amendment.] —The caveator filed a petition under schedule L, Rule 1, of the Real Property Act, 1 & 2 Edw. VII. c. 43, to prevent the

caveatees, tax sale purchasers, from getting a certificate of title applied for by them; and, after setting out the nature of her title by grant from the Crown, alleged that the caveatees claimed title to the same land under certain alleged sales of same for taxes, and that the said tax sales and all proceedings connected therewith under which the caveatees claimed title were illegal, null, and void, and that the caveatees were not at the time of their application the owners of the land:—*Held*, without deciding whether it is necessary in such a petition to go further than to set forth fully the title of the caveator, that, as the petitioner had set out the claim of the caveatees and the nature of it, it should also have shewn in what particulars the title of the caveatees was defective or invalid, and what facts were relied on to have the tax sales declared void, and *prima facie* to displace the adverse claims of the tax purchasers. An order giving leave to the petitioner, within a limited time, and upon payment of the costs, to amend the petition as she might be advised and to bring it on for further hearing before the Referee, and that in default the petition should be dismissed with costs, was affirmed with costs. *Iredale v. McIntyre*, 22 Occ. N. 330, 14 Man. L. R. 199.

REAL PROPERTY ACT, N.W.T.

Transfer—Executions—Priorities.] — While the Territories Real Property Act was in force, a title stood as follows: 5th July, 1887, certificate of ownership to Canadian Pacific Railway Company; 12th July, 1887, transfer, J. S. to L. H. R., filed and entered in day book: 31st March, 1888, transfer, Canadian Pacific Railway Company to J. S. registered, and certificate of ownership issued to J. S.; 5th February, 1891, 14th April, 1891, 13th January, 1893, executions, King and others v. J. S., lodged by sheriff. On 19th January, 1893, L. H. R. applied to the registrar to issue her a certificate of ownership upon her transfer of 12th July, 1887. The registrar was ready to do so, but proposed to mark the certificate as being subject to the several above mentioned executions. On a reference by the registrar under s. 114:—*Held*, that in view of ss. 34 and 65, the registrar had no right, where the land had been brought under the Act, to receive a transfer for registration executed by a person other than the certificated owner, and that therefore the filing of the transfer, prior to the lodgment of the executions, was ineffective, and that therefore the registrar's view was correct. *In re Rivers*, 13 Occ. N. 118, 1 Terr. L. R. 464.

See SOLICITOR, 6.

REAL REPRESENTATIVE.

See DEVOLUTION OF ESTATES ACT.

RECEIVER.

See COMPANY, V. 9 — LIQUOR LICENSE ACT, III. 2—RAILWAY, II.—VENDOR AND PURCHASER, 5.

RECEIVER-GENERAL.

See CROWN, IV. 1.

RECOGNIZANCE.

See CRIMINAL LAW, III. 14, V. 3.

RECORD OF ACQUITTAL.

See MALICIOUS PROCEDURE, 5.

RECORDER'S COURT.

See APPEAL, VIII. 2—CERTIORARI, 2.

RECOUNT.

See PARLIAMENTARY ELECTIONS, IV.

RECTIFICATION.

See ACCOUNT, 1—CONTRACT, IV. 1.

REDEMPTION.

See ASSESSMENT AND TAXES, VI. 2—MORTGAGE, 11—TRUSTS AND TRUSTEES, 9.

REFEREES AND REFERENCES.

1. Accounts — Warrant to proceed—Dismissal of bill.—It is not a ground for dismissal of the bill in a suit that the plaintiff fails to take out a warrant to proceed in a reference in the suit to take accounts between the parties. On the failure of the plaintiff to take out the warrant the defendant is entitled to do so. *Gallagher v. City of Moncton*, 22 Occ. N. 169, 2 N. B. Eq. Reps. 360.

2. Drainage referee—Official referee—Practice.—An official referee is only official in the sense of being an officer of the Court. The drainage referee, being an officer of the Court, with all the necessary powers, is an official referee for the purposes and within the meaning of the Arbitration Act, and an action for damages in connection with the construction of drains may be referred to him. *McClure v. Township of Brooke, Bryce v. Township of Brooke*, 22 Occ. N. 255, 4 O. L. R. 97. (And see *S. C.*, 22 Occ. N. 254, 4 O. L. R. 102.)

3. Yukon law—Order of reference—Jurisdiction of Court to make.—The power to make an order of reference in an action is a matter of jurisdiction and not merely a question of "procedure and practice," within the meaning of s. 3 of the Judicature Ordinance, N. W. T., and therefore the Yukon Court had no power under this section to make an order of reference. *Williams v. Faulkner, Raymond v. Faulkner*, 22 Occ. N. 40, 8 Brit. Col. L. R. 197.

See MORTGAGE, 4 — PARTITION, 3 — STAY OF PROCEEDINGS, 1—TRUSTS AND TRUSTEES, 4.

REGISTRY LAWS.

1. Gift of land — Prior sale — Non-registration—Notice—Gift burdened with debts.—A universal donee of property charged with the debts of the donor cannot evict the prior purchaser for value of one of the immovables comprised in the gift, in spite of the fact that the sale has not been registered, while the gift has, for the donee has succeeded to the obligation of warranty of his donor.—**2. Article 2085, C. C.**, is not applicable to a donee of an immovable in such a manner that his knowledge of an unregistered right belonging to a third person cannot be set up against him, but it is otherwise when the burdens upon the gift equal the value of the thing given, for in that case the pretended gift is in fact a sale.—**3. The mere knowledge of a purchaser for value that the immovable which he has acquired was previously sold by his grantor to a third person, whose title has not been registered, does not constitute a fraud sufficient to affect the validity of the duly registered title of such purchaser.** *MATHIEU, J., diss. Barbe v. Barbe*, Q. R. 20 S. C. 119.

2. Registrar's certificate — Substitution, how registered.—Erroneous conclusions which the registrar, in his certificate, expresses with regard to registered documents, cannot prejudice those whose

rights are regularly registered.—2. A substitution is sufficiently registered by the registration of the wills which have created it, of the declaration of the death of the testators, and of the immovables transmitted by the wills. *Pelletier v. Michaud*, Q. R. 20 S. C. 413.

3. Renewal of registration—Act of sale—Irregularities—Hypothec.—A notice of renewal of the registration of an act of sale, which does not give the date of the original registration, which gives the wrong number of such registration as well as of the register and the volume, and which confuses the names of the vendor and the purchaser, giving that of the vendor for the purchaser and vice versa, is informal and irregular and is not sufficient to preserve the hypothec created by the sale. *Giard v. Lachance*, Q. R. 21 S. C. 103.

See EASEMENT, 2—EXECUTION, II. 4—HUSBAND AND WIFE, IV. 1, 3, 4—LAND TITLES ACT, N. W. T.—LIS PENDENS—MECHANICS' LIENS—PARTIES, IV. 2—REAL PROPERTY ACT, MANITOBA—REAL PROPERTY ACT, N. W. T.—SUCCESSION, 3—VENDOR AND PURCHASER, 10, 14.

REJOINDER.

See PLEADING, VIII.

RELEASE.

See ARREST, IV. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3—PLEADING, II.—VENDOR AND PURCHASER, 13.

RELIEF OVER.

See PARTIES, III. 2—WAY, II. 6.

REPLEVIN.

Distress for rent under an illegal lease—*In pari delicto*, &c.]—Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim, *In pari delicto potior est conditio possidentis*, is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument: *per TUCK, C.J., BARKER and McLEOD, JJ.* (HANINGTON and VANWART, JJ., dissenting). *Per HANINGTON, J.*—An illegal contract is valid as between the parties

thereto for all purposes that can be accomplished without the aid of a Court; therefore that person must fail who is first compelled to set a Court in motion in order to obtain such aid. *Per VAN WART, J.*—The Court ought not to assist any of the parties to an illegal transaction; therefore, in the above case, the parties should be restored to the position in which the writ of replevin found them; that is, an order should be made to restore the goods replevied to him out of whose possession they were taken by the process of the Court. *Gallagher v. McQueen*, 35 N. B. Reps. 198.

REPLY.

See PLEADING, IX.

RES JUDICATA.

Action for penalty—Previous action—Distinct contraventions of same by-law—*Ultra vires*—Judgment *ultra petita*.]—The plaintiffs had sued the defendant for a penalty of \$20 for having sold goods in November, 1900, without having taken out a license, contrary to a by-law of the municipality. This action was dismissed upon the ground that the by-law in question was *ultra vires*. Afterwards, the defendant having in the month of April following sold goods by retail in the municipality, the plaintiffs sued him again claiming a like penalty of \$20, under the same by-law:—*Held*, that the new action of the plaintiffs should be dismissed upon the plea of *res judicata* in spite of the fact that distinct contraventions of the by-law were in question in the two suits.—2. That the fact that the first judgment had gone beyond the pleadings in declaring the by-law void without any pleading to that effect, could not deprive this first judgment, which had not been attacked by petition of the authority of *res judicata*. *Village of Dorval v. Legault*, Q. R. 21 S. C. 197.

See COMPANY, IV. 9—EXECUTION, III. 3—HUSBAND AND WIFE, I. 2—MINES AND MINERALS, 1—MUNICIPAL CORPORATIONS, I. 2, V. 4.

RESCISSION.

See CONTRACT, VII.—SALE OF GOODS, II. 3, IV.—VENDOR AND PURCHASER, 2, 3, 5, 10, 11.

RESULTING TRUST.

See TRUSTS AND TRUSTEES, 3.

RETAINER.

See HUSBAND AND WIFE, VII. 1.

REVENDEICATION.

See WRIT OF REVENDEICATION.

REVENUE.

1. Customs duties — Foreign built ship — Statutes.] — A foreign built ship owned in Canada, which has been given a certificate from a British consul, and comes into Canada for the purpose of being registered as a Canadian ship, is liable to duty under s. 4 of the Customs Tariff Act, 1897. A taxing Act is not to be construed differently from any other. Judgment of the Exchequer Court, 7 Ex. C. R. 239, 22 Occ. N. 85, reversed. *Ree v. Algoma Central R. W. Co.*, 22 Occ. N. 249, 32 S. C. R. 277.

2. Customs duties — Importation of steel rails — Return of duties paid under protest — Interest — Quebec law.] — The suppliants had imported, at different times during the years 1892 and 1893, large quantities of steel rails into the port of Montreal, to be used by them as contractors for the construction of the Montreal Street Railway. The customs authorities contended that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of \$53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council in *Toronto R. W. Co. v. The Queen*, [1896] A. C. 551, and some time in the year 1897, the customs authorities returned the amount of the duties to the suppliants. The suppliants claimed interest on the money during the time it was in the hands of the Crown, and they filed their petition of right therefor:—*Held*, that, as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec.—2. That on the question at issue the law of the Province of Quebec was the same as the laws of the other Provinces of the Dominion.—3. That, as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed, it could not be made liable by the institution or commencement of action. *Laine v. The Queen*, 5 Ex. C. R. 128, and *Henderson*

v. The Queen, 6 Ex. C. R. 47, distinguished. *Ross v. The King*, 22 Occ. N. 86, 7 Ex. C. R. 287.

3. Inland Revenue Act—Amending Act—Possession of still—Conviction — "At any place."] — The defendant was convicted before the stipendiary magistrate in and for the city of Halifax, for that he did, in the said city of Halifax, on the 11th February, 1892, without having a license under the Inland Revenue Act then in force, unlawfully have in his possession, in the city of Halifax, aforesaid, a still, suitable for the manufacture of spirits, without having given notice thereof as required by the Act, the said still not being registered under s. 125. The prosecution and conviction were under the Inland Revenue Act, R. S. C. c. 34, s. 159 (e), as amended by the Acts of 1898 c. 27. The Act as it originally stood read, "Everyone who, without having a license under this Act, then in force, has in his possession any such still, &c., in any place or premises owned by him, or under his control, without having given notice thereof, &c., is guilty, &c."—As amended it read, "...has in his possession, at any place, any such still," &c.:—*Held*, sustaining the conviction, that the amendment gave the Act a much wider operation, and did not confine it to cases where the place was owned or controlled by the accused; and was intended to cover all cases of actual or constructive possession, no matter where the still was, the words "at any place" in the amended Act being equivalent to "anywhere;" that the gist of the offence was not having possession of the still in any particular place, but having possession of it anywhere, or at all; that the intention of the Act was to prevent any unauthorized person from having possession of a still, &c., in any place, at any time, or in any capacity. *Ree v. Brennan*, 35 N. S. Repts. 106.

4. Succession duty—Bank deposit by foreigner.] — Under the British Columbia Succession Duty Act, 1899, c. 68, s. 4, succession duty is payable upon money deposited in a bank in British Columbia, belonging to a person domiciled in a foreign country at the time of his death. *In re McDonald Estate, In re Succession Duty Act*, 9 Brit. Col. L. R. 174.

5. Succession duty—Charge against legacies—Payment of legacy within year —Set-off.] — The direction in a will to executors to pay debts and funeral and testamentary expenses does not operate so as to make the payment of the succession duty, payable under R. S. O. 1897 c. 24, a charge on the residue and to exonerate the legacies from payment thereof. *Manning v. Robinson*, 29 O. R. 483, followed.

The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies, and charges, from paying a legacy forthwith, and so to allow the amount thereof to be set off against a mortgage due by a legatee to the estate. *In re Holland*, 22 Occ. N. 164, 3 O. L. R. 406.

6. Succession duty—Debentures exempt from taxation.]—A part of the estate of L., deceased, consisted of debentures of the Province of Nova Scotia, issued under the provisions of a statute of the Province, which exempted them from taxation for provincial, local, or municipal purposes:—*Held*, that, notwithstanding the exemption from taxation, under the provisions of the Act, the debentures in question must be included in the valuation of the estate for the purpose of determining the amount payable to the Government of the Province, under the Succession Duty Act, Acts of 1895 c. 8, s. 5. *Attorney-General v. Lovitt*, 35 N. S. Reps. 223.

REVIVOR.

1. Action to remove curator of interdict—Death of plaintiff—Survival of action—Costs.]—The plaintiff brought suit for the removal of the curator appointed to his son-in-law, interdicted for prodigality. While the case was proceeding the plaintiff died, and his testamentary executors petitioned to be permitted to take up the *instance*. The heirs of the deceased, who were relations by affinity of the interdict, also petitioned to be allowed to intervene and continue the suit for the removal of the curator, defendant:—*Held*, that while an action to remove a curator forms no part of the plaintiff's succession and is not transmissible to his heirs, nevertheless the claim against the defendant for costs incurred in the action is a claim which formed part of the patrimony of the plaintiff, and was transmitted under his will to his executors, who, therefore, were entitled to take up the *instance*, not to have the defendant removed from the curatorship, but in order to determine his liability for costs.—2. The heirs were entitled to intervene to continue the action, not in virtue of any right transmitted to them, but in virtue of their quality of relatives by affinity of the interdict, and in this quality were entitled to ask for the removal of the defendant from his office of curator. *Wilson v. Giroux*, Q. R. 21 S. C. 56.

2. Executors—Petition—Acceptance of office.]—When one of the parties dies

during the pendency of a suit, the suit may be continued by his testamentary executors.—2. It is not necessary for the executors to allege that they have accepted office as such, inasmuch as the making of the petition is in itself a sufficient acceptance. *Gignac v. People's Telephone Co.*, Q. R. 21 S. C. 154.

See JUDGMENT, IV. 1—PARTNERSHIP, 2.

REVOCATION.

See JUDGMENT, II.—MUNICIPAL CORPORATIONS, III. 11—WILL, III. 2.

RIPARIAN RIGHTS.

See DEED, 3.

ROADS.

See WAY.

ROYALTIES.

See MINES AND MINERALS, 7.

SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

SALARY.

See ATTACHMENT OF DEBTS, I. 6—CROWN, IV. 3.

SALE OF GOODS.

- I. ACCEPTANCE AND NON-ACCEPTANCE.
- II. CONDITIONAL SALE AND LIEN CONTRACT.
- III. PROPERTY PASSING.
- IV. RESCISSION OF SALE.
- V. STATUTE OF FRAUDS.
- VI. TERMS AND CONDITIONS OF SALE.
- VII. WARRANTY.
- VIII. WEIGHTS AND MEASURES ACT.

See BILLS OF SALE AND CHATTEL MORTGAGES—CONTRACT, I. 1, IV. 4, 5, 6, VI. 1, 2—EXECUTION—LIMITATION OF ACTIONS, II. 3—PRINCIPAL AND AGENT, 5—PRINCIPAL AND SURETY, 1.

I. ACCEPTANCE AND NON-ACCEPTANCE.

1. Contract—Receipt—Sale of Goods Ordinance.]—In an action for the price of 43 head of horses at \$23 per head, the evidence established that the plaintiff and defendant drove to the plaintiff's ranche and saw the plaintiff's bunch of horses; that the defendant specified such horses as were unsuitable for his purpose, which were thereupon marked and separated from the others; that the defendant gave the plaintiff \$3 with which to purchase oats to feed the horses, and also bought and gave the plaintiff some rope with which to make halters for the horses; but that the horses never left the possession of the plaintiff.—*Held*, that, though there may have been a sufficient acceptance, there was not such an actual receipt by the defendant of the horses as to establish a contract binding under s. 6 of the Sales of Goods Ordinance. *Livingstone v. Colpitts*, 21 Occ. N. 102, 4 Terr. L. R. 441.

2. Refusal to accept—Entire contract—Failure to supply part.]—The defendant ordered, by illustrated catalogue, received from the plaintiffs, several articles of furniture for his country residence. The order included a table with tipping top, styled a "monk's bench." The plaintiffs, being unable to supply this article as described in the catalogue, substituted another of a similar character. The defendant refused acceptance of the entire order. Subsequently the plaintiffs offered to take back the substituted article:—*Held*, that the order of the defendant being for articles of furniture forming a suite, it was important that he should get exactly what was ordered, and that he was justified in refusing to accept any part of the furniture offered. *Tobey Furniture Co. v. Macmaster*, Q. R. 21 S. C. 336.

3. Refusal to accept—Perishable goods—Sequestrator.]—In an action to enforce a contract of sale and to recover the price, when the object of the sale has been tendered by the vendor to the purchaser, who refuses to take delivery, and where it is perishable and its price liable to fluctuate, the Court will appoint a sequestrator with power to sell. *Gordon v. Pinder*, 4 Q. P. R. 321.

II. CONDITIONAL SALE AND LIEN CONTRACT.

1. Name of vendor—Agreement to purchase.]—Upon a piano made by a company whose corporate name was "The Mason and Risch Piano Company, Limited," and place of business Toronto,

claimed by them in replevin as against a mortgagee thereof, there were painted the words "Mason & Risch, Toronto."—*Held*, that if the transaction came within the Conditional Sales Act, R. S. O. 1897 c. 149, this was not a compliance with the provisions of s. 1 of that Act. But *held*, also, that the transaction did not come within the Act, the mortgagor not being bound by the agreement under which the piano was in his possession, to purchase the piano, but having merely the option to purchase it. *Helby v. Matthews*, [1895] A. C. 471, distinguished and applied. *Mason v. Lindsay*, 22 Occ. N. 371, 4 O. L. R. 365.

2. Possession—Chattel mortgage—Lien Notes Act—Bills of Sale Act—Registration—Assignment for creditors—Exemptions.]—The owner of manufactured articles, which were in his possession free from any lien for the unpaid portion of the purchase money, signed a lien note in favour of the defendant, the manufacturer, containing a description of the goods and statement that the property in them was to remain in the defendant until paid for in full and that on default the defendant might enter and retake them:—*Held*, in the absence of evidence to prove that defendant had obtained the lien note by fraud or misrepresentation, that it might be treated as a chattel mortgage on the articles for the debt secured by it as against the person who had signed it. The defendant had not put on the articles his name or any other distinguishing name so as to comply with s. 2 of the Lien Notes Act, R. S. M. c. 87:—*Held*, notwithstanding, that the lien note was valid as against the maker of it. The lien note was not registered under the Bills of Sale and Chattel Mortgage Act, 63 & 64 V. c. 31, and the maker of it, before maturity of the debt, became insolvent and made an assignment to the plaintiff under the Assignments Act, R. S. M. c. 7, for the benefit of his creditors:—*Held*, that, for want of such registration, the lien note, being an instrument intended to operate as a mortgage of goods which remained in the debtor's possession until the assignment, was null and void as against his creditors, including the plaintiff as his assignee, by virtue of s. 2 (a) of the Bills of Sale and Chattel Mortgage Act. It was doubtful upon the wording of the assignment whether the debtor had reserved any exemptions to which he would be entitled under s. 43 (f) of the Executions Act, R. S. M. c. 53:—*Held*, that defendant could not claim the benefit of any such exemption even if it was reserved by the debtor in the assignment. *Cox v. Schack*, 22 Occ. N. 188, 14 Man. L. R. 174.

3. Rescission by vendor—Principal and agent—Authority of agent—Parol evidence of agency.]—Held, that the buyer of an article under a sale, conditional upon the property not passing until full payment of the price, was entitled to treat the contract as rescinded where the seller took possession, used, offered for sale, and neglected to take proper care of, the article, although he made no actual use of it. *Sawyer v. Pringle*, 20 O. R. 111, 18 A. R. 218, followed. The evidence of the authority of a person assuming to act as agent for a dealer in agricultural implements, and the scope of his authority discussed. Where, on the trial, parol evidence was given, without objection, to establish agency, and afterwards it appeared that the agent's appointment was in writing, and, on appeal, it was contended that the parol evidence should not have been and should not be considered:—*Held*, that, though upon the written appointment being put in evidence, an application might, perhaps, have been properly made to strike out the parol evidence bearing on the same point, yet, as no such application had been made, nor any objection taken to its reception, the parol evidence might properly be considered. *Harris v. Dustin*, 1 Terr. L. R. 404.

See COMPANY, V. 6—CRIMINAL LAW, III. 2.

III. PROPERTY PASSING.

1. Condition — Waiver—Detinue—Demand and refusal.]—The plaintiff sold to the defendant his one-half interest in a heifer named Irene, registered as a thoroughbred, the defendant already being owner of the other half. The defendant subsequently charged the plaintiff with having wrongfully secured the registration of the heifer as a thoroughbred when, as he alleged, she was not. The charge was laid before the Executive Committee of the Dominion Short Horn Breeders' Association at Toronto. The parties then entered into a written agreement, which provided: (1) that the heifer should be resold to the plaintiff at a certain price; (2) that on payment of the price the heifer was to become the property of the plaintiff; (3) that the defendant should withdraw the charge above referred to, and upon all proceedings in respect to it being dropped by the association the "foregoing part" of the agreement was to be carried out. The defendant did not withdraw the charge, nor were the proceedings dropped. The plaintiff twice tendered the purchase price of the heifer to the defendant, which was refused. He then, without making a formal demand for the heifer,

sued the defendant in detinue:—*Held*, that, as the condition contained in the third clause of the agreement was inserted for the plaintiff's benefit, he could waive it; that he had waived it, by preferring payment; that on refusal to accept the price the defendant became *ipso facto* the wrongful detainer of the heifer; that a demand and refusal was therefore not essential to the plaintiff's right of action; and that the plaintiff was, therefore, entitled to succeed. *Wright v. Shattuck*, 4 Terr. L. R. 455, 5 Terr. L. R. 264.

2. Future delivery — Destruction before measurement.]—Whether the property in goods contracted to be sold has or has not passed to the purchaser, depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained. The property in the cordwood in question in this case was held to have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision. Judgment of a Divisional Court, 1 O. L. R. 107, 21 Occ. N. 141, affirmed. *Wilson v. Shaver*, 22 Occ. N. 11, 3 O. L. R. 110.

3. Place of inspection—Acceptance of part—Rejection of residue.]—Contract for sale of butter then manufactured and also for all butter to be manufactured during the season; quality to be "fine;" delivery to be f. o. b. cars, Birtle. Purchaser carried on business in Winnipeg. No inspection took place at time of contract. Vendor shipped car load at purchaser's request to Winnipeg. Purchaser refused to accept because of defect in quality. Vendor re-sold and sued for difference between contract price and amount realized:—*Held*, that the agreement as to quality was a condition of the contract; that the property in the butter had not passed; that the place for inspection was Winnipeg; that the purchaser's duty to accept depended upon the quality of the butter; that the fact that the purchaser had accepted other car loads of "fine" butter did not bind him to accept one that was not; (*Dyment v. Thompson*, 9 O. R. 560, 12 A. R. 658, 13 S. C. R. 303, commented on;) that the onus was on the vendor to prove the quality of the butter; that such evidence could not be given in rebuttal. *Lewis v. Barré*, 22 Occ. N. 330, 14 Man. L. R. 32.

IV. RESCISSION OF SALE.

1. Contract—Refusal to perform—Remedies.]—A refusal by the promisor

to perform the contract unless the promisee will do something which he is not bound to do, may be treated as an absolute refusal to perform it, and the promisee may at once rescind the contract and sue for damages. *Freeth v. Burr*, L. R. 9 C. P. 208, *Withers v. Reynolds*, 2 B. & Ad. 882, and *Mercsey Steel and Iron Co. v. Naylor*, 9 App. Cas. 434, followed. When the promisee has thus rescinded a contract of sale of ascertained goods, and afterwards put it out of his power to perform it by otherwise disposing of some of the goods, subsequent negotiations on his part to induce the promisor to take other similar goods on the same terms, or offers to settle the dispute for the sake of avoiding litigation, will not necessarily be considered as doing away with the effect of the previous rescission. *McCowan v. McKay*, 22 Occ. N. 100, 13 Man. L. R. 590.

2. Defect—Diligence.]—Where communication between buyer and seller may be had easily and promptly, and, in the case of the sale of a horse, the defect complained of is one which would have been quickly discovered if a proper trial of the animal had been made promptly, but the buyer did not make any complaint until sixteen days after the sale, and even then did not tender the animal back, but allowed eight days more to elapse before bringing suit, the action for rescission of the sale was not instituted with reasonable diligence. *Brown v. Wiseman*, Q. R. 20 S. C. 304.

V. STATUTE OF FRAUDS.

Memorandum in writing—Omission of term—Oral evidence connecting documents.]—The plaintiff's agent took an oral order for goods from the defendant, one of the terms of payment being that he should, in a certain event, have six months' credit. The plaintiff's agent signed a memorandum containing all but this term of the contract. The defendant subsequently wrote cancelling the order. This led to further correspondence. In none of the letters was any reference made to the term allowing six months' credit. The Sale of Goods Ordinance, No. 10, 1896, s. 4 (now C. O. 1898 c. 39, s. 6), (substantially a re-enactment of s. 17 of the Statute of Frauds), was pleaded:—*Held*, that it was open to the defendant to prove, as he had, that the term as to six months' credit was part of the contract, and, as it did not appear in any of the documents submitted to constitute the note or memorandum in writing, the plaintiff was not entitled to recover.—2. That as the

statement of claim alleged the term as to six months' credit to be part of the contract sued on, it was unnecessary for the defendant to have proved it, and he might have taken the objection immediately upon the written evidence of the contract being put in.—3. That a letter cancelling the contract for the purchase of goods cannot be taken to constitute an acceptance of the goods. *Semble*, that parol evidence is admissible to connect several writings so as to constitute them together a note or memorandum under the Ordinance. *Oliver v. Hunting*, 44 Ch. D. 203, referred to. That a memorandum of sale required to be in writing may be complete and binding, though silent as to price and to time and mode of payment, if no agreement in fact was made on these points, the omission being equivalent to a stipulation for a reasonable price and immediate payment in the usual mode. *Valpy v. Gibson*, 4 C. B. 837, referred to. *Calder v. Hallett*, 5 Terr. L. R. 1.

VI. TERMS AND CONDITIONS OF SALE.

Contract—Written order—Parol variation—Evidence.]—Judgment in 33 N. S. Reps. 21, affirming by a division of opinion the judgment of the trial Judge in favour of the defendants, affirmed on appeal. *Wilson v. Windsor Foundry Co.*, 31 S. C. R. 381.

VII. WARRANTY.

1. Breach—Implied condition as to reasonably good usage.]—In an action to recover the amount of a promissory note given by the defendant for the price of a bicycle purchased by him from the plaintiff's agent, the defendant pleaded an undertaking on the part of the agent that the bicycle delivered would carry the defendant or bear his weight, but that the bicycle delivered would not carry defendant or bear his weight, and broke down. The evidence shewed that the agent by whom the bicycle was sold was to have come the following morning to instruct the defendant in the use of it, but that the defendant, who was a heavy and clumsy man, and had never ridden a bicycle before, undertook to try it in the absence of the agent. The County Court Judge found that a warranty that the bicycle would bear the defendant's weight implied the condition of reasonably good usage, and that, under the circumstances in proof, the defendant assumed the risk of injuring the bicycle, and even if there was a warranty as alleged, there was not

sufficient proof of breach:—*Held*, that the Judge was right. *Johnson v. Moore*, 34 N. S. Reps. 85.

2. Implied warranty — Latent defect—Inspection—Caveat emptor.—The plaintiffs sought to recover from the defendants a sum of money paid on account of the purchase of a boiler and engine purchased by the plaintiffs from the defendants for the purpose of operating a grist mill, claiming that the engine and boiler were not reasonably fit for the purpose for which they were sold:—*Held*, that the case came within the first class of cases mentioned in *Jones v. Just*, L. R. 3 Q. B. 202, and that the goods being in *case*, and in a position to be inspected by the buyers, and there being no fraud on the part of the sellers, the maxim *caveat emptor* applied, even though the defect was latent, and could not be discovered on examination. *Higgins v. Clish*, 34 N. S. Reps. 135.

See PARTIES, III. 3.

VIII. WEIGHTS AND MEASURES ACT.

Agreement—Objection not raised at trial—Payments on account.—When a defendant seeks to avoid payment of an account for lime furnished to him on the ground that it was sold to him by measure and that the measure used was not stamped as required by the Weights and Measures Act, R. S. C. c. 104, the onus is on him to prove that the measure was not properly stamped. *Hanbury v. Chambers*, 10 Man. L. R. 167, followed. Section 21 of that Act does not render it illegal for parties to agree upon a sale by some authorized measure, and then that the quantities should be ascertained by authorized weights; and, when lime is ordered by the bushel and supplied by weight, the sale would not be illegal or void if the purchaser knew that such was being done, and the onus is on him to prove that he did not know of it. After the passing of 61 V. c. 30, s. 2 (D.), a bushel of lime was to be determined by weighing, unless a bushel by measure should have been specially agreed upon:—*Held*, that, as to certain lime furnished by measure after the passing of the Act of 1898, the plaintiff was entitled to recover for it, on the ground that the defendant had not raised at the trial the objection that there had been no agreement for a determination by measure. The defendant had voluntarily made certain payments on account of certain other sales of lime which were admitted to have been illegal, but he gave no evidence to shew that, when he made

the payments, he was ignorant of the illegality:—*Held*, that he could not recover back the amount of such payments. *Hughes v. Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163.

SALE OF LAND.

Judgments Act — Equitable mortgage—Notice—Right to dispose of timber—Estoppel by course of litigation.—In 1891 O'B. pre-empted Provincial Crown land, and in 1898 M. obtained a judgment against him, which provided that he might cut timber from O'B.'s pre-emption, and apply the proceeds in satisfaction of the judgment, and which restrained O'B. for six months from cutting or selling timber. M. registered his judgment in 1899. In January, 1900, O'B. agreed to sell to McK. the timber for \$1,050, payable at various times, part of the consideration being the fees payable to the Crown for Crown grant; and, on these being advanced by McK., the Crown grant was delivered to him as security for such advance. The plaintiff moved for liberty to sell the land under his judgment, and DRAKE, J., made an order for sale, holding that McK., being an equitable mortgagee, was excluded by the statute:—*Held*, reversing the decision, that the sale should be subject to McK.'s interest. *Per* MARTIN, J., that, as the plaintiff at the trial induced the Court to grant him a judgment recognizing the defendant's right to timber, he was estopped from afterwards contending that, by virtue of certain sections of the Land Act, the defendant had no right to dispose of timber. *Manley v. O'Brien, In re Mackintosh*, 22 Occ. N. 74, 8 Brit. Col. L. R. 280.

See ARBITRATION AND AWARD, 1—BANKRUPTCY AND INSOLVENCY, I. 6, 12—COMPANY, I. 3—CONTRACT, IV. 6—COURTS, VIII. 5—DEVOLUTION OF ESTATES ACT—DOWER, 1—EXECUTION, II.—INDIAN LANDS—MORTGAGE, 10, 11, 12—OPPOSITION, 2—PRINCIPAL AND AGENT, 1, 6, 7—REGISTRY LAWS—SPECIFIC PERFORMANCE—STATUTES, 1—VENDOR AND PURCHASER—WILL, I. 5.

SALVAGE.

See COSTS, I. 7.

SCALE OF COSTS.

See COSTS, V.

SCHOOLS.

I. PUBLIC SCHOOLS.

II. SEPARATE SCHOOLS.

See ARBITRATION AND AWARD, 1 — ASSESSMENT AND TAXES, III. 4.

I. PUBLIC SCHOOLS.

1. Commissioners — Liability to valuers—Valuation roll—Errors in—Correction.] — The valuers named by the superintendent of public instruction are entitled to be paid for their services by the school commission.—2. The commissioners of schools cannot declare void the valuation roll prepared by their valuers, because lands belonging to dissidents are entered thereon, or because the description of lands therein is erroneous, but they ought, according to the provisions of Art. 353 of the statute respecting public instruction, to examine and correct the errors in the roll. *Robert v. Commissioners of Schools of St. Hermengilde*, Q. R. 20 S. C. 540.

2. Expenditure — Annual estimates—Revision—Power of municipal council.]—Under the proper construction of ss. 65 (9) and 71 (1) of the Public Schools Act, 1 Edw. VII. c. 39—which provide that the public school trustees are to submit to the municipal council an estimate of the expenses of the schools under their charge for the current year, and that the council shall levy and collect upon the taxable property of the municipality such sums as may be required by the trustees, and shall pay the same to the treasurer of the public school board—the right of the school board, in preparing their estimate, is to include therein everything that in their best judgment may be needed to meet legitimate expenditure, that is, expenditure upon objects or for purposes within their lawful authority, and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are, and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* of the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this the council cannot go. The council has no voice in the control or management of the affairs which are committed by law to the school board; its duty is to levy and collect and pay out, from

time to time, as required, the moneys shewn by the estimate to be necessary for lawful school purposes. Judgment of a Divisional Court, 2 O. L. R. 727, 22 Occ. N. 15, affirmed. *In re Toronto Public School Board and City of Toronto*, 22 Occ. N. 279, 4 O. L. R. 468.

3. Selection of school site—Award—Conditions precedent—Mandamus.]—The words "selection of a site for a new school house," contained in s. 31 of the Public Schools Act, 59 V. c. 70 (O.), refer to a selection of a site in a newly established school section, and probably also to the selection of a site for an additional school house, while the words the "change of site of an existing school house," also contained in such section, refer to the case where a site has been chosen and a school house provided, but which it is deemed desirable to abandon, and to choose a new site, the section not applying to the case where the site selected is an existing site; but, in any event, before arbitration proceedings can be taken and an award made under the said section, the trustees must first select a site which the ratepayers decline to approve of on the matter being submitted to them. An award made without such prerequisites having been complied with, is unauthorized and nugatory. The fact that such an award is valid on its face is no answer to an application for a mandamus to compel a township municipality to pass a by-law to raise the amount required for the purchase of a site and erection of a school house under steps subsequently taken therefor under the section, where all the requisites thereof were duly complied with. *In re Cartwright School Trustees and Township of Cartwright*, 22 Occ. N. 291, 4 O. L. R. 272.

4. Separate town within county—County model school situated in.]—The town of Toronto Junction, territorially within the limits of the county of York, but a separate town within the provisions of the Municipal Act, and as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of ss. 83 and 84 of the Public Schools Act, 1 Edw. VII. c. 39; and the county is bound to contribute to the support of a county model school situated in the town. *Toronto Junction Public School Board v. County of York*, 22 Occ. N. 145, 3 O. L. R. 416.

5. Trustee—Election of—Equality of votes—Casting vote—Complaint—Jurisdiction of County Court Judge.]—Upon the complaint of S. of the election of I. as a public school trustee for the year 1902 for a ward in a city:—*Held*, that

the Public Schools Act, 1 Edw. VII. c. 39, s. 63, presupposes an election, and that, inasmuch as in the election in question there was a tie, and the proper officer had not yet given the casting vote, there was not an election within the meaning of the section, and the Judge of the County Court had no jurisdiction to hear the complaint. *In re Ireland*, 22 Occ. N. 151.

6. Trustees—Power to borrow—Ordinary expenditure.]—The plaintiff, one of the trustees of a school section, at the instance of his co-trustees, lent to the trustees a sum of money required for payment of the teacher's salary:—*Held*, that, as the amount borrowed was to be applied to ordinary expenditure, and did not increase the liabilities of the corporation, no special authority to borrow was necessary. *McNeil v. Victoria School Trustees*, 34 N. S. Reps. 546.

7. Union of school sections—Powers of arbitrators—Appeal to county council—1 Ed. VII. c. 39, s. 42.]—An application was made to a township council to alter the boundaries of school sections 12, 13, and 14, by taking about 1,200 acres from 13 and adding them to 12, and by taking about 2,000 acres from 14 and adding them to 13. The township council refused the application; an appeal was taken to the county council against such refusal; and arbitrators were appointed by the latter council under the authority of s. 42 (3) of the Public Schools Act, 1 Edw. VII. c. 39. The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite sections 12 and 13, and recommended the building of a new school house in a central position in the thus united sections:—*Held*, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power "to form, divide, unite, or alter the boundaries;" but that means to form, divide, unite, or alter in accordance with the subject matter of the appeal. Award set aside without costs. *In re South-wold Public School Sections*, 22 Occ. N. 62, 3 O. L. R. 81.

II. SEPARATE SCHOOLS.

Supporters of—Assessment for public school debts.]—A ratepayer rated as a supporter of a separate school where a separate school district has been formed is not liable to be assessed for a debt of indebtedness of the public school in-

curred prior to the establishment of the separate school district. *McCarthy v. Town of Regina*, 21 Occ. N. 321, 5 Terr. L. R. 71.

SCIRE FACIAS.

See CROWN, I. 2.

SEAL.

See MUNICIPAL CORPORATIONS, III. 10.

SECONDARY EVIDENCE.

See EVIDENCE, III.

SECURITY FOR COSTS.

See COSTS, VI., VII.

SEDUCTION.

See CRIMINAL LAW, III. 18.

SEIZURE.

See EXECUTION, III., IV.

SEPARATE ESTATE.

See HUSBAND AND WIFE, V.

SEPARATE SCHOOLS.

See SCHOOLS, II.

SEPARATION.

See HUSBAND AND WIFE, V.

SEQUESTRATION.

1, Petition—Grounds.]—In a petition for sequestration the grounds upon which the petition is based should be special, and it is not sufficient to allege simply that it is in the interest of the

petitioner that the immovable should be judicially sequestered. *Crevier v. Cloutier*, 4 Q. P. R. 347.

2. Petition—Grounds—Administration.]—In a petition for sequestration, the grounds upon which the demand is based must be special, and it is not sufficient to allege simply "that the immovables have not been leased nor administered," especially where the defendant, being absent from the country, has named an attorney to see to the administration of such properties. *Meyers v. Ritson*, 4 Q. P. R. 394.

See COSTS, V. 6—SALE OF GOODS, I. 3.

SERVICE OF PAPERS.

1. Interrogatories—Personal service—Domicil—Place of business.]—A motion that interrogatories *sur faits et articles* shall be taken as answered against him, in pursuance of Art. 364, C. P., will not be granted against a defendant in default, unless such interrogatories have been served upon him personally or at his domicil (Art. 361, C. P.), if it is not established that he is absent or in hiding.—2. Service effected at his place of business is only valid when such defendant has no regular domicil or ordinary residence, as that exists for the service of process in an action under Art. 128, C. P. *Myers v. Mercier*, 5 Q. P. R. 6.

2. Petition—Husband and wife—Substituted service.]—If a defendant is absent from his domicil, habitually, during the hours in which the service of process may be regularly effected upon him, and leaves a writing upon his door notifying those seeking him to apply at the house of one of his neighbours, permission will be granted to serve upon him a petition *pour ester la justice en séparation*, by serving the neighbour indicated by the writing. *Mead v. Fyen*, 4 Q. P. R. 406.

See ATTACHMENT OF DEBTS, II. 6, 9, 14—BAILIFF, 2—CANADA TEMPERANCE ACT, 2—COURTS, V. 3—HUSBAND AND WIFE, I.—JUDGMENT, IV. 6—MECHANICS' LIENS, III. 1—MORTGAGE, 10, 12—PARLIAMENTARY ELECTIONS, III. 2, 8, 9, 10—PLEADING, VII. 17—RAILWAY, IX.—TRIAL, IV. 2—WITNESSES—WRIT OF REVENDICATION—WRIT OF SUMMONS, I. 3, II.

SERVITUDE.

See EASEMENT, 2, 3—WAY, I. 4.

SESSIONS.

See MALICIOUS PROCEDURE, 5.

SET-OFF.

1. Action on contract—Damages for breach.]—Where an action is brought on a contract, and the defendant pleads non-fulfilment of contract, he may plead as a set-off damages which are alleged to have directly resulted from the negligence and defaults of the plaintiff in connection with the contract sued on. *Latour v. Yasinooski*, Q. R. 20 S. C. 292.

2. Bank in liquidation—Deposit—Note discounted and not yet due—Renunciation of term—Indorser—Intercession—Costs.]—A deposit made in a bank is a loan to such bank, and Art. 1190, which says that a debt arising from a deposit shall not be the subject of set-off, does not prevent the same deposit being set off by a debt due to the bank by the depositor.—2. The set-off of a debt due to a bank by the claim resulting from a deposit in such bank, may be effectuated up to the time of service of a petition for the winding-up of the bank, provided that both debts are equally liquidated and exigible.—3. Nevertheless, the term of the currency of a bill of exchange or promissory note is to be regarded as a stipulation in favour both of the creditor and of the debtor, and, therefore, the maker or indorser of a note discounted in a bank cannot, by renouncing the benefit of the time which the note has to run, set off the debt arising upon such note by the sum which he has on deposit in the bank.—4. The indorser of a note discounted in a bank does not become the debtor of such bank until the note has been protested for non-payment and notice of protest given to him.—5. Although a creditor of a bank in liquidation has a right to intervene in a suit pending between the liquidators and a debtor of the bank, who alleges that his debt has been extinguished by set-off, in order to watch the proceedings and take measures necessary for the protection of his rights, such creditor will be ordered to pay the costs incurred by the debtor of the bank if he produces, in opposition of the demand of the latter, a useless contestation founded upon grounds which have already been set up by the liquidators. *Vanier v. Kent*, Q. R. 11 K. B. 373.

See APPEAL, IV. 11—ATTACHMENT OF DEBTS, II. 15—BANKRUPTCY AND INSOLVENCY, IV. 1, V. 2—COMPANY, V. 8—CROWN, IV. 1—EXECUTION, I. 1—INSURANCE, IV. 7—PLEADING, VII. 7, 10, 13—PLEDGE, 1—RAILWAY, IV. 3—REVENUE, 3.

SEWERS.

See MUNICIPAL CORPORATIONS, IX. 3.

SHARES.

See COMPANY, IV.—TRUSTS AND TRUSTEES, 7.

SHERIFF.

Executing writ—Public officer—Notice of action.—The sheriff is not, when executing a *fi. fa.* at the suit of a private individual, a public officer entitled to notice and other protection under s. 468 of the Judicature Ordinance, R. O. 1888 c. 8. *McWhirter v. Corbett*, 4 C. P. 203, followed. *MacDonnell v. Robertson*, 1 Terr. L. R. 438.

See APPEAL, VIII. 7—BANKRUPTCY AND INSOLVENCY, I. 6—EXECUTION, III. 9, IV. 4, VI. 5—LAND TITLES ACT, N. W. T., 2—MINES AND MINERALS, 6—PRINCIPAL AND AGENT, 2—SOLICITOR, 6—VENDOR AND PURCHASER, 15, 16.

SHIP.

- I. BILL OF LADING.
- II. COLLISION.
- III. OTHER CASES.

See CONSTITUTIONAL LAW, 1—INSURANCE, V.—REVENUE, 1.

I. BILL OF LADING.

1. Delivery—Shortage in goods—Carrier—Custom of trade.—Where the ship-owners and their agents never notified or requested the consignee to take delivery of the goods from the ship's side, after arrival at the port of destination, as they had a right to do by the terms of the bills of lading, but, on the contrary, retained possession of the goods, and proceeded, after they were landed, to sort the boxes and arrange them in separate lots, partly in their own shed, and partly upon the wharf itself, and caused the goods to be watched by their employees, without any interference or participation by the consignee, and where, in the opinion of the Court, the only delivery which took place was made by the ship-owners upon orders given by the consignee to the parties who had purchased the goods at an auction sale held five days after the

arrival of the ship, the ship-owners are responsible for any shortage in the quantity mentioned in the bills of lading as compared with the quantity delivered, notwithstanding the payment of freight made under reserve and before delivery. Judgment in Q. R. 15 S. C. 515 reversed. *Hart v. Parsons*, Q. R. 10 K. B. 555. (Reversed 20 Occ. N. 372, 30 S. C. R. 473).

2. Exceptions in—Voyage—Obligation to provide fit ship—Clause limiting liability of ship-owners.—The plaintiff shipped six cases of dry goods on board the defendants' ship for carriage from Vancouver to Skagway and thence to Dawson, under a bill of lading which provided that all claims for damage to or loss of any of the merchandise must be presented within one month. The grating on the outside of the hull of the ship and at the mouth of the pipe in which the sea-cock was placed was defective and rendered the ship unseaworthy, the result being that salt water entered the after-hold and damaged the plaintiff's goods. The plaintiff did not present his claim within a month, but subsequently sued for damages:—*Held*, that the stipulation in the bill of lading to the effect that no claim for loss should be valid unless presented to the company within a month, did not apply to damage occasioned by the defendants not providing a seaworthy ship. *Drysdale v. Union Steamship Co.*, 22 Occ. N. 74, 8 Brit. Col. L. R. 228. See the next case.

3. Limitation of time to sue—Damage from unseaworthiness.—On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date, after which the same should be completely barred:—*Held*, reversing the judgment in 8 Brit. Col. L. R. 228, 22 Occ. N. 74. *MILLS, J.*, dissenting, that this limitation applied to a claim for damages caused by unseaworthiness of the steamer. *Union Steamship Co. v. Drysdale*, 22 Occ. N. 278, 32 S. C. R. 379.

II. COLLISION.

1. Anchor-light—Lookout—Weight of evidence—Credibility.—A collision occurred between the A. L. T., a ship at anchor, and a steamship, the L. O., proceeding in charge of a pilot to her dock, within the harbour of Halifax, N. S., at night in the month of January. The weather was blustering, and intermittently clear and cloudy. On arriving at the quarantine grounds the L. O. had signalled, by guns and whistles, for the

medical officer of the port, and then proceeded up the harbour on the east side of George's Island. After passing the northern line of George's Island the L. O. changed her course westerly toward her berth, and in proceeding thereon passed between the lights of two vessels anchored on the northern side of that island. While doing so she suddenly came upon the A. L. T. lying at anchor, collided with and sank her. The only person on board of the A. L. T. was a caretaker, and while admitting that he was not on deck at the time, he swore that a proper anchor-light was burning on his ship. His statement as to the anchor-light was corroborated by the captain of a fishing schooner lying close by, and that of some boatmen and labourers on the wharves. On the other hand the pilot of the L. O., the captain and the first and third officers, boatswain and boatswain's mate, and four of the seamen, all swore positively that there was no light on the A. L. T. while they were approaching her, and that she was not seen by any one until their lookout called that there was something ahead. The evidence further shewed that both the officers and crew were alert at the time of the accident, and anxiously working the ship through anchored vessels in the darkness and blustering weather:—*Held*, that the state of facts as substantiated by the evidence for the owners of the L. O. must be accepted as correct, and that being so, the collision and subsequent loss were wholly attributable to the A. L. T. in not keeping a proper light and lookout. *Dominion Coal Co. v. The Lake Ontario*, 7 Ex. C. R. 403.

2. Appreciation of evidence — Findings of fact—Appeal—Proper navigation.]—In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance," the decision mainly depended on whether or not the lights of the lost schooner were burning, as the Admiralty rules required, at the time of the accident. The local Judge gave judgment against the "Reliance."—*Held*, that, though the evidence given was contradictory, it was amply sufficient to justify the judgment, which should not, therefore, be disturbed on appeal. *Santanderino v. Lanvert*, 23 S. C. R. 145, and *Village of Granby v. Mcnard*, 21 Occ. N. 7, 31 S. C. R. 14, followed. *The "Reliance" v. Conwell*, 22 Occ. N. 77, 31 S. C. R. 653.

3. Fog—Sailing rules.]—The defendant steamer bound for St. John, while steering in a dense fog, a N.-W. by N. course, heard three blasts of a fog horn from the plaintiff's vessel, a little before

the beam on the port side. The steamer was then going at a speed of from 4 to 6 knots an hour, and kept on her course. The plaintiff's vessel continued sounding her horn at regular intervals, and was proceeding on a northerly course before a light wind barely sufficient to enable her to keep steerage way. About 10 minutes after the horn was heard by the steamer, she struck the vessel on her starboard side, and sunk her:—*Held*, that the steamer was solely to blame, as she had infringed Art. 16 of the regulations by not stopping after the horn was heard. *Roberts v. The "Pawnee"*, 7 Ex. C. R. 390; *The "Pawnee"*, 22 Occ. N. 129.

4. Fog — Speed — Damages.]—In an action for collision, where the Court found both vessels in fault for moving at an immoderate rate of speed in foggy weather, and that such immoderate speed was the chief, if not the sole, cause of the collision, the owner of the damaged ship was allowed to recover only half his loss. *Wineman v. The "Hiawatha"*, 7 Ex. C. R. 446.

III. OTHER CASES.

1. Actions in rem—Wages — Equality—Priority—Costs—Pro rata payment of subsequent claims.]—*Held*, following *The "Saracen"*, 6 Moo. P. C. 56, that when claimants against a fund in the registry are of equal degree, the Court will give priority to the diligent creditor.—2. Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim before a decree has passed for distributing the fund, but not afterwards.—3. Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the Court, the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata*. *Munson v. The "Comrade"*, *Saunders v. The "Comrade"*, *Dickson v. The "Comrade"*, 7 Ex. C. R. 331.

2. Contract by master—Effect of—Seizure of vessel — Action against master alone — Particulars—Certificate.]—A captain contracting in his own name for the needs of his vessel and its navigation, at a place where neither the owner nor the agent of the vessel lives, binds himself, the vessel, and its owner.—2. The vessel may be seized for a debt contracted

for the purpose of a voyage, or for the fees of a consul, in an action begun against a captain in his capacity as such, and without making the owners parties.

—3. Among the principal provisions of the certificate of ownership which the *procès-verbal* of the seizure must contain, when production of the certificate is refused, are the number of the vessel and its tonnage engraved upon the main beam; and the bailiff may cause the hatchway to be opened in order to find out these particulars; and upon refusal an order for its opening may be made. *Fréchette v. Martin*, Q. R. 21 S. C. 417.

3. Pilotage dues—Liability of barge for same—"Every ship which navigates."—*Held*, affirming the judgment of the local Judge for the Quebec Admiralty District, that the expression "every ship which navigates," found in s. 58 of the Pilotage Act, R. S. C. c. 80, means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means and which must be moved or propelled or navigated by another vessel. *Corporation of Pilots for the Harbour of Quebec v. The "Grand-duc"*, 22 Occ. N. 428.

4. Seizure for wages of sailors—Internal navigation.—Save in the case provided for by cl. 2 of Art. 955, C. P., a *saïsie conservatoire* does not lie for the wages of sailors in respect of services rendered on ships employed in internal navigation. *Bertrand v. Anderson*, 4 Q. P. R. 387.

SLANDER.

See CRIMINAL LAW, III. 16—DEFAMATION—INJUNCTION, 2.

SOLICITOR.

1. Action for costs—Lump charge for professional services—Champerly—Agreement.—The plaintiffs, advocates in the Yukon, sued the defendant for a lump sum for professional services in obtaining a judgment for the defendants against one H., it being alleged by the plaintiffs that they were to charge \$600 if the amount was collected, and by the defendant that they were to get ten per cent. if collected by them:—*Held*, in appeal, *per DRAKE, J.*, that by Yukon law an advocate cannot legally obtain a lump sum for professional services under R. 524 of the North-West Territories Judicature Ordinance of 1893. *Per MARTIN, J.*, that the plaintiffs failed to prove any agree-

ment. *Robertson v. Bossuyt*, 8 Brit. Col. L. R. 301.

2. Agreement with client—Costs—Misrepresentation—Pressure—Manitoba Law Society Act—Interest—Consideration.—Section 68 of the Law Society Act, R. S. M. c. 83, making it legal for a solicitor to bargain with his client, does not preclude the Court from determining the validity of any such agreement upon equitable principles, although it contains no express provision. In the course of negotiations leading up to such an agreement, the solicitor overstated the amount of his disbursements, and threatened to dispose of a judgment which had been assigned to him:—*Held*, that the misstatement and threat were such as to render the clients incapable of acting freely and independently, and therefore the agreement should be set aside.—Forbearance to sue may be a sufficient consideration for an agreement by a client to pay interest to his solicitor upon an amount agreed on as due for costs, although there is no legal liability for such interest, and although the client acted without independent advice. *Preston v. Nugent*, 21 Occ. N. 543, 13 Man. L. R. 511.

3. Authority—Mortgage—Collection.—In the absence of legal proceedings to enforce a mortgage security, there is nothing in the mere relation of solicitor and client from which an authority may be implied to the solicitor to receive interest or principal due the client on the mortgage, even though the solicitor arranged the mortgage loan. The solicitor must have either express authority for the purpose, or the course of dealing between the parties must have been such as to necessarily imply such an authority: and the onus of establishing that is upon the mortgagor. An authority to receive interest confers no authority to receive principal, and the possession of the mortgage securities is no evidence of authority to receive money due on them. *Foreman v. Seely*, 22 Occ. N. 67, 2 N. B. Eq. Repts. 341.

4. Lien—Settlement of action—Discontinuance—Judgment for costs—Costs of acte of tutorship.—If a discontinuance is filed in a suit without notice thereof being given to plaintiff's attorneys, and evident collusion is shewn against the latter by the plaintiff and defendant, the plaintiff's attorneys will be entitled to take judgment against the defendant for their costs.—2. Such costs do not comprise the costs of appointment of the plaintiff as tutrix to minors, there being no *lien de droit*, in respect thereof, between the defendant and the plaintiff's attorneys. *Skelly v. Thibault*, 5 Q. P. R. 75.

5. Lien—Settlement of action—Fraud—Costs.]—As a general rule, a settlement of the suit by the parties thereto is valid, unless it be made in fraud of the rights of the plaintiff's attorney, in which case it will be carried out subject to the obligation to pay the plaintiff's attorney his costs.—2. The mere fact that the settlement was made by the defendant without paying the plaintiff's attorney his costs, although aware that the plaintiff was unable to pay them, does not constitute fraud, more particularly where it appears that the plaintiff's action was unfounded, and that the defendant was induced by her knowledge of the plaintiff's inability to pay costs, and her reluctance to continue the contestation under such circumstances, to make a settlement by which the plaintiff profited to some extent. *Lareau v. Martineau*, Q. R. 21 S. C. 469.

6. Negligence—Advice—Established jurisprudence—Territories Real Property Act—Charge on land—Execution—Sheriff—Tort—Pleading—Interpleader—Counterclaim—Bill of costs.]—Where a sheriff and an execution creditor are sued together in respect of an alleged irregular levy, the sheriff is not obliged to interplead, but may defend with the execution creditor.—2. A solicitor who advises his client according to the established jurisprudence is not guilty of actionable negligence if the decision upon which he relies is overruled.—3. Neither a solicitor nor a sheriff becomes a tortfeasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of his duty, an execution of a judgment against lands of the judgment debtor.—4. The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy.—5. In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested, because such overcharges, if recoverable, do not belong to the solicitor, but to his clients. In such an action, however, the solicitor may counterclaim for costs in a former suit in which he acted for the sheriff, notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. Judgment in 21 Occ. N. 270. 4 Terr. L. R. 474, reversed. *Taylor v. Robertson*, 22 Occ. N. 80, 31 S. C. R. 615.

7. Recovery of costs—Solicitor—trustee—Profit costs—Lien.]—Held, that, notwithstanding the provision in s. 40 of the Manitoba Trustee Act, R. S. M. c. 146, the rule of English law that a sole trustee who is a solicitor cannot charge against the trust estate profit costs for acting as solicitor for the estate, still prevails to the extent that he is not entitled as of right to have such costs taxed to him as a solicitor. *Meighen v. Buell*, 24 Gr. 503, followed. *Cradock v. Piper*, 1 Macn. & G. 664, distinguished. *Held*, also, that neither the Imperial Act 23 & 24 V. c. 127, nor the Ontario Rule 1129 founded upon it, gives a solicitor an absolute right to a lien for his costs upon property recovered or preserved through litigation, but only a discretionary power in the Court to charge the property. *Tarriff v. McDonald*, 21 Occ. N. 545, 13 Man. L. R. 577.

8. Recovery of costs against opposite party in litigation.]—In the absence of any special provision of law, the advocate is not a party in the cause, but merely the agent of the party whom he represents.—2. There being no provision of law by which an advocate appearing in a cause before the Recorder's Court of Montreal, is granted distraction of costs awarded to his client, there is no *lien de droit* between him and the city of Montreal, the other party to the cause, and he, therefore, has no action in his own name against the city for the costs of a cause in which costs were awarded in favour of his client. *Beaudin v. City of Montreal*, Q. R. 20 S. C. 32.

9. Taxation of bill of costs—Allowance of lump sum—Work done out of Court—Power of taxing officer.]—A solicitor employed by the assignee of a number of life insurance policies to collect \$82,000 from eleven different insurance companies, of which payment was resisted on the ground that they were gambling policies, while the widow of the insured set up a trust for herself and her family, subject only to a lien for premiums paid and interest, after long negotiations, collected from nine of the companies, in all, \$70,000, without suit, and also compromised the widow's claim, leaving \$60,000 to his client, who by another solicitor then sued unsuccessfully upon the remaining policies. The former solicitor rendered a bill showing in detail the negotiations, and charging disbursements and ordinary costs in connection with an action by the widow and for drawing claim papers and affidavits, and a further lump sum to cover the negotiations out of Court. On taxation of the bill the taxing officer allowed \$3,200 in respect of the lump sum.

charged, having first, with the acquiescence of the parties, conferred with various referees, officers of the Court, and solicitors as to charges usually made in such matters, and then determined the amount to be allowed in the light of his own general knowledge and experience:—*Held*, that the ruling of the taxing officer should be affirmed; and that, after himself issuing the order for taxation, the client could not claim to have the solicitor's remuneration assessed in an action. *In re Attorneys*, 26 C. P. 495, followed. *In re Johnston*, 21 Occ. N. 561, 22 Occ. N. 24, 3 O. L. R. 1.

10. Uncertificated solicitor—Right of client to party and party costs.—The plaintiff was deprived of costs on the ground that her solicitor had failed to take out a certificate, as required by the Nova Scotia Barristers and Solicitors Act, 1899, s. 27:—*Held*, that the procedure to enforce compliance with the provisions of the Barristers and Solicitors Act being by fine and suspension, under ss. 31 and 32 of the Act, and there being no provision enacting in express terms that attorneys who failed to take out certificates as required should be debarred from recovering their costs, or that parties employing such attorneys should be debarred from recovering, there was nothing to prevent the plaintiff from recovering her attorney's costs from the opposite party to the suit. *Wallace v. Harrington*, 34 N. S. Reps. 1.

See BANKRUPTCY AND INSOLVENCY, III. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 6—COMPANY, II. 1—COSTS, I. 9—COURTS, IX. 4—DEFAMATION, II. 7—DISCOVERY, III. 2, 3, 4—JUDGMENT, IV. 4—LAW SOCIETY—LUNATIC, 2—MORTGAGE, 9, 12—MUNICIPAL CORPORATIONS, VIII. 3—PARLIAMENTARY ELECTIONS, III. 1, 10—PARTICULARS, 1—PARTIES, IV. 4—PEREMPTION, 4. 5—TRUSTS AND TRUSTEES, 6.

SPECIAL INDORSEMENT.

See WRIT OF SUMMONS, III.

SPECIAL JURY.

See TRIAL, II. 10, 11.

SPECIFIC PERFORMANCE.

1. Contract — Option—Purchase of land—Time—Ejectment — Injunction to restrain.—Time is of the essence of an

unilateral agreement, such as an option to purchase land. On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to recover possession of the land, the Court ordered that, on the defendant confessing the action of ejectment, the plaintiff should be restrained until further order from taking possession; otherwise the application should be dismissed. *Semble*, that relief by specific performance cannot be obtained under s. 283 of 60 V. c. 24. *Freeman v. Stewart*, 2 N. B. Eq. Reps. 365; *Stewart v. Freeman*, 22 Occ. N. 211.

2. Lease—Undertaking to build—Non-performance in lifetime of lessor—Devise to lessee—Damages.—By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of \$200 payable in October of each year, and undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease:—*Held*, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build. *Cooper v. Jarman*, L. R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished. *In re Murray*, 22 Occ. N. 373, 4 O. L. R. 418.

See LANDLORD AND TENANT, I. 3, 5—PRINCIPAL AND AGENT, 6—VENDOR AND PURCHASER, 5, 15.

STATEMENT OF CLAIM.

See MECHANICS' LIENS, III. 1—PLEADING, X.

STATEMENT OF DEFENCE.

See PLEADING, XI.

STATUTE OF FRAUDS.

See CONTRACT, VIII.—SALE OF GOODS, V.

STATUTES.

1. Amending Act — Retroaction — Sale of land — Judgments and orders—County Courts.]—Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under Rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following year the Legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment:"—*Held*, SEDGEWICK, J., dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments, and not to orders and judgments of the County Courts. *Held*, further, reversing the judgment of the Queen's Bench, 13 Man. L. R. 419, 21 Occ. N. 396, DAVIES, J., dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force, but not from the date on which they were made. *Held*, per SEDGEWICK, J., that the clause had no retroactive operation at all. *Ritz v. Schmidt*, 22 Occ. N. 79, 31 S. C. R. 602.

2. Interpretation — Dual language — Different versions.]—Where the text of one version of a statute appears to be in conformity with the intention of the Legislature, such version may be followed in the interpretation of the statute, notwithstanding that an ambiguity exists in the text of the other version. *Town of Coaticook v. People's Telephone Co.*, Q. R. 19 S. C. 535.

3. Parliamentary elections—Controverted election — Petition — Trial — Time — Amendment — Retroaction — Public Act.]—The Quebec statute respecting controverted elections, 1 Edw. VII. c. 7, enacting that "the trial of every election petition now pending, or which shall be pending in the future, must be commenced within the three months which follow the publication, pursuant to Art. 213 of the Quebec Elections Act, 1895, in the Quebec Official Gazette, of the notice of the election of the member, given by the Clerk of the Crown in Chancery, and in default the

petition shall be absolutely extinguished, perempted, void and of no effect," extinguishes and nullifies an election petition pending at the time of its coming into force, where the trial has not been commenced within the three months; and this although the petitioner has proceeded with all the diligence required by the previous statute.—2. If a party may derogate from and renounce certain statutes having the character of public order, which confer private rights upon him, he may not, by his mere act and will, hinder and arrest the effect of a statute of public order.—3. The statute respecting controverted elections, being a law politic, has a retroactive effect. *Sweeney v. Lovell*, Q. R. 19 S. C. 538.

See ASSESSMENT AND TAXES, II. IV. 5, V. 1, VI. 1, 2—BANKRUPTCY AND INSOLVENCY, I. 7—CERTIORARI, 1. 3—COMPANY, II. 2, V. 5—CONSTITUTIONAL LAW—COPYRIGHT—CROWN, I. 1—INSURANCE, IV. 14—LAND TITLES ACT, N. W. T., 1, 2—LIQUOR LICENSE ACT, I. 1, 2, 3—MINES AND MINERALS, 5, 7, 12, 13—MUNICIPAL CORPORATIONS, II. 6, 8. III. 11, IV. 1, X. 1, 3—NUISANCE, 1—PENALTIES AND PENAL ACTIONS, 5—PEREMPTION, 6—RAILWAY, IX., X. 2, 3.—REVENUE, 1, 3.

STATUTORY DECLARATIONS.

See EXECUTORS AND ADMINISTRATORS, 5.

STAY OF PROCEEDINGS.

1. Agreement to refer—Application to stay action—Time.]—An application under s. 11 of the Common Law Procedure Act, 1854, to stay proceedings in an action for the purpose of compelling the plaintiff to carry out an agreement to submit the matters in dispute to arbitration, must, under the practice now in force in Manitoba, be made before the filing of the statement of defence. *Northern Elevator Co. v. McLennan*, 22 Occ. N. 302, 14 Man. L. R. 147.

2. Claims in contestation—Payment by defendant.]—A motion by the defendant to stay the proceedings because of claims in contestation, in order that he may pay them, will be dismissed with costs; Art. 1198, R. S. Q., indicates how, in such circumstances, the defendant should dispose of the sums which he owes. *Montambault v. Brien*, 4 Q. P. R. 328.

See APPEAL, I. 8, IV. 9, X. 14—COSTS, VII. 12, VIII. 2, 6—EXECUTION, V.—PATENT FOR INVENTION, 1—PENALTIES AND PENAL ACTIONS, 5.

STIPENDIARY MAGISTRATE.

See CANADA TEMPERANCE ACT, 3—LIQUOR LICENSE ACT, II. 1.

STORAGE.

See BAILMENT.

STREET RAILWAYS.

1. Contract with corporation—Construction of contract—Snow and ice.]—In a contract between the parties, clause 3 provided as follows:—"The said city (of Montreal) shall grant to the said (Montreal Street Railway) company all the licenses, rights, and privileges necessary for the proper and efficient use of electric power, to operate cars in the streets in a manner successfully in use elsewhere," &c.; and clause 16 reads:—"The company shall, under instructions from the city, keep their track free from ice and snow, and the city may, at its option, remove the whole or such part of ice and snow, from curb to curb, as it may see fit, from any street or part of street in which cars are running, including the snow from the roofs of houses, thrown or falling into the streets, and that removed from the sidewalks into the streets with the consent of the city, and the company shall be held to pay one-half of the cost thereof."—*Held*, affirming the judgment in Q. R. 19 S. C. 504, that, under the provisions of the contract quoted above, the company is bound to keep its tracks clear from ice and snow, but not to remove or cause to be removed from the streets, and conveyed elsewhere, the snow which is so cleared from its tracks.—**2.** The company, without the permission of the city council, may use, for the purpose of clearing the snow or ice from its tracks, electric sweepers, rotary brushes, or similar apparatus which sweeps the snow or ice into the street. *City of Montreal v. Montreal Street R. W. Co.*, Q. R. 11 K. B. 458.

2. Negligence—Collision—Contributory negligence.]—The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross

the track, and the waggon was struck by a car which was coming behind, at what was held to have been a reasonable rate of speed. The plaintiff said that one hundred feet from the point at which he had tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross:—*Held*, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages. *Danger v. London Street R. W. Co.*, 30 O. R. 493, applied. *O'Hearn v. Town of Port Arthur*, 22 Occ. N. 255, 4 O. L. R. 209.

3. Negligence—Danger to public—Avoidance of—Notice of action.]—An electric tramway company ought to avoid everything which, without being absolutely necessary for its service, constitutes a danger to the public, and if the company does not do so it is guilty of actionable negligence.—**2.** The fact that a cause of danger can be suppressed only by means of an increase of labour or expense, is not an excuse for allowing it to subsist.—**3.** A provision of the charter of the Montreal Street Railway Company which obliges those who wish to sue it for damages to give a thirty days' notice, does not make of such notice a condition of the right of action against the company; it is but one of those prejudicial obligations the non-observance of which must be invoked by a dilatory exception. *Mattice v. Montreal Street R. W. Co.*, Q. R. 20 S. C. 222.

4. Negligence—Injury to person—Failure to give warning.]—The plaintiff, travelling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and, after walking for some distance, the car by which he had travelled, backing up, struck and injured him. There was a light at both ends of the car, but the current was very weak at the time, and the light given very slight, and the motorman came within four or five feet of the plaintiff before seeing him. The car was going along at the rate of only three or four miles an hour. The motorman did not sound the gong nor give any other warning of his approach:—*Held*, that the case could not properly have been withdrawn from the jury; that the accident was fairly and properly attributable to the defendants' negligence; and that there had been no misdirection; but that the sum awarded by the jury as damages, \$1,800, was largely in excess of what had been given in cases of much more serious injury, although it cannot be said that there is a standard of damages in such

cases. New trial directed unless the plaintiff would consent to the reduction of his verdict to \$900. *Ford v. Metropolitan R. W. Co.*, 22 Occ. N. 227, 4 O. L. R. 29.

See NEGLIGENCE, 5—NUISANCE, 2.

SUBPOENA.

Absence of signature of prothonotary — Nullity.—An original subpoena not signed by the prothonotary or his deputy is absolutely void. *Tapley v. Irving*, 4 Q. P. R. 319.

See DISCOVERY, I. 1, 3—WITNESSES.

SUBSTITUTION.

See PARTITION, 3—REGISTRY LAWS, 2—WILL, II. 13.

SUCCESSION.

1. Claims on—Alimentary allowance for widow.—A widow, as such, has no right to an alimentary allowance from the succession of her deceased husband. *Peloquin v. Brazeau*, 5 Q. P. R. 128.

2. Claims on — Widow's mourning.—A widow who sues to obtain from her husband's succession a provision for the expense of her mourning, has a right herself to choose what she regards as proper to buy, and the person who is obliged to pay for the mourning must pay such a sum as is fitting, having regard to the estate and fortune of the deceased; a detailed account of the cost of the mourning cannot be claimed. *Peloquin v. Brazeau*, 5 Q. P. R. 129.

4. Renunciation of — Mandate of attorney — Execution—Registration.—In the absence of proof of express mandate, an allegation of renunciation of a succession made by an attorney *ad litem*, in an action claiming rights under a substitution, is absolutely void and ineffective as a renunciation, the same not being made by a notarial deed or by a judicial declaration which has been recorded, as required by Art. 651, C. C., and an attorney *ad litem* having no presumed mandate to renounce a succession.—2. A document purporting to be a renunciation of a succession in this Province, executed in a foreign country before witnesses and a justice of the peace, and recorded on the same day by the town clerk of the place,

is also void and ineffective as a renunciation, the forms prescribed by Art. 651, C. C., not having been thereby complied with, and the document, moreover, not having been registered, as required by Art. 2126, C. C. *Legrand v. Legrand*, Q. R. 20 S. C. 521.

See EXECUTION, V. 1—PARTITION, 4—WILL.

SUCCESSION DUTY.

See REVENUE.

SUMMARY CONVICTION.

See CRIMINAL LAW, V. — JUSTICE OF THE PEACE.

SUMMARY JUDGMENT.

See JUDGMENT, III. — WRIT OF SUMMONS, III.

SUMMARY PROCEDURE.

Action—Amendment.—When an action is summary in its nature, the plaintiff will be allowed, on motion, to add to the fiat, writ, and declaration the words "summary procedure." *Sessenwein v. Schwartz*, 4 Q. P. R. 393.

See AMENDMENT — ATTACHMENT OF DEBTS, II. 3—BANKRUPTCY AND INSOLVENCY, I. 4—CONCILIATION—MASTER AND SERVANT, III. 2 — MECHANICS' LIENS, III. 1, 5—TRUSTS AND TRUSTEES, 9—WATER AND WATERCOURSES, 2.

SUMMARY TRIAL.

See CRIMINAL LAW, VI.

SUNDAY.

See CONSTITUTIONAL LAW, 6, 7—MUNICIPAL CORPORATIONS, III. 3.

SUPERIOR COURT, QUEBEC.

See APPEAL, IX.—COURTS, IX.

SUPREME COURT OF BRITISH COLUMBIA.

See APPEAL, I.—COURTS, II.

SUPREME COURT OF CANADA.

Powers of Judge of as to habeas corpus—Effect of judgment in Provincial Court.]—An application for a writ of *habeas corpus* was referred by the Judge to the Supreme Court of the Province, where it was refused. On application subsequently made for a *habeas corpus* to a Judge of the Supreme Court of Canada:—*Held*, that, under the circumstances, it would be improper to grant the writ. *In re Patrick White*, 31 S. C. R. 383.

See APPEAL, X.—COSTS, VIII. 6.

SUPREME COURT OF NOVA SCOTIA.

See APPEAL, III.

SUPREME COURT OF THE NORTH-WEST TERRITORIES.

See APPEAL, II.

SURETY.

See COSTS, VII. 13 — PRINCIPAL AND SURETY.

SURGERY.

See MEDICINE AND SURGERY.

SURPLUS.

See COMPANY, V. 10.

SURROGATE COURTS.

See APPEAL, V. 2—COURTS, VII.

SURVEY.

Village lots—Authorization—Statutory requirements—Order in council—REVOL. XXII. O.L.T. ANN. DIG.

solutions of municipal council—By-law—Cost of survey—Assessment for—Proprietors interested.]—After a resolution of the council of an incorporated village in favour of a survey of certain streets and lots, and correspondence with the Crown lands department, an order in council was passed, by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph street, Bailey street, and a street south of Bailey street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of \$290.77 should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate:—*Held*, that the survey directed was not authorized and was illegal, the requirements of the statute (R. S. O. 1887 c. 152, s. 39) not having been complied with so far as to give the Lieutenant-Governor in council jurisdiction to authorize the survey.—2. That the survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it.—3. That, if there was jurisdiction to authorize the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not. *In re Scott and County of Peterborough*, 26 U. C. R. 36, followed. *Regina v. McGregor*, 19 C. P. 69, distinguished. *Sutton v. Village of Port Carling*, 22 Occ. N. 139, 3 O. L. R. 445.

See MINES AND MINERALS, 2.

SURVEYOR.

Services—Rate of remuneration.]—If a surveyor is appointed by the Court, as in this case, to do certain acts in his capacity of surveyor, he has a right, according to the tariff of surveyors, to \$6 a day of six hours of work, and \$1 for every additional hour, and, besides, to his travelling expenses. *Jutras v. Mercure*, 5 Q. P. R. 6.

SURVIVAL OF ACTION.

See EXECUTORS AND ADMINISTRATORS, 10—REVIVOR, 1.

TAX SALE.

See ASSESSMENT AND TAXES, VI.

TAXATION OF COSTS.

See COSTS, VIII.—SOLICITOR, 9.

TAXES.

See ASSESSMENT AND TAXES.

TAXING OFFICERS.

See SOLICITOR, 9.

TELEGRAMS.

See PARLIAMENTARY ELECTIONS, VI. 2.

TELEPHONE COMPANY.

See APPEAL, IX. 2 — CONSTITUTIONAL LAW, 8—MUNICIPAL CORPORATIONS, III. 14.

TENANT AT WILL.

See LIMITATION OF ACTIONS, I. 2.

TENANTS IN COMMON.

Erection of wharf by one—Ouster—Trespass—Burden of proof.—The defendants erected a wharf on a portion of a water lot in the town of L., of which they were tenants in common with the plaintiff:—*Held*, that the wharf was a permanent structure, and that the defendants by erecting it ousted the plaintiff, their co-tenant, from the portion of the lot which it covered; that a claim by the plaintiff for damages for cutting logs, and a counterclaim by the defendants for the erection of the logs so cut, must both be dismissed, neither party having satisfied the burden of proof by shewing ownership of the land upon which the trespasses complained of were committed. *Zwicker v. Morash*, 34 N. S. Reps. 555.

See INFANT, 3.

TENDER.

See INSURANCE, IV. 12, 13—LANDLORD AND TENANT, I. 5—MORTGAGE, 1—PLEADING, XI. 2—PLEDGE, 1.

TESTAMENTARY CAPACITY.

See WILL, IV.

THEFT.

See CRIMINAL LAW, II.

THIRD PARTIES.

See PARTIES, L. 3, III.

THRESHER'S LIEN.

See LIEN, 1.

TIMBER.

Sale of—Interest in land—Severance—Identification—Vendor's lien—Injunction.—St. G., the owner of land, by an agreement in writing sold all the timber on it to E., taking promissory notes in payment. E. assigned all his interest in the agreement to S., his principal, who made the notes; E. indorsed them to St. G. S. cut and removed timber from the land, and cut and piled on the land a lot of cordwood, which he sold to the defendant, but did not pay the notes. St. G. sold the land and all her interest in the timber and the notes to the plaintiff. The defendant sought to remove the wood, but the plaintiff obtained an injunction restraining him, and claimed a vendor's lien:—*Held*, that the sale of the timber to be removed in three years by the purchaser was of an interest in land, in respect of which a vendor's lien arose by operation of law, which was not displaced by the cutting or sale of the timber, as long as it could be identified and remained on the land; and the remedy was by an injunction and enforcement of the lien. *Summers v. Cook*, 28 Gr. 179, followed *Ford v. Hodgson*, 22 Occ. N. 177, 3 O. L. R. 526.

See CROWN, I. 4, 5—GIFT, 1—SALE OF LAND—TREES.

TIME.

See APPEAL, I. 2, 3, II. 3, VII., VIII. 7, X. 3—ARBITRATION AND AWARD, 5—ARREST, IV. 2—ASSESSMENT AND TAXES, II., V. 1, VI. 2—ATTACHMENT OF DEBTS, II. 12—BANKRUPTCY AND INSOLVENCY, I. 7, IV.

8—COMPANY, V. 4—CONCILIATION—COSTS, I. 8, VII. 8, 11, 13, IX. 4—COURTS, V. 3—CRIMINAL LAW, I. 1, V. 6—DISCOVERY, I. 7, III. 7—EXECUTORS AND ADMINISTRATORS, 6—JUDGMENT, IV. 1—LANDLORD AND TENANT, IV. 5—LAND TITLES ACT, N. W. T., 3—LIMITATION OF ACTIONS—MECHANICS' LIENS, III. 4, IV. 4—MINES AND MINERALS, 3—MUNICIPAL CORPORATIONS, III. 7—MUNICIPAL ELECTIONS, 9—PARLIAMENTARY ELECTIONS, III. 6, 8, 9, 13, V. 1—PARTICULARS, 6—PARTIES, II. 2, III. 2—PARTNERSHIP, 1—PEREMPTION—PLEADING, IV. 2, VI., VII. 17—PRINCIPAL AND SURETY, 1, 2, 3—SHIP, I. 3—SPECIFIC PERFORMANCE, 1—STATUTES, 3—STAY OF PROCEEDINGS, 1—TRIAL, I. 2, II. 4, IV. 1, 3—VENDOR AND PURCHASER, 5—WRIT OF SUMMONS, II. 14.

TITLE TO LAND.

Trespass — Overhanging roof — Right of view — Evidence — Boundary line — Waiver.—In 1844 the defendants constructed a toll-house close to or on the boundary of their land, with windows overlooking the adjoining lot and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the adjoining lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable to his house, and the defendants paid the cost of the necessary alteration. In 1900 the plaintiff instituted the present action against the defendants to have the remainder of the projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties, and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty:—*Held*, STRONG, C.J., dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute, and consequently that his action could not be maintained. *Held*, further, *per* GIBOUARD, J., following *Delorme v. Cusson*, 28 S. C. R. 66, that, as the plaintiff and his auteurs had waived objection to the manner in which the toll-house had been constructed, and permitted the roof and windows to remain there, the demolition could not be required, at least so long as

the building continued to exist in the condition in which it had been so constructed. *Parent v. Quebec North Shore Turnpike Trustees*, 22 Occ. N. 46, 31 S. C. R. 556.

See CROWN, I. 5—COURTS, III.—PLEADING, XI. 1—TRUSTS AND TRUSTEES, 8—VENDOR AND PURCHASER.

TOLLS.

See WATER AND WATERCOURSES, 2.

TRACTION ENGINE.

See WAY, II. 1.

TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN.

1. Assignment — Execution — Right of property.—The right of property in a registered specific trade mark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which it has been used. *Gegg v. Bassett*, 22 Occ. N. 114, 3 O. L. R. 263.

2. Industrial design — Cook-stove — Imitation — Infringement — Injunction — Cancellation of conflicting design.—The plaintiffs were registered owners of an industrial design for a cook-stove, called the "Royal Favourite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of such stoves, caused a model to be made from it, and, with some minor alterations chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement, and for an order to expunge the defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs:—*Held*, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of the defendants' design should be expunged from the register. *Findlay v. Ottawa Furnace and Foundry Co.*, 22 Occ. N. 200, 7 Ex. C. R. 338.

3. Infringement — "Cream yeast" — Protection — Acquisition of right by user — Abandonment — Injunction.—The words "cream yeast" are not the

proper subject of a trade mark, being common words of description. *Partlo v. Todd*, 14 A. R. 444, and *Provident Chemical Works v. Canada Chemical Co.*, 2 O. L. R. 182, followed. But the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have the defendants restrained from so using it. The fact that the plaintiff had not for some years before action sold many boxes of the article did not shew an abandonment of the right to use the name in connection with the goods, the plaintiff having always been ready to furnish the article when it was asked for. *Gillett v. Lumsden*, 22 Occ. N. 297, 4 O. L. R. 300.

4. Infringement — Fancy name—Descriptive letters — Forum—Exchequer Court.—The letters "C. A. P.," standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trade mark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates." Judgment of *MEERDITH, C.J.*, 2 O. L. R. 182, 21 Occ. N. 467, reversed. The amendments to the Exchequer Court Act since the decision in *Partlo v. Todd*, 14 A. R. 444, 17 S. C. R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trade mark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trade mark, its invalidity may be shewn. *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 22 Occ. N. 381, 4 O. L. R. 545.

5. Infringement—Geographical designation.—[Apart from any consideration as to registered trade marks, an action lies at common law to restrain a trader from applying to his goods the name of a place in which they were not manufactured, and where the adoption of such name tends to confuse his goods in the eyes of the public with those of a rival trader who has made his goods known to the public under a designation including the name of their place of origin or manufacture. *Pabst Brewing Co. v. Ekers*, Q. R. 20 S. C. 20.

6. Infringement — Use of corporate name—Fraud and deceit — Evidence.—Since 1885 the plaintiffs, incorporated in

Massachusetts, had done business in the United States of America and Canada as manufacturers and dealers in india rubber boots and shoes under the name of "The Boston Rubber Shoe Company," having a trade line of their manufactures marked with the impression of their corporate name, registered as their trade mark known as "Bostons," which had acquired a favourable reputation. The defendants were incorporated in Canada in 1896 by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods, on one grade of which was impressed their corporate name, these goods being referred to in their price lists, catalogues, and advertisements as "Bostons," and the company's name frequently mentioned therein as "Boston Rubber Company." In an action to restrain the defendants from continuing to use such impressed trade mark, or any other similar mark on such goods as an infringement of the plaintiffs' registered trade-mark:—*Held*, reversing the judgment in 7 Ex. C. R. 187, 21 Occ. N. 517, that, under the circumstances, the use by the defendants of their corporate name in the manner described on goods of their own manufacture similar to those manufactured by the plaintiffs, was a fraudulent infringement of the plaintiffs' registered trade mark and calculated to deceive the public, and so, in bad faith, to obtain sales of their own goods as if they were the plaintiffs' manufactures, and consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark upon such goods manufactured by them in Canada. *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal*. 22 Occ. N. 275, 32 S. C. R. 315.

TRADE UNION.

Watching and besetting—Conspiracy—Injunction.—[Injunction granted in the terms of the order, in *Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426. *Le Roi Mining Co. v. Rossland Miners Union*, No. 38, *Western Federation of Miners*, 5 Brit. Col. L. R. 370.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS, III. 15.

TREATING.

See PARLIAMENTARY ELECTIONS, II.

TREATY.

See CONSTITUTIONAL LAW, 3 — EXTRA-DITION, 1.

TREES.

Property in trees planted in highway — Destruction—Recovery.]—Trees planted upon the public highway in the city of Montreal, with the consent of the municipal authority and in conformity with its regulations, become an accessory to the property in the land in front of which and for the advantage of which they have been planted, and the owner of such land may maintain an action for damages against a neighbour, when by reason of the industry carried on by the neighbour, the trees have been destroyed. *Beauchamp v. City of Montreal*, M. L. R. 7 S. C. 382, followed. *L'Huissier v. Brosseau*, Q. R. 20 S. C. 170.

See MUNICIPAL CORPORATIONS, III. 16 —TIMBER.

TRESPASS.

1. To land—Wrongful and wilful—Damages—Mode of assessment.]—Where in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or *bona fide*. *Union Bank of Canada v. Rideau Lumber Co.*, 22 Occ. N. 114, 3 O. L. R. 269.

2. To person—Arrest and search—Reasonable and probable cause—Post office—Decoy letter.]—The appellant, a letter carrier employed by the post office department at Montreal, was intrusted with the delivery of two decoy letters, for the purpose of testing his honesty. Each of the letters contained a small sum of money. One of them bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter should have been returned by the carrier to the post office. There being no entry of this letter in the post office book, after the usual time for making such entry had elapsed, the appellant was detained and searched by the respondent, a detective, acting under the instructions of the post office department. The letter not being found on the appellant, he was released. On the following day the

letter was returned to the post office:—*Held* (affirming the *dispositif* of the judgment in Q. R. 20 S. C. 549, with a modification of the *considérants*) that the appellant having violated the rules of the post office department, by failing to enter the letter bearing a non-existent address in the book provided for that purpose, there was reasonable and probable cause for detaining and searching him, and that his action of damages against the respondent, in the absence of evidence that the respondent had made an improper and illegal use of his authority in the manner in which he effected such detention and search, and subsequent release, could not be maintained. —2. A letter is a post letter although directed to a fictitious or non-existent address. *Mayer v. Vaughan*, Q. R. 11 K. B. 340.

See BOUNDARIES—COSTS, VI. 5—MALICIOUS PROCEDURE—MINES AND MINERALS, 14—MUNICIPAL CORPORATIONS, V. 2—TENANTS IN COMMON—TITLE TO LAND—TRIAL, II. 5.

TRIAL.

- I. INSCRIPTION.
- II. JURY.
- III. JURY NOTICE.
- IV. NOTICE OF TRIAL.

See COSTS, I. 4—CRIMINAL LAW—EVIDENCE, IV. 6—MUNICIPAL ELECTIONS, 6—NEW TRIAL—PARLIAMENTARY ELECTIONS, III. 13—PARTIES, III. 3—SALE OF GOODS, VIII.—STATUTES, 3—VENUE.

I. INSCRIPTION.

1. Proceeding taken in name of deceased party — Amendment—Discretionary order—Interference with discretion on appeal.]—During the time between the hearing of a case and the rendering of the judgment in the trial Court, the defendant died. His solicitor, by inadvertence, inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend and to be allowed to make a regular *reprise d'instance*. The Court of Review allowed the plaintiffs' motion as to costs

only, permitted the amendment and *reprise d'instance* applied for, and reversed the trial Court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of Review, on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities:—*Held*, reversing the judgment appealed from, STBONG, C.J., and TASCHEREAU, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and *reprise d'instance*, and that, as there was no abuse of discretion, the Court of King's Bench should not have interfered. *Price v. Fraser*, 22 Occ. N. 46, 31 S. C. R. 556.

2. Time—Premature filing.]—A proceeding in an action has no efficacy except as of the day upon which it is filed at the record office and made part of the record.—2. An inscription for examination and hearing, made before the expiration of the three days which follow issue joined, will be set aside upon the application of the opposite party. *Lachance v. Casault*, 4 Q. P. R. 223.

See APPEAL, IX. 1—EXHIBITS, 1, 2—PLEADING, VII. 4, 5, 6.

II. JURY.

1. Application for—Action for money lent—Joinder of claims—Exception.]—A claim arising from a loan of money by an advocate to a broker is not a debt of a commercial nature, and consequently is not susceptible, under Art. 421, C. C. P., of trial by jury. And where such claim is joined to a demand of a commercial nature the defendant is entitled, under Art. 177, C. C. P., to stay the suit by dilatory exception. *Gilman v. Fenwick*, Q. R. 20 S. C. 513.

2. Application for—Delay in proceeding—Bar.]—A party who has applied for a trial by jury is deprived of the right of proceeding by the expiration of the delay of 30 days from issue joined, if the application has been made by pleading, or from the judgment granting a special application for a trial by jury, if there has been such an application. *Copland v. Canadian Pacific R. W. Co.*, 4 Q. P. R. 163.

3. Application for—Equitable relief—Questions of fact.]—Action by a former shareholder in a company against T. and the company, the latter being joined as defendant because T. and his

brother and partner had a controlling interest in the company, and the consent of the company to be joined as plaintiff could not be obtained. It was alleged that T. while a director of the company had discovered a valuable bed of gold in areas as to which the company held an option to purchase; that the discovery was concealed; and that T. procured a conveyance of the property to himself, and also purchased the shares of the other shareholders, including those of the plaintiff, without disclosing the discovery. These facts were put in issue by T. The relief sought to be obtained was, among other things, a declaration that T. held the areas as trustee for the company, and that the company was entitled to a transfer thereof; also that the transfer of the shares by the plaintiff to T. should be set aside. The defendant applied for an order to have the issues tried by a jury: O. 34 2:—*Held*, that the admitted relation of T. with these properties and to his co-owners and co-partners in the transaction was such as to entitle all others interested in the property to the fullest explanation of the dealings of T. with the officers of the company, and the circumstances under which he and his partner became proprietors of the mine. This inquiry could be more effectively made in a trial before a Judge, as in other equitable proceedings, than before a jury. The application was dismissed. *Rood v. Thompson*, 22 Occ. N. 36.

4. Application for—Fraud—Time.]—There cannot be a trial by jury except in the cases enumerated in Art. 421, C. P.—2. An action for damages, founded upon fraud and false representations, does not come within any of the classes of actions mentioned in that Article.—3. After a motion is made to settle the facts, it is not too late to plead that the action is not one proper to be tried by a jury. *Bell v. Royal Bank of Canada*, 4 Q. P. R. 309, Q. R. 21 S. C. 321.

5. Application for—Trespass.]—To make a case for an order for trial of an action by a jury, all the causes of action must be susceptible of being tried in this exceptional way.—2. An action in which damages are claimed against the defendants for having executed an illegal *mandat de perquisition* and having entered without warrant the domicile of the plaintiff and having threatened her with criminal prosecution, may be tried before a jury; but if the plaintiff claims, besides, damages on account of being deprived of the use of certain personal property, that cause of action takes away the right to trial by jury. *R. v. Dickson*, 4 Q. P. R. 357.

6. Claim and counterclaim.]—

Where the claim is such that it cannot by reason of R. 170 of the Judicature Ordinance (C. O. 1898 c. 21), be tried by a jury, and there is a counterclaim which, if the defendant had sued in a separate action, he would have been entitled to have tried by a jury:—*Held*, that if the counterclaim arises out of the same transactions as the claim, they must be tried together; and in that event the defendant, having accepted the forum chosen by plaintiff, a jury cannot be allowed. *Friel v. Stinton*, 5 Terr. L. R. 252.

7. Disagreement—Fraud—Judgment by Court.]—

On the second trial of an action on a promissory note, where the defence alleged fraud on the part of the plaintiffs in obtaining the indorsement, the jury disagreed. Plaintiffs then moved for judgment on the ground that there was no evidence of fraud, and the motion was refused:—*Held*, that no jury could properly find fraud, and it was desirable, especially in view of the first abortive trial, that the judgment should now be entered which should have been entered at the trial. *Yorkshire Guarantee and Securities Corporation v. Fulbrook*, 9 Brit. Col. L. R. 270.

8. Inconclusive findings — New trial—Negligence.]—

The plaintiff's intestate had a contract with the defendant company to repair a bridge, and in an action to recover damages for his death by the defendants' negligence, the jury found, *inter alia*, that he went on such business on a coal train without any ticket, but with the consent of the officer in charge, and that the latter had no authority, unless by custom, to allow the deceased to travel on the train:—*Held*, that the findings were inconclusive and that there should be a new trial. *Nightingale v. Union Colliery Co.*, 8 Brit. Col. L. R. 134.

9. Jurors—Same juror sitting on former trial—New trial.]—

This action was originally tried in 1894, before a Judge with a special jury, and the plaintiff got a verdict for \$19,377. On appeal a new trial was ordered, and at that trial in 1897, also with a special jury, a nonsuit was entered. On appeal a new trial was ordered by the full Court (affirmed by the Supreme Court of Canada, 20 S. C. R. 334). The third trial took place before a Judge with a special jury in December, 1901, and on the verdict the plaintiff obtained judgment for \$9,667.62. The defendant before the last trial changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present

at either the second or the third trial. James Muirhead was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of that fact until after the conclusion of the trial:—*Held*, refusing a new trial on this ground, that it was the duty of the solicitor to inquire who the first jurors were, an opportunity to do which is provided by s.s. 5 of s. 59 of the Jurors Act. *Harris v. Dunsmuir*, 22 Occ. N. 341.

10. Special jury—Fees of jurors—Mileage.]—

A special juror is entitled to \$2 for each day's attendance at Court, whether he serves or not, and whether in order to attend Court he travels from his place of residence or not; if he so travels he is in addition entitled to mileage. *Taylor v. Drake*, 22 Occ. N. 220, 9 Brit. Col. L. R. 54.

11. Special jury—Striking—Parties—Defendant to counterclaim—Challenge.]—

The defendants in the original action counterclaimed against the plaintiff and one R. On the defendants' application an order for a special jury was made, the plaintiff and R. acquiescing. On the striking of the jury the sheriff refused to allow R. to take any part, and the plaintiff then applied under Rule 157 to strike out the counterclaim because of the impossibility of properly striking a special jury where there are more than two parties:—*Held*, that the plaintiff had no right to make the application. As R. acquiesced in the order for a special jury when it was made and had not appealed, a challenge to the array by his counsel at the trial was overruled. *Bank of British North America v. Robert Ward & Co. (Ltd.)*, 9 Brit. Col. L. R. 49.

12. Verdict — Indefiniteness — Circumstances of case—Discharge of jury—

Recalling, and amending verdict—Effect of—New trial—Non-direction.]—In an action for damages caused by water being backed up on to the plaintiff's premises, the jury did not answer the questions put, but answered: "We have not answered exactly in the form of the question. We find that the construction and grading of the street across Boundary creek caused the plaintiff damage in the sum of \$3,000," without stating that the grading was done by the defendants. It appeared that the dispute at the trial narrowed down to whether it was the grading of the street by the defendants or the grading of an alley by one Fletcher that caused the damage. On the verdict judgment was entered for the plaintiff:—*Held*, on appeal, that from the circumstances of the case the verdict would support the judgment. Where counsel at the trial

abstains from asking the Judge to submit a point to the jury, a new trial will not be granted on the ground of non-direction as to that point. After judgment was pronounced and the jury was discharged, at the direction of the Court the jury was recalled and asked certain questions as to the meaning of the verdict, and the verdict was amended accordingly. *Held*, that whatever was done after the discharge of the jury was a nullity. *Waterland v. City of Greenwood*, 22 Occ. N. 245, 8 Brit. Col. L. R. 396.

13. Verdict—Special verdict—Setting aside—Weight of evidence.—The Court will not set aside a verdict rendered by a special jury, merely because the Court would have come to a different conclusion on the evidence; the verdict is not considered against the weight of evidence unless, in the opinion of the Court, it is one which the jury, viewing the whole of the evidence, could not reasonably find. (Article 501, C. C. P.). *McLeod v. Montreal Street R. W. Co.*, Q. R. 20 S. C. 8.

14. Verdict—Weight of evidence—Negligence—Railway—Sparks from engine.—Fire was discovered on J.'s farm a short time after the passing of a train of the Grand Trunk Railway, drawn by two engines, one having a long, and the other a short, or medium, smoke box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a longer smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine, and they believed it was from that with the short smoke box; and that the use of said box constituted negligence in the company, which had not taken the proper means to prevent the emission of sparks:—*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 689, 22 Occ. N. 12, that the latter finding was not justified by the evidence, and the verdict for plaintiff at the trial was properly set aside. *Jackson v. Grand Trunk R. W. Co.*, 22 Occ. N. 249, 32 S. C. R. 245.

See APPEAL, X. 5—CONTRACT, III. 3—COURTS, IX. 1—DEFAMATION, I. 5, II. 6—INSURANCE, I. 3, V. 2—MASTER AND SERVANT, II. 5, 6, 12—MEDICINE AND SURGERY, 2—NEGLECT, 5—PRINCIPAL AND SURETY, 4.

III. JURY NOTICE.

1. Libel—Necessity for.—The effect of s. 102 of the Judicature Act, R. S.

O. 1897 c. 51, which provides for actions of libel, &c., being tried by a jury, is to dispense with a jury notice being given in such actions, so that a notice of trial is properly given without such notice having been first served; s. 106 not applying to actions of libel. *Putterbaugh v. Gold Medal Mfg. Co.*, 22 Occ. N. 122, 3 O. L. R. 259.

2. Order striking out—Powers of Judge in Chambers—Leave to appeal.—See *People's Building and Loan Assn. v. Stanley*, 22 Occ. N. 254, 4 O. L. R. 90.

IV. NOTICE OF TRIAL.

1. Equitable action—Default judgment—Appearance in spite of—Time—Entry for trial—Motion to set aside—Non-appearance at trial—Dismissal of action—Conditions of order—Appeal—Amendment—Costs.—An action for partition or sale of lands and for a declaration that a Crown grant to the defendants was inoperative and void. Judgment for default of appearance was entered against three of the four defendants in June, 1899. In February, 1900, an appearance was entered on behalf of all the defendants and a defence delivered. Notice of trial was given and the action entered by the defendants. The plaintiffs moved before the trial Judge to set aside the notice. This motion was dismissed; and, the plaintiffs not proceeding with the trial, an order was made dismissing the action for want of prosecution unless plaintiffs paid costs and gave security:—*Held*, that the action was of an equitable nature, and the plaintiffs were not entitled under any practice prevailing immediately prior to the 1st October, 1884 (when the Judicature Act came into force), to obtain a judgment by default against the defendants as at common law; the suit must be governed by the same practice as any other equitable action not provided for in Order XIII. Rules 11, 13; the defendants could appear at any time before judgment, although the time limited for appearance had elapsed; a defendant could appear at any time, though not served.—**2.** The appearance and defence being regular, the notice of trial and entry were regular; and *semble*, that, if the appearance and defence were irregular the motion should have been to set them aside, and not the subsequent proceedings.—**3.** The notice of trial was regularly given under Order XXXIV., Rule 11, and, the defendants having appeared when the cause was called for trial, and the plaintiffs having failed to appear, the action was properly dismissed under Rule 23 of that Order.

—4. The conditions of the order made by the trial Judge, though unusual, were within his province.—5. The order made at the trial should be amended by adding recitals shewing what actually took place at the trial, and the appeal from it should be dismissed without costs, the difficulty having been created by want of care in drawing up the order, and the action should be dismissed with costs in case the conditions imposed were not complied with. *Duyon v. LeBlanc*, 34 N. S. Reps. 215.

2. Service of—Letter wrongly addressed—Ratification.]—On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in St. Thomas, prepared a notice of trial and copies thereof, in three actions, which he directed to be forwarded to his Toronto agents, with instructions to serve and return with admissions of service; but, by a mistake in the office, the envelope was addressed to the defendants' solicitors in Toronto, and reached their office on the following morning; but did not come to the notice of the member of the firm who had charge of the defences therein until after four o'clock, when, on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitor, which was done:—*Held*, reversing the decision of the Master in Chambers, that what was done did not constitute valid service of the notices on the defendants' solicitors; nor did the defendants' solicitors do anything to ratify such service. *Newsome v. Mutual Reserve Fund Life Association*, 22 Occ. N. 115, 3 O. L. R. 253.

3. Time—Judgment granting new trial—Settlement of.]—By the judgment of the Supreme Court of Canada an appeal in this action was allowed and a new trial granted. The judgment was read in open Court on the 27th May. The plaintiff's solicitor thereupon gave the usual ten days' notice of trial for the 10th June, 1902. The minutes of the judgment were not settled until the 3rd June, and when settled bore date the 27th May, 1902. The notice of trial was set aside as premature. *Grant v. Acadia Coal Co.*, 22 Occ. N. 261.

TROVER.

See DETINUE.

TRUST COMPANY.

See COSTS, VII. 14.

TRUSTS AND TRUSTEES.

1. Breach of trust—Liability for, of co-trustee—"Honestly and reasonably."]

—A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated the moneys of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be wealthy:—*Held*, that the defendant, having acted honestly and reasonably within the meaning of 62 V. (2) c. 15, s. 1, was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor. *Dover v. Denne*, 22 Occ. N. 204, 3 O. L. R. 664.

2. Breach of trust—Relief—61 V. c. 26—Costs.]—A testator devised and bequeathed his real and personal estate to his wife "to be hers in such a way that she shall during her natural life have the full use, benefit, and enjoyment thereof." He directed his executors to sell his real estate and to invest any money belonging to his estate in certain specified securities, "so that my said wife may have the interest and income arising therefrom during her life," and appointed his wife and the plaintiffs executors. Proceeds from the sale of real estate came to the hands of the plaintiffs, and were by them remitted to the widow, living in England. The widow invested part of the proceeds in securities in the name of herself and one of the plaintiffs, and disposed of, though in what way did not appear, the balance of the principal moneys. A suit was brought by the plaintiffs after the widow's death to be relieved from liability for the loss of such part of the estate. By 61 V. c. 26, a trustee who has acted honestly and reasonably, and ought fairly to be excused for the breach of a trust, and for omitting to obtain the directions of the Court in Equity in the matter in which he committed such breach, may be relieved by the Court from personal liability for such breach. Relief granted, but without costs. *Simpson v. Johnston*, 22 Occ. N. 38, 2 N. B. Eq. Reps. 333.

3. Conveyance absolute in form—Mortgage—Resulting trust—Notice to equitable owner—Estoppel—Inquiry.]—The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners. *Oland v. McNeil*, 22 Occ. N. 197, 32 S. C. R. 23.

4. Lien of trustee—Abortive sale—Foreclosure—Purchase by trustee—Report on sale—Certificate in lieu of—Order—Terms.]—The defendant having been declared a trustee, with a lien for advances, and the greater portion of the trust estate having been offered for sale, to satisfy the amount found due him, under the direction of the Court, and the sale having proved abortive:—*Held*, that the defendant's position as a trustee debarred him from the ordinary remedy of foreclosure, to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate. *Tenant v. Trenchard*, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661. followed. *Held*, also, that it was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested. *Held*, also, that the property embraced in the order not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept that which was put up for sale in satisfaction of his entire claim. The defendant offering to submit to terms, an order was made providing that he should be allowed to purchase at the amount of his claim less \$250, in the event of \$17,500 not being realized by a sale by tender or private contract. *Hutton v. Justin*, 22 Occ. N. 23, 2 O. L. R. 713.

5. New trustee—Married woman.]—Under the Trustee Act, R. S. O. 1897 c. 129, a married woman was appointed a trustee to fill a vacancy, in view of the circumstances detailed in the report. *In re Gough*, 22 Occ. N. 112, 3 O. L. R. 206.

6. Remuneration of trustees — Fixed annual sum — Solicitor-trustee — Profit costs.]—Appeal by one of the trustees of an estate from the judgment of a Surrogate Court fixing his remuneration. The Surrogate Judge allowed five per cent. on the interest collected only, but nothing for any other services, on the

ground that he had allowed two and a half per cent. in a former order for the taking over of the corpus:—*Held*, following *Re Berkeley's Trusts*, 8 P. R. 193, that an annual allowance should be made for looking after the corpus of the fund, and that it should not depend upon the amount collected and invested, but should be a fixed annual allowance, based on the nature of the property and the consequent degree of care and responsibility involved. *Held*, also, that the Surrogate Judge, instead of allowing the trustees a percentage on the principal sum taken over, and nothing for the collection of the interest, should have allowed them nothing for the taking over of the estate, but a percentage on all interest collected and paid over, and an annual sum for the care of the estate. *Held*, also, that the general rule is, that a trustee-solicitor is not entitled to charge the estate with fees for any professional services, but that an exception, which is not to be extended, has been established by the decision of Lord Cottenham in *Cradock v. Piper*, 1 Macn. & G. 664, under which a solicitor-trustee, who brings or defends proceedings in Court for himself and his co-trustee, is entitled to recover profit costs, and, therefore, to charge such costs to the estate. *In re Williams*, 22 Occ. N. 323, 4 O. L. R. 501.

7. Shares in building society— "In trust"—Notice—Mortgage—Purchaser for value—Consolidation.]—The defendant A. J., being the holder of six shares of permanent stock in her own name, and six shares of instalment stock "in trust," and other shares, in a building society, obtained a loan of \$700 from the company, and transferred to the company's treasurer, as security, "all my stock in the said company." Subsequently she obtained a further loan of \$600 and transferred to the treasurer, as security, six shares of instalment stock, the intention being to transfer the six shares held "in trust" and already assigned, as the company contended, to secure the prior loan of \$700, giving also a mortgage on land, reciting that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance \$600 upon the said shares with this mortgage as further security. The defendant A. K. J. became the purchaser of the land subject to the \$600 mortgage (which she assumed), and purchased from A. J. her equity in the six shares of instalment stock:—*Held*, that the use of the words "in trust" put the company upon inquiry, and they were affected by the notice that A. J. was not the owner of the shares and had no power to mortgage. *Held*, also, that s. 53 of c. 203, R. S. O.

1897. did not empower the company to disregard the trusts, although it relieved them from seeing to the execution of any trust to which the shares were subject. *Held*, that the company could not consolidate the two mortgages as against A. K. J., as she was a purchaser for value, without it being shewn that she was aware at the time she purchased the equity of redemption in the lands that any prior mortgage existed against the six shares in the hands of the company. *Birkbeck Loan Co. v. Johnston*, 22 Occ. N. 160, 3 O. L. R. 497.

8. Transfer of mining areas to trustee—Power to sell—Title of vendee—Action—Parties.]—In an action for, among other things, a declaration, that, as against the defendants, the plaintiffs were entitled to an undivided one-third interest in certain gold mining areas transferred by the plaintiffs to the defendant McN., and sold by the latter to the defendant W., it appeared that the main objects with which the transfer in question was made were: (1) payment of certain advances made by McN. on account of the purchase money of the property; (2) the payment of an amount due by the plaintiff E. H. O. to the McLaughlin Carriage Co., for which the plaintiff C. G. O. was liable on a bond as surety:—*Held*, that the defendant McN. had power to sell the property for the purpose of carrying out the intentions of the parties. —2. That the plaintiffs not having established their right to the declaration prayed for, the claims or rights of the company, for whose benefit the transfer was made, could not be adjudicated upon without their being made parties to the suit. *Orland v. McCull*, 34 N. S. Repts. 453.

9. Will—Annuities—Setting apart securities—Distribution of residue—Realization of estate—Investments—Redemption—Consent—Summary application—Rule 938.]—An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose came to the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled:—*Held*, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts

and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose. *In re Parry*, 42 Ch. D. 570, and *Harbin v. Masterman*, [1896] 1 Ch. 351, followed. *Hicks v. Ross*, [1891] 3 Ch. 490, referred to. *Held*, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue. *In re Medland, Eland v. Medland*, 41 Ch. D. at p. 492, and *In re Parry*, *supra*, followed. *Held*, that it is only when the persons whose estate is liable to pay an annuity and the annuitant both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent. Order of *BOYD, C.*, 21 Occ. N. 380, varied. *In re McIntyre, McIntyre v. London and Western Trusts Co.*, 22 Occ. N. 90, 3 O. L. R. 212.

See CHURCH, 2—COMPANY, IV. 5—COSTS, VI. 3—EVIDENCE, I. 8—SCHOOLS, I. 5, 6—SOLICITOR, 7—WILL.

TUTOR.

See ALIMENTARY ALLOWANCES—APPEAL, IX. 3—INFANT, 5—SOLICITOR, 4.

UNDUE INFLUENCE.

See FRAUD—WILL, IV.

UNLAWFUL ASSEMBLY.

See CRIMINAL LAW, III. 19.

USUFRUCT.

See HUSBAND AND WIFE, IV. 1—PARTITION, 4—WILL, II. 13.

VACATION.

See COSTS, VII. 12—HUSBAND AND WIFE, VI. 8—MUNICIPAL CORPORATIONS, III. 2.

VAGRANT.

See CRIMINAL LAW, III. 19.

VALUATION.

See ASSESSMENT AND TAXES, VII.

VALUATORS.

See SCHOOLS, I. 1.

VENDOR AND PURCHASER.

1. Contract of sale—Construction of covenants—Dependent or independent—Payment into Court.]—The plaintiff's claim was for payment of the balance of the purchase money of land under an agreement of sale, in the usual form, in which the purchaser covenanted that he would well and truly pay . . . the said sum of money together with the interest thereon on the days and times mentioned, and the vendor covenanted that, in consideration of the purchaser's covenant and on payment, &c., he would convey and assure or cause to be conveyed and assured to the purchaser, his heirs and assigns, by a good and sufficient deed in fee simple, &c., the said price or parcel of land freed and discharged from all incumbrances:—*Held*, following *Macarthur v. Leckie*, 9 Man. L. R. 110, that the two covenants were independent, and that the defendant was bound to pay the purchase money before he could call on the plaintiff to convey the property, and that it was not necessary for the plaintiff to prove the tender of a conveyance or to allege that he was ready and willing to convey, although it appeared that the property was subject to two mortgages. With the plaintiff's consent, the defendant's purchase money was ordered to be paid into Court so that the incumbrances could be discharged out of it and only the balance paid to the plaintiff. *Sword v. Tedder*, 21 Occ. N. 546, 13 Man. L. R. 572.

2. Contract of sale—Default—Rescission—Demand or notice—Necessity for—Costs of pending opposition.]—The plaintiffs had sold to the defendants a bit of land for construction of their line, for an annual rent of \$25 as long as the purchase money, \$500, should not have been paid, it being stipulated that if the defendants made default in payment of any gale of rent for six months after it fell due, the sale should be rendered void and of no effect, and it should be lawful for the plaintiffs to resume possession of the land and to dispose of it as their own property without indemnity or reimbursement of the sums paid. The defendants

having made default in payment of one of the gales of rent for more than six months after it fell due, the plaintiffs began an action to rescind the sale, and, besides, claimed the costs of a pending opposition which they had filed to protect their rights upon a seizure of the land being made as against the defendants:—*Held*, that, by reason of the default clause above referred to, the plaintiffs had the right to demand the rescission of the sale, without any demand of payment of the gale of rent, or any *mise en demeure* having been addressed to the defendants, the latter being in default by the very terms of the contract.—2. But the plaintiffs could not recover from the defendants the costs of the opposition, seeing that litigation was still pending on the subject of such costs, no adjudication having been made upon such opposition. *Maison St. Joseph du Sault au Récollet v. Montreal Port and Island R. W. Co.*, Q. R. 19 S. C. 484.

3. Contract of sale—Rescission for fraud—Secret commission to purchaser's agent—Collusion—Election.]—The defendant was induced by his agent to agree to buy the plaintiff's farm for \$1,850, although the plaintiff's price for it was only \$1,800. He paid \$250 in cash and went into possession. It was represented to him that there were 50 acres of cultivated land on the farm, but it turned out that there were only about 58 acres. On discovering this he asked to have the agreement cancelled and his money returned, but this was refused. He then, on the advice of the same agent, raised a crop on the farm and remained in possession for over a year, but refused to make the further payments agreed on. The plaintiff then brought this action to have the agreement cancelled and the money he had received forfeited. At the trial it came out that the plaintiff had paid the agent \$50 out of the money paid by the defendant, who asked to have the agreement cancelled and his money refunded to him:—*Held*, without deciding whether the defendant by his inaction had lost his right to repudiate the bargain on account of the shortage in the cultivated area, and distinguishing *Campbell v. Fleming*, 1 A. & E. 40, that, on account of the newly discovered secret payment by the plaintiff to the defendant's confidential agent, the defendant had the right to ask for cancellation of the sale and repayment of the \$250, with costs of action. *Panama, &c., Co. v. India Rubber, &c., Co.*, L. R. 10 Ch. 515, followed. *Murray v. Smith*, 22 Occ. N. 241, 14 Man. L. R. 125; *Sparring v. Houshan*, 22 Occ. N. 306, 14 Man. L. R. 134.

4. Contract of sale—Taxes—St. John Assessment Act.]—By agreement dated the 18th March, 1902, for the sale of land in the city of St. John, the vendee was to be given a "good title free of all claims on the 1st May," the date when possession was to be given. Section 131 of the St. John Assessment Act, 52 V. c. 27, enacts that "any assessment upon or in respect to real estate shall be a special lien on such real estate from the 1st day of April in the year of the assessment," &c. By 58 V. c. 49, s. 1, power is given to the city to sell real estate, on failure of the person assessed to pay taxes assessed in respect of the land. On the 1st May, 1902, the rate of taxation for the year from the 1st April had not been fixed by the assessors, and the rate was not determined, nor was the assessment list filed by the assessors with the common clerk until a number of weeks after the 1st May. The vendee contended that the taxes for the year beginning on the 1st April should be paid by the vendor, and the matter was referred to the Attorney-General, whose decision it was agreed should be final:—*Held*, that the vendee should pay the taxes, save one month's proportion thereof, to be borne by the vendor. *In re de Forest*, 22 Occ. N. 400.

5. Contract of sale—Time of essence—Waiver—Notice—Rescission—Forfeiture of payments—Receiver—Rents—Laches—Specific performance—Costs.]—*Semble*, that the acceptance by a vendor of a payment on account of a past due instalment of purchase money is a waiver of his right to take advantage of a provision in the agreement of sale making time of the essence thereof; but, if there be a subsequent default in payment of a subsequent instalment, that, being a new breach, gives the vendor a right to insist on that provision. *Held*, that a vendor, if he gives to the purchaser a notice limiting a reasonable time within which to complete an agreement to purchase, and informing him that after the lapse of the time limited the agreement will be treated as at an end, and if he does no act subsequent to waive the effect of the notice, thereby legally rescinds the agreement, and the purchaser is not entitled to specific performance.—2. That mere delay in enforcing his rights, consequent upon such a rescission, does not disentitle the vendor to a declaratory order that the agreement is rescinded.—3. That in such a case payments on account of purchase money are forfeited to the vendor if there be a provision to that effect in the agreement, and, *semble*, even without such a provision.—4. That where, after such an agreement, the property in question passed into the hands of a receiver

appointed by the Court, and he, as well as the purchaser, was given a notice of the terms above mentioned, the receiver was accountable to the vendor for the rents received subsequent to the date on which the notice terminated the agreement. The receiver, on the grounds of his being an officer of the Court, and of the delay of the vendor in taking steps to enforce his rights, was not ordered to pay the costs of the application in which the above questions were raised. *Forfar v. Sage, Es p. Wilkins*, 5 Terr. L. R. 255.

6. Fraudulent representation—Value of land rental—Abatement of price.]—In an action *quantum minoris*, it is necessary to prove that the buyer, plaintiff, gave more than the real value of the property, which proof had not been made in this case. Judgment in Q. R. 17 S. C. 387 affirmed. *DOHERTY, J.*, did not concur in the last *considérant* of the judgment of the Court below, viz., that where the alleged fraud relates to the motive inducing the purchaser to buy at a price exceeding that which he would have given if the fraud had not been practised, no action lies at the suit of the purchaser who adheres to the sale, to reduce the price. *Bailey v. Reinhardt*, Q. R. 20 S. C. 225.

7. Lien—Bailleur de fonds—Charge on purchase money—Gift—Acceptance.]—Although an act of sale or gift does not contain a stipulation for an hypothecary guaranty, the immovable sold or given remains burdened with a lien in the nature of a *bailleur de fonds*, for appreciable charges in money stipulated for in the act of gift, or for what remains due of the price of sale. Such hypothec exists in favour of the vendor or donor, or of the third person to whom it is stipulated in the act of gift or sale that the charges upon the gift or the price of the sale shall be paid.—2. The lodging of his claim by a creditor with the liquidator to be collocated upon the product of the sale of an immovable, of which the price is due to him, as a creditor indicated in the act of sale, constitutes a sufficient acceptance of the stipulation on his part. *Canadian General Electric Co. v. Shipton*, Q. R. 21 S. C. 83.

8. Mortgage sale—Notice of sale—Service of—Recitals in deeds—Assigns—Meaning of—Devolution of Estates Act—Caution—Non-registration of.]—Where, by a provision in a mortgage, no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible, and the conveyance made on a sale under the power of sale contained

recitals that service had been duly made on the mortgagor and his wife, the accuracy of such recitals being in no way disproved, a subsequent vendor of the land, in making title on a sale thereof, is not called upon to furnish any other evidence of such service; and further, the objection being as to the proof of service on the wife, no such proof was in any event required, for, by the terms of the mortgage, service only was to be required to be made on the mortgagor and his assigns, and the wife was not an assign. Where, after the death of a mortgagor, a married woman, and after the coming into force of the Devolution of Estates Act, R. S. O. c. 127, and the expiration of a year from the mortgagor's death, without any caution being registered, sale proceedings were taken on the mortgage, service of notice of sale on the husband and her heirs, two infant daughters, is sufficient, it not being necessary to serve the personal representatives. *In re Martin and Merritt*, 22 Occ. N. 116, 3 O. L. R. 284.

9. Possession by purchaser—Title—Waiver—Improvements.]—Where a purchaser, entitled by the terms of the contract to a perfect title, upon payment of his deposit entered into and continued in possession as provided by the contract, and made improvements even after alleged defects in the title were brought to his attention, and after he had brought an action for specific performance, the vendor asserting that he had a good title:—*Held*, that the purchaser had not waived his right to have a good title shewn. In the absence of fraud on the part of the vendor, or other special circumstances, if a purchaser takes possession under the contract, and the vendor is unable to make a good title, the purchaser is not entitled to be repaid the amount expended by him in improvements. *Rankin v. Sterling*, 22 Occ. N. 230, 3 O. L. R. 646.

10. Rescission of sale—Default of payment—Registration.]—The vendor cannot demand that the sale of an immovable effected by him shall be declared void, and that he shall be placed in possession of the immovable, without alleging and proving that the stipulation for the rescission of the sale in default of payment has been registered. *Beaudoin v. Gaudry*, 4 Q. P. R. 161.

11. Rescission of sale—Delay in making title—Pleading—Oral demand.]—The delay of a vendor to make title to his purchaser of the immovable, which he has sold him, is not a ground for rescinding the sale.—2. When the purchaser has not demanded the rescission of

the sale by his pleading, he cannot obtain it upon a demand made *ore tenus*, and this is so even when the grounds which he invokes for obtaining it, appear upon the record. *Brunet v. Berthiaume*, Q. R. 21 S. C. 314.

12. Sale under direction of Court—Error in fixing reserve bid—Opening biddings.]—A purchaser at a sale under the direction of the Court, having no knowledge of an irregularity in fixing the reserved bid, cannot be affected by such irregularity; and a motion made to set aside a sale and open the biddings, on the ground that in fixing the reserved bid the value of one part of the property was not taken into consideration, was dismissed with costs. The referee, not having in his report approved of the sale, but having made a special report regarding it, the purchaser, although ready, was unable to pay the balance of his purchase money into Court:—*Held*, that he should be allowed to pay it in without interest, and without prejudice to his right to object to the title. *In re Jelly, Provincial Trusts Co. v. Gammon*, 22 Occ. N. 64, 3 O. L. R. 72.

13. Sale under power in will—Debts charged on lands—Devise after payment—Executors' power to sell—Gifts to widow in lieu of dower—Evidence of election—Release.]—A testator by his will directed his executors to pay his debts, and, subject to the payment of debts, devised a particular portion of his estate, and directed that the balance of that portion of his estate, after payment of the debts, should be divided among his four children in equal shares. Then followed a paragraph declaring that the property willed should go to the parties direct:—*Held*, that a power of sale was given to the executors under the provisions of s. 19 of R. S. O. 1897, c. 129, and that purchasers were, by s. 19, released from the necessity from inquiring as to the due execution of the power. The will also contained gifts to the widow, including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower:—*Held*, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower. *In re Bradburn and Turner*, 22 Occ. N. 142, 3 O. L. R. 351.

14. Title to land—Removal of incumbrances—Certificate of registrar.]—One who has bought an immovable, free and clear of incumbrances, is entitled to compel his vendor to make title to him in respect of such immovable and to remove the charges upon such immovable.

—2. The documents of title to an immovable include a certificate of the registrar stating that the property is free from every charge and hypothec. *Ville-Marie Bank v. Kent*, 4 Q. P. R. 206.

15. Title to land—Specific performance — Purchaser at judicial sale—Administration proceedings — Mortgage — Advertisement of sale—Form of—Sheriff's deed.—A lot of land was devised to M. for the term of her natural life, and, after her death, to any child or children that she might have by the devisor. At the time of the devisor's death the property was subject to a mortgage, and there was one child by the marriage, who subsequently married. M. instituted an administration suit for the settlement of the estate, as the result of which, a sale was ordered; and she became the purchaser at the sale, and the Master's deed was made out to her. Subsequent to the purchase, M. executed a paper by which she agreed to convey the property in question to her daughter K. for her life, subject to the life interest of M.; then to go to the children of K. in fee simple:—*Held*, following *Kearney v. Kean*, 3 S. C. R. 339, that the purchase by M. at the administration sale must be presumed to have been an act done in the due course of administration; that it was in substance a mere discharge of an incumbrance; and, notwithstanding the fact that the Master's deed was absolute in its form, M. took the property in question subject to the life interest in herself, in trust for her daughter K., who had a clear title to the remainder in fee, paramount to any title derived under the agreement.—2. That, as against the title of K., the instrument executed by M. purporting to give K. a life estate only had no effect.—3. That K. had a good title to the land, and that, as against the defendant, who purchased at a sheriff's sale under the decree in an action on a mortgage made by K. and her husband, and who refused to complete the purchase, the plaintiff, the holder of the mortgage, was entitled to a decree for specific performance.—4. The advertisement of sale was in the following form: "All the estate, right, title, interest, and equity of redemption of K., and of all persons claiming, or entitled from or under the said K., of, in, to, or out of all that lot, piece, or parcel of land," &c.; and the form of the order was that "the said land and premises be sold," &c.:—*Held*, that this form was sufficient to cover all the estate, right, title, interest, and equity of redemption of the defendant at the time of giving the mortgage.—5. That the deed was given by virtue of the statute (Acts 1890 c. 14, ss. 5 and 6), and by virtue of the provisions of the statute the land ordered to be sold by virtue of

the sheriff's deed was vested in the grantee.—6. *Semble*, that the form of words in use in Nova Scotia was adopted in consequence of the practice of not settling conditions of sale, and offering a specific title: *Diocesan Synod of Nova Scotia v. O'Brien*, Ritch. Eq. Dec. 352; and that the form is suitable for a good title, or a limited one, and a more specific reference to the title is not made. *Power v. Foster*, 34 N. S. Reps. 479.

16. Warranty of vendor — Construction of deed—Sheriff's deed—Sale of rights in land—Eviction by claimant under prior title.—By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff of the lands therein mentioned, and of which he was actually in possession, and that "the immovable belonged to him as having been acquired from the sheriff."—*Held*, reversing the judgment appealed from, *Strong, C.J.*, and *Taschereau, J.*, dissenting, that the warranty covenanted by the vendor had reference merely to the rights he might have acquired in the lands under the sheriff's deed, and did not oblige him to protect the purchaser against eviction by a person claiming prior title to a portion of the lands. *Ducondu v. Dupuy*, 9 App. Cas. 150, followed. *Drouin v. Morissette*, 22 Occ. N. 79, 31 S. C. R. 563.

17. Warranty of vendor — Description—Plan of subdivision—Change in street line—Accession—Troubles de droit—Eviction—Issues on appeal.—A vendor of land described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line. A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from the trial Court judgments maintaining both the principal action and the action in warranty, although he may have refused to do so in the Court of first instance, but, should the appellate Court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. *Monarque v. La Banque Jacques-Cartier*, 22 Occ. N. 7, 31 S. C. R. 474.

18. Warranty of vendor—Incumbrance—Special municipal tax—Apparent charge.—When an immovable is sold after the passing of a municipal by-law providing for the execution of certain

works in the municipality where the immovable is situated, and for payment for such work by means of a tax upon the immovables in such municipality, but before the completion of an assessment roll for the purpose of levying such tax, the vendor is not liable as a warrantor to pay such tax.—2. It is only by the putting into force of such roll that the tax becomes a charge upon the immovables of the municipality.—3. One who buys an immovable in a municipality is supposed to have knowledge of all the municipal by-laws which can affect it, and a charge made by a by-law is, therefore, an apparent charge, as to which the vendor is not a warrantor.—4. The vendor who has sold with a guaranty of title, but without any stipulation "de franc et quitte," is not obliged to extinguish a charge which exists upon the immovable sold, as long as the debt which constitutes such charge is not exigible. Judgment in Q. R. 17 S. C. 573 reversed. *St. Sulpice Seminaire v. Masson*, Q. R. 10 K. B. 570.

See ASSESSMENT AND TAXES, I. 1, 2—BANKRUPTCY AND INSOLVENCY, I. 6—FIXTURES, 2—LANDLORD AND TENANT, I. 5—MECHANICS' LIENS, I. 2, II. 2, IV. 2—MORTGAGE, 11—PRINCIPAL AND AGENT, 6—REGISTRY LAWS, 3—SALE OF LAND—SPECIFIC PERFORMANCE—STATUTES, 1—TIMBER.

VENUE.

1. Change of—Agreement before action.—A conditional sale agreement provided that "in case of any litigation arising in connection with this transaction, it is agreed that the trial will be held only in" (the place where the vendors carried on business):—*Held*, that this condition was binding, and in an action by the purchaser to recover damages because of the unsatisfactory condition of the article sold, an order was made changing the place of trial to the place agreed upon, although the balance of convenience was in favour of the place named by the plaintiff in his writ. *Dulmage v. White*, 22 Occ. N. 260, 4 O. L. R. 121.

2. Change of—Statement of claim—Amendment.—A plaintiff who wishes to name some place other than that named in the original statement of claim as the place of trial, must obtain leave to do so on a summons which clearly shews that it is desired to change the venue, and not on a summons simply to amend statement of claim. *Wade v. Uren*, 9 Brit. Col. L. R. 274.

See ACTION, 6.

VERDICT.

See CRIMINAL LAW—NEW TRIAL, 1—RAILWAY, VI. 7, VII. 1—TRIAL, II. 12, 13.

VIS MAJOR.

See WAY, II. 4.

VOLUNTARY WINDING-UP.

See COMPANY, V. 19.

VOTERS' LISTS.

See MUNICIPAL ELECTIONS, 11, 12—PARLIAMENTARY ELECTIONS, III. 12, V.

VOTING.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

WAGER POLICY.

See INSURANCE, IV. 15.

WAGES.

See ATTACHMENT OF DEBTS, II. 13—BANKRUPTCY AND INSOLVENCY, I. 7—MASTER AND SERVANT, III.—MECHANICS' LIENS, I. 3—SHIP, III. 1, 4.

WAIVER.

See APPEAL, I. 3, VIII. 1—ARREST, I. 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, 4—COMPANY, V. 11—COURTS, V. 3, IX. 2—CRIMINAL LAW, I. 2—INSURANCE, I. 3, II. 3, 5, 6, 7, 8, IV. 5, V. 2—LANDLORD AND TENANT, I. 1, 4—MORTGAGE, 1—SALE OF GOODS, III. 1—TITLE TO LAND—VENDOR AND PURCHASER, 5, 9.

WARRANT.

See COSTS, VI. 5—EXTRADITION, 4—MALICIOUS PROCEDURE, 3.

WARRANTY.

See DEED, 3—PARTIES, III. 3—SALE OF GOODS, VII. — VENDOR AND PURCHASER, 16, 17, 18.

WATER AND WATERCOURSES.

1. Discharging water on neighbour's land — Remedy — Landlord or tenant.]—An action *negatoire* on account of works executed by the tenant of land which cause waters from such land to be discharged upon the property of the plaintiff, which did not previously receive them, should be brought against the owner of the land, and not against the tenant. The plaintiff may demand in such an action that the owner of the land shall be adjudged to take measures to perform the work necessary for preventing the flowing of such waters, but he cannot claim damages resulting from the act of the tenant, if the latter in doing such work was not the agent of the owner. *Ecclesiastiques du Séminaire des Missions Étrangères v. Kieffer*, Q. R. 11 K. B. 173.

2. Flooding land—Damages—Summary procedure—Costs of action—Dam—Owners—Tolls—Persons using dam.]—A certain dam was the property of an improvement company incorporated under the Timber Slide Companies Act, R. S. O. c. 194, and the original defendants had used it for the purposes only of floating logs down the river. The improvement company were added as defendants. The action was for flooding the plaintiffs' lands by such dam:—*Held*, that, although (as decided in *Blair v. Chew*, 21 Occ. N. 404) a plaintiff is not bound to proceed summarily upon such a claim, under R. S. O. c. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of it.—2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.—3. Nor were the defendants assisted by ss. 15 and 16 of R. S. O. c. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.—4. But s. 1 of R. S. O. c. 142 places the public advantage of allowing lumbermen to use rivers and streams

as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.—5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by s. 15 of R. S. O. c. 194. *Neely v. Peter*, 22 Occ. N. 297, 4 O. L. R. 293.

3. Water record—Applications for—Mining companies—Gold Commissioner—Land Commissioner—Water notice—Posting—Evidence.]—Where an application for a record of water for mining purposes is pending before a Gold Commissioner, an application for a record of the same water for domestic, mechanical, and industrial purposes should not be adjudicated upon by an Assistant Commissioner of Lands and Works without express notice to the applicants before the Gold Commissioner. A water notice posted on a board usually used for such notices, in a hall leading to the rooms occupied by the Commissioner and his staff, is posted in the office of the Commissioner within the meaning of s. 9 of the Water Clauses Consolidation Act. Where an application is not contested, the Commissioner need not take evidence, but where it is contested he should have the evidence taken in shorthand. *In re Water Clauses Consolidation Act, War Eagle Mining Co. v. British Columbia Southern R. W. Co.*, 22 Occ. N. 247, 8 Brit. Col. L. R. 374.

4. Water record—Joint application for—Purpose for which water required—Duty of Gold Commissioner.]—Mine owners, in a notice of application to the Gold Commissioner for water records, stated, as one of the purposes for which the water was required, a purpose not authorized by s. 10 of the Water Clauses Consolidation Act, *i. e.*, "domestic and fire purposes." At the hearing before the Gold Commissioner the applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application:—*Held*, on appeal, that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers; and the matter

should be referred back for rehearing. *Held*, also, that water records, under part II. of the Water Clauses Consolidation Act, may be held jointly. *Quere*, whether a supply of water for fire purposes would be necessary as being directly connected with the working of a mine or incidental thereto. *Centre Star Mining Co. v. British Columbia Southern R. W. Co.*, 21 Occ. N. 491, 8 Brit. Col. L. R. 214.

5. Water record.—Pending applications.—Duty of officer.—Where two different officials are called upon to exercise their functions in regard to applications for water rights in respect of the same water, the official who is determining the later application should stay his hand until the final result of the prior application before another official is known. *In re Water Clauses Consolidation Act, War Eagle Mining Co. v. British Columbia Southern R. W. Co.*, 8 Brit. Col. L. R. 381.

6. Water record — Validity of—Ditch—Continuation into United States.—The fact that a ditch constructed in intended compliance with the provisions of s. 41 of the Land Act (C. S. B. C. 1888), runs partly through United States territory, does not of itself prevent the ditch from being a good ditch within the meaning of the Act. *Held*, also, applying *Martley v. Carson*, 20 S. C. R. 634, that the plaintiff's water record was valid. *Covert v. Pettijohn*, 22 Occ. N. 308, 9 Brit. Col. L. R. 118.

See COURTS, V. 4—DEED, 1, 3—EASEMENT, 4 — MUNICIPAL CORPORATIONS, V. 4.

WATER RECORD.

See WATER AND WATERCOURSES, 3-6.

WAY.

I. DEDICATION.

II. INJURY FROM NON-REPAIR OF HIGHWAY.

III. OBSTRUCTION AND CLOSING.

See ASSESSMENT AND TAXES — CONSTITUTIONAL LAW, 8—COURTS, III.—CROWN, I, 3, II. 4, III. 3—EASEMENT, 2 — MANDAMUS, 2 — MORTGAGE, 7—MUNICIPAL CORPORATIONS, III. 13, 16, IV. 2, VI. 2, VII., X. 2 — RAILWAY—TREES.

I. DEDICATION.

1. Maintenance — Cost of work—Action to recover from land-owner—

Work done by inspector—Evidence of inspector — Account—Report—Authorization—Percentage.—It is the imperative duty of a municipal corporation and its officers to put its roads in good order without delay.—2. The testimony of the inspector who has done the work is a sufficient proof, if not contradicted, that the work has been executed, that the sum claimed is the value of it, that the formalities required have been followed, and that the defendant in an action to recover the cost of the work is the person bound by law to pay such cost.—3. It was not necessary to give the defendant in this case a municipal notice, she residing in England, nor to give notice to her agent, who resided at Quebec, inasmuch as no writing had been deposited at the office of the municipal council giving the address of the defendant or of her agent.—4. A road crossing the defendant's lots and other lots in the 4th range of Gosford having been for a great many years open and free to the public as a road in front of such lots, and being governed by a *procès-verbal* which declared such road to be the road in front of such lots and to be at the charge, as to its maintenance, summer and winter, of every land-owner in the 4th range whose land abutted thereon, should be maintained by the defendant as regards the part which crossed her lots, and there was no ground for an act of apportionment to execute such part of the *procès-verbal*, for there were no works to apportion.—5. Even if there was need of any act of apportionment, in default of such an act, Art. 824, M. C., would apply until such act was made.—6. The inspector of roads himself did the work which the defendant should have done; he rendered an account for it without adding the statutory 20 per cent.; and he did the work without first having made the report required to the council and without the authorization of the council. Later the plaintiff corporation paid the inspector the amount of his account without the 20 per cent.:—*Held*, that the corporation had a right to pay the amount of the account; in paying it, they paid the defendant's debt. (b) The corporation had an action against the defendant to recover what they had paid. (c) But they had not the right to recover the 20 per cent. from the defendant. (d) The corporation would have no right in their own behalf to the 20 per cent. except in cases falling under Arts. 399, 400, and 401. M. C. *Corporation de St. Raymond v. Prior*, Q. R. 21 S. C. 172.

2. Plan.—The plaintiff's predecessor in title bought a certain lot according to a plan (then unregistered), on which was shewn a strip 33 feet in width, running along one side of the lot. The

plaintiff alleged that this strip had been dedicated, either as a public highway or a private way for the use of the owner of the lot, and claimed a declaration to that effect and an injunction. On the evidence, the Court found for the plaintiff and gave judgment accordingly. *Daly v. Robertson*, 1 Terr. L. R. 427.

3. Plan — Crown — Obstruction—Nuisance—Injunction.—The defendants, claiming under the original squatter on certain Dominion lands, erected a building thereon fronting on an old trail; the original squatter subsequently, in expectation of the Crown recognizing the claims of himself and his assigns, registered a plan of the entire land, whereon was shewn a highway approximately conforming to the lines of the old trail, but so that the building in question projected into the highway shewn on the plan. The Crown did, afterwards, grant a patent to the original squatter for the entire land, excepting the portions shewn on the plan, as reserved for the defendants and others in like position. These excepted portions as they appeared on the plan approximately conformed in size and position to the portions which the squatter had assumed to convey to the defendants and others. Patents for these excepted portions were granted by the Crown to the defendants and others, respectively:—*Held*, that the Crown, by issuing patents in accordance with the registered plan, had adopted it, and thereby dedicated to the public the highway as shewn thereon; that the plaintiff municipality, within which the land lay, having demanded of the defendants the removal of the building, so far as it encroached on the highway as shewn on the plan, and the defendants having refused to comply with the demand, the plaintiff municipality were entitled to a mandatory injunction to abate the nuisance. *Held*, also, that the defendants were consequently not entitled to compensation as owners or occupiers under the provision of the Municipal Ordinance. *Town of Edmonton v. Brown*, 1 Terr. L. R. 454, 23 S. C. R. 308, 28 S. C. R. 510n.

4. Plan — Other acts — Servitude—Violation.—The proprietors of certain land prepared an official subdivision plan of the property, dividing it into lots and tracing a street thereon. They registered this plan as the official plan, and sold lots described as fronting on the street indicated on the plan. They also constructed a sidewalk along the street, and permitted the public to pass freely without objection. They also petitioned the municipal council to annex the property in accordance with the plan, which petition was granted:—*Held*, that there was a valid dedication of the property as a

public street.—2. In any case, the acts above mentioned constituted at least a servitude of right of way over and through the property, in favour of the purchasers of lots described as fronting on such street, and the erection of platforms thereon was an illegal obstruction, and a violation of the servitude. *Geoffrion v. Montreal Park and Island R. W. Co.*, Q. R. 20 S. C. 559.

II. INJURY FROM NON-REPAIR OF HIGHWAY.

1. Bridge—Threshing engine—Traction engine.—An engine used for the purpose of operating a thresher or grain separator, is not a "traction engine" within the meaning of R. S. O. 1897 c. 242; and a municipality is bound to keep its bridges in such a condition that they will bear the weight of such an engine. *Pattison v. Township of Wainfleet*, 22 Occ. N. 364.

2. Roadway — Defect in—Findings of trial Judge.—The plaintiff, in crossing at night on foot a busy street in a city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriage-way. There was a hole or depression in the asphalt pavement from one and a half to one and seven-eighths inches deep at its nearest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff:—*Held*, *FALCONBRIDGE, C.J.*, dissenting, that the plaintiff, using the carriage-way when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe for vehicles; and the last finding of the Judge put the plaintiff out of Court. *Boss v. Litton*, 5 C. & P. 407, explained and distinguished. *Semble, per STREET, J.*, that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it. *Belling v. City of Hamilton*, 22 Occ. N. 110, 3 O. L. R. 318.

3. Roadway — Obstruction—Injury to traveller—Contributory negligence.—Action for damages for injuries caused through the alleged negligence of a municipal corporation in permitting a moun-

of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night, the plaintiff's horse stumbled and fell, throwing the plaintiff from the vehicle, and causing the injury complained of:—*Held*, affirming the judgment in 33 N. S. Reps. 291, that there had been no negligence on the part of the defendants; that the obstruction was not serious or unusual; and that the accident occurred through want of proper care by the plaintiff in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight. *Messenger v. Town of Bridge-town*, 31 S. C. R. 379.

4. Roadway—Vis major—Action—Security for costs—Deposit—Preliminary exception.]—The failure by a plaintiff who is not a ratepayer to deposit \$10 as security for costs of an action against a municipal corporation, in accordance with Art. 793, M. C., must be raised by preliminary exception and not by plea to the merits.—2. In regard to the deposit required by Art. 793, M. C., there is no distinction between actions for penalties and actions for damages.—3. A municipal corporation is bound to keep roads at all times in good order, and can only be relieved by proving *force majeure*. *Young v. Township of Stanstead*, Q. R. 21 S. C. 148.

5. Sidewalk—Defect in—Notice of defect—Damages—Quantum.]—Where a sidewalk on one of the principal streets of a town, on which there was considerable traffic, had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them:—*Held*, that its condition was such as to impose on the corporation a constant care and supervision over it; so that when one of the boards was proved to have been missing for a week, leaving a hole some six or eight inches deep, into which a person fell and was injured, notice to the corporation of such defect in the sidewalk must be assumed, and liability for the damage occasioned by the accident imposed on them. The damages assessed at the trial, \$1,500, were reduced to \$900, the Court being of opinion that the latter was the more reasonable amount, having regard to the injuries sustained, a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date. *McGarr v. Town of Prescott*, 22 Occ. N. 281, 4 O. L. R. 280.

6. Sidewalk—Excavation—Municipal corporation—Gas company—Joint

liability—Negligence—Relief over.]—A municipal corporation having placed a barrier round a portion of a sidewalk in course of repair, the plaintiff, at night, passing around the barrier, fell into a trench dug by a gas company, with consent of the corporation, under an agreement for indemnity and to properly warn and protect the public. No light was put up by the corporation or company:—*Held*, that both were liable to the plaintiff, the corporation for non-repair and not warning the public, and the company under their special contract with the corporation and under R. S. O. 1897 c. 199, s. 26; but that the corporation should have judgment over against the company. *McIntyre v. Town of Lindsay*, 22 Occ. N. 292, 4 O. L. R. 448.

7. Sidewalk—Excavation insufficiently protected—Municipal corporation—Negligence.]—The defendant company made an excavation across a sidewalk on a public street, in the city of Halifax for the purpose of laying cables underground. The excavation was protected after working hours by a number of barrels, with planks laid across the top from one to another. Plaintiff, while passing along the sidewalk, after dark, in the absence of the watchman, fell into a portion of the excavation, from which the barricade had been removed after it had been placed in position, and was severely injured. The evidence given on the trial of an action for negligence shewed that the barrier erected was of a frail and insufficient character, and that the place was insufficiently lighted, and that if it had not been for the want of care on the part of defendant in these particulars, the accident would not have happened:—*Held*, that plaintiff was entitled to a verdict. *Cos v. Nova Scotia Telephone Co.*, 35 N. S. Reps. 148.

8. Sidewalk—Voluntary subscription—Statute labour.]—A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it, nor was any public money or statute labour expended on it with the knowledge of the council, when the latter was aware of the existence of the sidewalk, and there had been opportunity and time to repair it. *Medall v. Township of Caledon*, 22 Occ. N. 173, 3 O. L. R. 66, 555.

III. OBSTRUCTION AND CLOSING.

1. Conviction—Old trail—Hudson's Bay Company—Transfer to Territories—

Crown — Expropriation—Compensation—Petition of right.] — When a statute authorizes the expropriation of private land, the owner is not entitled to compensation, unless the statute so provides. Even where compensation is payable by the statute, the party expropriating may (unless the statute otherwise provides) enter upon the land for the purposes expressed by the statute, without being liable to an action for damages; the owner must take such proceedings as may exist for obtaining compensation—in the case of expropriation by the Crown by petition of right in the Exchequer Court. Where land, which was part of the lands reserved to the Hudson's Bay Company, was sold in a state of nature to a purchaser, who obtained a certificate of ownership therefor under the Territories Real Property Act, and cultivated and enclosed it, thus preventing the use of an old trail, which, subsequently, was surveyed and transferred to the Lieutenant-Governor for the use of the Territories:—*Held*, that the purchaser was rightly convicted of obstructing a public highway. *Regina v. Nimmons*, 1 Terr. L. R. 415.

2. Municipal corporation — By-law—Power to close roads.]—The roads mentioned in s.s. 127 of s. 50 of the Municipal Clauses Act, which may be closed by by-law, are not only such roads as are wholly situate within the limits of the municipality, but include also highways or trunk roads leading into the districts beyond the boundaries. *Stiles v. City of Victoria*, 8 Brit. Col. L. R. 406.

3. Proof of abandonment — Obstruction — Action to compel removal—Owner of abutting land.]—The appellant removed a fence and took possession of a strip of land which originally had been detached from his property, but which for many years had formed part of a public highway, and had served to give the respondent access to his property. The respondent brought suit asking that the appellant be ordered to cease his disturbance, and replace the fence as it was:—*Held* (affirming the judgment in *Q. R. 20 S. C. 26*, but omitting one *considérant*), that it was incumbent on the appellant, in order to make good his pretension that the strip in question had ceased to be a public road, to prove that by some act of duly constituted and competent authority qualified to act on behalf of the public, the road had been closed or abolished and the rights of the public thereto renounced, or, at least, such a total cessation of use by the public of the road as a public road, and such a conversion thereof to other uses, acquiesced in by competent authority, as would constitute a total abandonment by the public and such competent authority, of all rights thereto as a public

road.—2. A person owning land abutting on such road, and who is deprived of the direct access which he previously had thereto, suffers special damage by the closing and obstruction of the road, and has in consequence a right of action in his own name to compel the removal of the obstruction. *Meloche v. Davidson*, *Q. R. 11 K. B. 302*.

4. Railways — Fences — Municipal corporation — By-law — Railway Act of Canada — Railway Committee of Privy Council — Injunction — Removal of obstruction—Jurisdiction.]—The allowance for a road made by a Crown surveyor, is a highway, within the meaning of s. 599 of the Municipal Act, and, although not an open public road, used and travelled upon by the public, it is a highway within the meaning of the Railway Act of Canada, 51 V. c. 29.—2. Although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it is not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council may direct their officers to open the road, and such direction will be sufficient.—3. The right of a railway company under s. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway is subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality.—4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; s. 11 (h) and (g) of the Railway Act not applying.—5. That the Court had jurisdiction to grant the relief sought. *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4, and *City of Toronto v. Lorsch*, 24 O. R. 227, followed.—6. That the highway, being vested in the township corporation, who desired to open and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences. *Township of Gloucester v. Canada Atlantic R. W. Co.*, 22 Occ. N. 63, 284, 3 O. L. B. 85, 4 O. L. R. 262.

See I. 3, II. 3.

WEIGHTS AND MEASURES ACT.

See LIEN, 1—SALE OF GOODS, VIII.

WIDOW.

See DOWER—SUCCESSION.

WILL.

- I. ADMINISTRATION AND DISTRIBUTION OF ESTATES.
- II. CONSTRUCTION.
- III. PROOF OF EXECUTION.
- IV. TESTAMENTARY CAPACITY AND UNDUE INFLUENCE.
- V. VALIDITY OF CONDITION.

See EXECUTION, IV. 5 — EXECUTORS AND ADMINISTRATORS—INSURANCE, IV. 2, 6—LIMITATION OF ACTIONS, I. 2—LIQUOR LICENSE ACT, III. 2—MARRIAGE, 3—SPECIFIC PERFORMANCE, 2 — TRUSTS AND TRUSTEES, 9 — VENDOR AND PURCHASER.

I. ADMINISTRATION AND DISTRIBUTION OF ESTATES.

1. Accumulation of revenues.]—Where the trustees under a will, to whom the entire estate is bequeathed in trust, are directed by the testator to apply certain amounts for specified purposes until a division of the estate shall be made at a time prescribed by the will, it is their right and duty to retain and accumulate the surplus revenues of the estate although not specially instructed by the testator to do so.—2. The fact that the estate is much larger at the date of the testator's death than it was when the will was made, is an extraneous circumstance which cannot be taken into account by the Court in the interpretation of a will, so as to change its meaning from that fairly deducible from the contents of the entire instrument itself. *Ogilvie v. Ogilvie*, Q. R. 21 S. C. 130.

2. Annuity—Ademption—Evidence.]—A testator gave by his will to each of two daughters an annuity for life of \$6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than \$1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly, and the will was not altered:—*Held*, that the doctrine of ademption applied, and that, notwithstanding the different natures of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced *pro tanto*. *Held*, also, however, that the evidence of intention was admissible and was conclusive. Judgment of FERGUSON, J., 1 O. L. R. 364, 21 Occ. N. 187, affirmed. *Tuckett-Lawry v. Lamourcaux*, 22 Occ. N. 174, 3 O. L. R. 577.

3. Charitable bequest — Religious order—Refusal of ecclesiastical authority—Application of bequest cy-près—Attorney-General.]—A will contained a direction that the executors should apply a portion of the income "in the introduction and support of the Jesuit Fathers" in the city of H. The same clause of the will gave the executors a discretion, "notwithstanding anything in this clause hereinbefore expressed," to apply the income in the promotion and support in the city of H. "of such charitable institutions and religious orders in connection with the Roman Catholic church as my said executors * * shall think proper." The testator died in 1881. The Archbishop of H. made unsuccessful efforts from 1883 to 1889 to induce the Jesuits to establish a college in H. A few years later another religious order was introduced. In 1897 the Jesuits were willing to come to H., but the Archbishop refused his assent. This action was brought by the Attorney-General, on the relation of the Archbishop, against the executors, for a declaration and directions:—*Held*, that the refusal of the Archbishop to give his assent to the introduction of the Jesuits rendered that mode of applying the residue impossible. As to matters within his ecclesiastical jurisdiction, he was the sole judge. He was not precluded from taking these proceedings as relator. The executors were ordered to formulate at once a scheme for the application of the income for the benefit of some charitable institution or religious order. In default of their doing so, the Court would take upon itself to formulate such a scheme as would best agree with the testator's wishes as expressed in the will. *Attorney-General v. Power*, 22 Occ. N. 397.

4. Direction to set sum apart and pay income to life tenant.]—A testator directed his executors to set apart and invest \$50,000 out of his estate and pay the income semi-annually to his wife during her lifetime, with power to appoint, and in default of appointment, over. He then gave the residue equally amongst his children. The estate consisted of income producing securities to the value of \$30,000, and a large amount of unproductive land:—*Held*, that the executors were bound to reserve sufficient productive assets for the preservation of the lands and payment of necessary expenses; and that the widow was entitled to the income of the balance from the expiration of a year from the testator's death, and to have such balance set apart towards the fund of \$50,000, ultimately to be made up to that sum as the lands were sold according to the following rule:—As lands or other assets were sold the proceeds should be

apportioned between capital and income by ascertaining the sum which, put out at interest at the date of the expiration of one year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital and added to the sum theretofore set apart towards the \$50,000, and the residue to be treated as income and paid over to the widow. *In re Chesterfield's Trusts*, 24 Ch. D. 643, and *In re Morley*, [1895] 2 Ch. 738, applied. *In re Cameron*, 21 Occ. N. 593, 2 O. L. R. 756.

5. Gift of income — Insufficiency—Sale or mortgage of land.—A testator by his will gave to his wife the income derivable from his real and personal estate, and directed that, if this was not sufficient to supply her wants, the executors might for such purpose draw upon any of his property:—*Held*, that to supply such wants the executors were empowered to sell or mortgage the real estate. *Re Crawford*, 4 O. L. R. 313.

6. Legacy—Charge on land—Interest—Statute of Limitations — Legatee also administrator with will annexed.—A legatee of money charged on land, whose legacy was to be paid six months after the death of the testator, was appointed administrator with the will annexed, but did not sell the land to pay herself the legacy, and held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties, some eight years after the death of the testator:—*Held*, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was still a subsisting claim with interest as accessory for the period till the fund was in hand for payment. *In re Yates*, 22 Occ. N. 413, 4 O. L. R. 580.

7. Legacy — Sicknes, provision in case of—Executors, discretionary power of—Personal representatives of deceased legatee—Creditors.—A testatrix by her will bequeathed a sum of money to a son, with a direction that her executors should invest the same and pay to the son half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary; and in case of his death, after paying the funeral and other necessary expenses, to divide the amount equally amongst her other surviving children; and by a residuary clause, she gave the residue of her estate to her children in equal shares:—*Held*, that in case of sick-

ness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives.—2. The son having taken ill and died, the trust arose; and the circumstance that the beneficiary died before the money was actually advanced or set apart did not operate to deprive his personal representatives of the right to receive it.—3. The son's creditors had no direct claim upon the executors or the fund. *In re Evans*, 22 Occ. N. 164, 3 O. L. R. 401.

See II. 7, 14.

See, also, TRUSTS AND TRUSTEES, 9.

II. CONSTRUCTION.

1. Alternative disposition—Death of testator and wife "at the same time"—Interpolation of words in will.—The testator bequeathed to his wife all his estate, and appointed her his executrix. His will then proceeded: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time I request the following disposition to be made of my property"—disposing of his estate and appointing executors. A few months after the making of the will the testator and his wife went to Europe, and both of them died there, the wife on the 11th December, 1888, and the testator on the 27th of the same month:—*Held*, that the testator and his wife were not deprived of life at the same time; and, as the actual event was not provided for there was an intestacy. *Held*, also, that there was no power in the Court to interpolate any such words as "in case my wife does not survive me," or "in case I should survive her." Judgment of a Divisional Court, 2 O. L. R. 169, 21 Occ. N. 434, affirmed; *MacLennan and Garrow, J.J.A.*, dissenting. *Henning v. Maclean*, 22 Occ. N. 405, 4 O. L. R. 666.

2. Bishop—Corporation sole—Private and ecclesiastical properties—Explanatory declarations — Intestacy — Costs.—The Roman Catholic Bishop of Saint John is a corporation sole. The testator, incumbent of the bishopric, by his will, made in his private name, declared that, "although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of Saint John, for the benefit of religion, education, and charity, in trust, according to the intentions and purposes for which they were acquired and established, yet to meet any want or

mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of Saint John, in trust for the purposes and intentions for which they are used and established." He then gave coupon bonds to the same devisee in trust for described charitable objects, a sum of money for masses, and a legacy of a sum of money. The testator held in his own name certain real estate which had been conveyed to him for religious, charitable, and educational purposes of the church. He possessed in his own right real and personal estate, the income from which he had used in common with income from all sources of church revenue, for the uses of the church, including its educational and charitable needs, as well as for his private purposes. In a suit by the next of kin for a declaration that the testator had died intestate as to his real and personal estate, less the specific and pecuniary bequests:—*Held*, that the testator's real and personal estate passed by the will. The Court being of opinion that the above suit was one proper to be brought, allowed the plaintiffs their costs, to be paid out of the estate. *Travers v. Roman Catholic Bishop of Saint John*, 2 N. B. Eq. Reps. 372; *Travers v. Casey*, 22 Occ. N. 210.

3. "Chattels" — Mortgage for purchase money.—A testator, after devising "all that I possess to be disposed of as follows," made two specific devises of land, and then bequeathed to his two sisters "all my chattels and movables and all moneys on hand and moneys to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels, moneys, and notes to" the survivor. Part of his estate consisted of a mortgage for unpaid purchase money on a sale of one of the pieces of land specifically devised, sold by him in his lifetime:—*Held*, that the mortgage passed as a chattel under the above bequest. *In re McMillan*, 4 O. L. R. 415.

4. Codicil—Revocation of bequest—Mortmain Act—Bequests to church and school, also to "three oldest and poorest in municipality" — Abatement of legacies.—Suit for the construction of a will. Testator directed: "To my son William McMurray I give and bequeath the sum of two thousand dollars." Except the above named William McMurray, no person named William was mentioned in the will. A codicil was as follows: "This is a codicil of my last will and testament. I am sorry, my dear William, to make this alteration. I cut you off my will and leave you two hundred dollars. You know how you have used me to make me

do this:—"*Held*, that the codicil revoked the bequest in the will of \$2,000 to the testator's son William, and make a new bequest to him of \$200. The codicil contained this clause: "I leave \$500 to Acton School; \$500 to Eden Presbyterian Church; \$500 to Winnipeg Hospital; and \$300 to the three oldest and poorest people in Rosedale Municipality:—"*Held*, that the Mortmain Act, 9 Geo. II. c. 36, was in force in Manitoba, except as it might be affected by Provincial statutes. So far as the bequest to the Acton school came out of land, or the proceeds of land, it was void; but it was valid to the extent of such part thereof as bore to the whole \$500 the proportion which the pure personality bore to the whole estate. The bequest to the three oldest and poorest, &c., was a valid bequest; it was sufficiently certain to be carried out. The Eden Presbyterian church was shewn to be a duly organized and lawful congregation of "the Presbyterian Church in Canada," and to have been such when the codicil was made. As the testator's death occurred more than six months after the making of the codicil, the provisions of s. 6 of c. 47 of 38 V. (Man.) took the bequest out of the operation of 9 Geo. II. c. 36, and the bequest was, therefore, a valid one. The "Winnipeg Hospital" referred to in the codicil was admitted to be the Winnipeg General Hospital. Section 2 of c. 48 of 38 V. (Man.) took the bequest out of the operation of 9 Geo. II. c. 36, and made it a valid one. *Law v. Acton*, 22 Occ. N. 419.

5. Condition—Vested estate subject to be divested—Application under Rule 938—Executors — Locus standi.—The testatrix devised certain land to her grandson "when he arrives at the age of twenty-five years. Should he not survive till the age of twenty-five years, I give" (the same land) "to my son Andrew, and should he die without heirs of his natural body, I give" (the same land) "to my son Robert, his heirs and assigns forever:—"*Held*, that the land was vested in the grandson, subject to be divested in the event of his not attaining the age of twenty-five years. *Doc dem. Hunt v. Moore*, 14 East 601, *Phipps v. Ackers*, 8 Cl. & Fin. 583, and other cases cited in Theobald on Wills, 5th ed., p. 497, referred to. *Scumble*, that the executors, having no estate in the land given to them by the will, and none under the Devolution of Estates Act, seven years having elapsed since the death of the testatrix, had no *locus standi* to make an application under Rule 938 to have questions arising under the will determined. *In re Young*, 22 Occ. N. 31.

6. Devise to wife — Condition—Children.—A testator devised his estate

to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will providing for two of his children, "and if she should fail or neglect to make the will, it's my will that instead of my said estate being so devised and bequeathed to her, the same shall be equally divided, share and share alike, between my said two children, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give and devise and bequeath unto my said wife."—*Held*, that under the above devise the widow, who had complied with the condition by making the will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and the judgment should so declare. *In re Turner*, *Turner v. Turner*, 22 Occ. N. 389, 4 O. L. R. 578.

7. Distribution of estate—"Heirs"—*"Next in heirship"*—*Period of ascertainment.*—Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the death of my wife) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Walkins, and my deceased sister, Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship."—*Held*, that the persons entitled in the first place were all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The words "children or their heirs" meant "children or their issue," and gave the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue, the share of that child was diverted and went to such issue, and vested at once and finally in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personality. The heirs or next of kin are to be ascertained at the death of the person whose vested share they took. *In re Gardner*, 22 Occ. N. 119, 3 O. L. R. 343.

8. Dower — Election — Annuities—Predecease of first annuitant—Rights of subsequent—Intestacy — "Balance" of estate.—The testator gave annuities to

his wife and only child; the latter predeceased him. He gave to his wife \$200 a year during widowhood, and to his daughter \$200 a year as long as she remained unmarried, but in case she married, only \$150, the other \$50 to go to the wife. At her death the \$150 was to go to a charity. Until the testator's farm was sold, his wife and daughter were to have the house and lot with furniture and chattels while they remained unmarried; at the death or marriage of either it was to go to the other, but after the death or marriage of both the house and lot were to be sold and the money was to go to a charity. The annuities were to be taken out of the farm rent. Any balance of money received from rent was to go, with the interest of money on deposit, annually to two charities until the farm was sold. The executors were to have power to sell the farm in case of increased expenses or rise in property, and the amount was to be invested, and the amount of interest required was to be used in place of rent, and the balance of interest to go to the two charities until the death or marriage of the wife or daughter. After the death of both, the estate was to be divided among charities:—*Held*, that the widow was put to her election between the provisions of the will and her dower.—2. That because the first annuitant died in the testator's lifetime, it did not follow that those who were to take at her death took nothing: the annuity was payable to them from the testator's death, but only \$150 a year.—3. There was no intestacy as to the additional \$50.—4. Upon the facts, as found by the Judge, with regard to the money on deposit, there were no reasons impelling the conclusion that there was an intestacy as to the interest therein, in the face of the testator's declaration that he disposed of all his property.—5. There was no intestacy as to the corpus or any part of it. By the word "balance" the testator meant the rest or residue of the whole of his property.—6. There was no intestacy as to the furniture and chattels, after the expiration of the interest therein given to the widow; this property was included also in the "balance." *In re Newborn*, *Toronto General Trusts Corporation v. Newborn*, 22 Occ. N. 120.

9. General Gift — Contest — Real estate—Deleted words.—By one of the clauses of his will, a testator gave to his nephew his mill, tannery, houses, lands, and all his real estate, effects, and property whatsoever, and of what nature and kind soever, at a named place, chargeable with certain legacies:—*Held*, that the clause, when taken by itself, would include personal as well as real property, yet when read with other

clauses of the will, and the whole context taken into consideration, the gift was limited to the real estate. *Quere*, whether in construing a will deleted words can be looked at. *Thorne v. Parsons*, 22 Occ. N. 379, 4 O. L. R. 682.

10. Gift "during natural life"—Absolute interest.]—A testator gave \$500 to A. S., but limited the disposition of it so that she got for her own use absolutely, only the interest upon it. He provided that at her death this \$500 was to be given to her eldest son, E. C. S., and that he could use this sum "for his benefit during his natural life." Then the testator purported to give to his wife all that remained after the \$500 was taken out, but he limited her for her own use absolutely to the interest only, and when the capital should be no longer needed to earn interest for his wife, he gave it to certain persons named, and in all cases "for their benefit during their natural lives."—*Held*, that the testator intended to dispose of all his real estate, and had carried out his intention by a payment over of the \$500 after the death of A. S., and by a division of the rest after the death of his wife; and that the sum of \$500 was an absolute gift to E. C. S., and upon the death of his mother he was to be entitled to it absolutely; and the testator did not die intestate as to any portion of his estate. *In re Chapman*, 22 Occ. N. 259, 4 O. L. R. 130.

11. "Including"—"Estate"—Policies of insurance.]—By a clause in his will a testator bequeathed to his wife one-half his estate, "including policies of insurance made payable to her upon my death." The testator left three policies, one for \$1,000 payable to his wife, the second providing for payment to his wife of an annuity of \$250 per annum, for twenty years, and the third payable at his death to the "legal heirs." There were no children, grandchildren, or mother, living at the time of the testator's death, but his widow survived him:—*Held*, that the third policy, being payable to the heirs and not to the widow as a preferred beneficiary, formed part of the testator's estate, although as a fact the widow was the legal heir; but the first two policies did not form part of the estate. By them a trust was created in favour of the wife as a preferred beneficiary, and so remained until the death of the testator:—*Held*, also, that "including" imported addition. *In re Duncombe*, 22 Occ. N. 167, 3 O. L. R. 510.

12. Legacies—Interest.]—A will directed that the estate, real and personal,

should be sold, and that the executors should hold the proceeds in trust to pay an annuity of \$800, and then to pay all the residue of the income to the testator's widow for life, and on her death to divide the corpus, paying to two grandchildren \$1,000 each, and dividing the residue among the testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest, and directed that they should be paid when the grandchildren should attain twenty-one, but in case the estate should be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow:—*Held*, that interest on the legacies should be paid by the estate only from the death of the widow. *Toomey v. Tracey*, 4 O. R. 708, distinguished. *In re Scadding*, 22 Occ. N. 409, 4 O. L. R. 632.

13. Legacy — Usufruct — Substitution.]—"I give . . . unto my daughter . . . wife of K., the use, usufruct, and enjoyment, during the term of her natural life, of all my property, real and personal, movable and immovable, of which I may die possessed, hereby constituting my said daughter my universal usufructuary legatee and devisee, without being held to give security for such usufruct and enjoyment, and whom I exempt from taking an inventory of my said property, which said usufruct shall at all times be excluded from the community of property existing between her and her husband. And as the bequest made by this will is meant as and for her maintenance and alimentary support, I expressly exempt the same from seizure for any debts created by her or her husband. . . . After the death of my said daughter . . . I order and direct that my said property, of which the use and usufruct is granted to her, shall go and belong to the child or children, issue of her marriage with the said K., or with any future husband, and in default of such issue, said property to become the absolute property of my nearest relatives or nearest of kin, in equal proportion, share and share alike." This clause in a will held to give a legacy of usufruct and not a substitution. *Kidder v. Campbell*, Q. R. 20 S. C. 324.

14. Power of advancement—Exercice of, by trustees—Division of estate.]—A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such

advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities:—*Held*, that a division of the estate among the children made by the trustees in good faith two years after the death of the testatrix was a valid exercise of the power. *Hospital for Sick Children v. Chute*, 22 Occ. N. 173, 3 O. L. R. 590.

15. Separate gifts—Rule in Shelley's case—Lien for improvements.—Action for the recovery of land, into the possession of which the defendants had entered under an agreement of sale made between them and the plaintiff. The plaintiff alleged a title in fee to the land by a conveyance from a devisee under a will as follows: "I give and devise to my grandson J. H. the last half . . . for the term of his natural life; after his death I devise the same to his children, lawfully begotten, in equal shares: should he die without a child living at the time of his death, then I devise said land to my son G. for the term of his natural life, and after his death to his children in equal shares, and if G. should die without a child living at the time of his death, then," &c., &c. J. H. was alive at the time of this action, aged 50 years, and had one child, a daughter, born after the death of the testator:—*Held*, that neither the rule in Wild's case nor that in Shelley's case applied. There were plainly two gifts, one to J. H. for life, and the other to his children in equal shares, which carried the remainder in fee to the child, or children, subject to be divested if he died without a child living at his death. The plaintiff, therefore, could not make title. The defendants were entitled to a lien for improvements, and for purchase money paid on account, with interest, less an occupation rent. *Young v. Denike*, 22 Occ. N. 27, 2 O. L. R. 723.

16. Subject of devise—After-acquired property.—Testator by his will devised to his daughter "the homestead farm on which I reside," and the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as

lot A., upon which he resided at the time of his death. By s. 19 of c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will:—"*Held*, that lot A. was not included in the devise to the daughter. *Ayer v. Estabrooks*, 22 Occ. N. 328, 2 N. B. Eq. Repts. 392.

III. PROOF OF EXECUTION.

1. Codicil—Suspicious circumstances—Testimony of beneficiary—Competency of testator.—A testator by his will, among other annuities, gave one to K. of \$600. By a codicil, executed in the following year, he increased the amount to \$800. By a second codicil, executed some years later and shortly before his death, he increased the annuity to \$1,000, and provided that, on the death of any of the annuitants, the amount should go to the survivor or survivors for life. There was evidence that K. had been actively concerned in procuring the execution of the second codicil; there was some suspicious circumstances as to the time and manner of execution; there was no evidence, except that of K., to shew that the testator had ever seen the codicil before he executed; there was evidence of delusions on his part as to his will and the property he had to dispose of; and the witnesses to the execution were of opinion from his demeanour, that he was not at the time in a condition to transact any important business. On petition by the executors for proof in solemn form, the second codicil was rejected by the Surrogate Judge:—*Held*, affirming his decision, that it was open to him to discredit the testimony of K., and, he having done so, the Court ought not to interfere with his finding.—2. That K. being the principal beneficiary under the codicil, and the principal witness in support of it, and having had knowledge of it, and been a party to promoting its execution, was required to reasonably satisfy the mind of the court. *In re Archbold*, 34 N. S. Repts. 254.

2. Revocation of probate—Evidence—Appeal on facts—Parties to proceedings.—In 1877 the will of H. was proved in common form before the Registrar of Probate on the oath of one of the subscribing witnesses, who swore that he and the other witness signed in the presence of the testator, and in the presence of each other. The will was acted upon, and remained unquestioned for a period of twenty-four years, when, after the

death of the witness on whose oath it was proved, it was set aside by the Judge of Probate, on the testimony of the remaining witness, M. H., and his brother, that M. H. did not sign his name to the will as witness, until after the testator's death:—*Held*, reversing the decision of the Judge of Probate, that, after the long lapse of time, it was impossible to accept the evidence of M. H. and his brother—both being interested parties—to establish the invalidity of the will, as against the oath of the deceased witness upon whose testimony it was proved. While some weight should be attached to the finding of the Judge of Probate, it was impossible for the Court, on appeal, to feel bound by such finding, when it appeared that he came to the conclusion he did simply on the evidence of the two interested parties, and without considering other facts bearing on the case. The devisee of a portion of the property under the will conveyed his title to a third party, and by several intermediate conveyances it came to M. et al., who opposed the setting the will aside:—*Held*, that M. et al., as "parties interested," were competent parties, and clearly entitled to be heard, even though "parties interested" were not specifically mentioned among those to be cited. *Held*, that the naming specifically of heirs, devisees, legatees, and next of kin, in the statute, was merely a matter of direction, leaving it open to those having an interest to intervene for the purpose of protecting their rights. *In re Hill Estate*, 34 N. S. Reps. 494.

IV. TESTAMENTARY CAPACITY AND UN- DUE INFLUENCE.

1. Codicil—*Increase of amount of legacy*.]—A codicil to a will, executed shortly before the testator's death, increased the provision for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece:—*Held*, reversing the judgment of the Supreme Court of Nova Scotia. *TASCHEREAU and SEDGEWICK, JJ.*, dissenting, that, as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece, even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence:—*Held*, also, following *Perera v. Perera*, [1891] A. C. 354, that, even if there was ground for saying that the testator was not at the time capable of making a will, the codi-

cil would still have been valid. *Kaulbach v. Archbold*, 22 Occ. N. 9, 31 S. C. R. 387.

2. Concurrent findings of fact by Courts below—*Gifts in expectation of death*.]—Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence:—*Held*, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered. *Held*, also, that gifts made by the testator to the respondent during his lifetime would not be avoided under Art. 762 of the Civil Code, where there was neither allegation nor evidence that they were made in expectation of death. The proviso in that Article, "unless circumstances tend to render them valid," requires that those circumstances should be investigated. *Archambault v. Archambault*, [1902] A. C. 575.

3. Insane delusion.]—F. in 1890 executed a will providing generally for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support; the son was given half the residue, and the testator's daughter the other half; his wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house, and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.:—*Held*, reversing the judgment in 33 N. S. Reps. 261, *SEDGEWICK, J.*, dissenting, that the provision made by the will for the testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed testator was induced by the insane delusion that they were guilty of the crime he had imputed to them, and the will was therefore valid. *Skinner v. Farquharson*, 22 Occ. N. 197, 32 S. C. R. 58.

See III. 1.

V. VALIDITY OF CONDITION.

Legacy — *Religious liberty* — *Public policy*—*Restrictions as to marriage*—*Education*—*Exclusion from succession*.]—In the Province of Quebec the English law governs on the subject of testamentary dispositions; and, therefore, in that

Province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rites of any church recognized by the laws of the Province, and that the grandchildren should be educated according to the teachings of such church, and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages, or who may not have been educated as directed. Judgment noted in 21 Occ. N. 392 affirmed. *Renaud v. Lamothe*, 22 Occ. N. 357. 32 S. C. R. 357.

WINDING-UP.

See COMPANY, V.

WITNESS FEES.

See COSTS, IX.

WITNESSES.

Order to appear again — *Re-service*.]—An order ought not to be given to witnesses subpoenaed, or present in Court, to appear upon another day, unless they have been first sworn. *Dechêne v. Dursault*, Q. R. 20 S. C. 296.

See HUSBAND AND WIFE, I. 4, VI. 1—INSURANCE, V. 2—LIQUOR LICENSE ACT. II. 1—NOTARY. 2.

WOODMEN'S LIEN.

See LIEN, 2—MECHANICS' LIENS, I. 3.

WORDS.

"Allotment."—See COMPANY, IV. 8.
 "Already established."—See MUNICIPAL CORPORATIONS, I. 1.
 "At."—See CONTRACT, IV. 5.
 "At any place."—See REVENUE, 3.
 "At or near."—See RAILWAY, III. 2.
 "At the same time."—See WILL, II. 1.
 "Balance of estate."—See WILL, II. 8.
 "By reason of the railway."—See RAILWAY, VI. 6.
 "Chattels."—See WILL, II. 3.

"Dependent."—See INSURANCE, IV. 4.
 "Diligent inquiry."—See ASSESSMENT AND TAXES, IV. 5.
 "Due or accruing due."—See ATTACHMENT OF DEBTS, I. 6.
 "Duly presented."—See WRIT OF SUMMONS, III. 5.
 "During natural life."—See WILL, II. 10.
 "Efficient."—See PLEADING, X. 3.
 "Estate."—See WILL, II. 11.
 "Every ship which navigates."—See SHIP, III. 3.
 "Exigible under execution."—See JUDGMENT DEBTOR.
 "Faced or shewn surface."—See CRIMINAL LAW, III. 3.
 "Fastened."—See EASEMENT, 3.
 "Good cause."—See BANKS AND BANKING, 2.
 "Heirs."—See WILL, II. 7.
 "Hirer, lessor, or bargainer."—See BILLS OF SALE AND CHATTEL MORTGAGES, 3.
 "Honestly and reasonably."—See TRUSTS AND TRUSTEES, 1.
 "Immediately."—See ARREST, IV. 1.
 "Including."—See WILL, II. 11.
 "Interest."—See TRUSTS AND TRUSTEES, 7.
 "Issue."—See COMPANY, IV. 8.
 "Just and equitable."—See COMPANY, V. 17.
 "Limited."—See PENALTIES AND PENAL ACTIONS, 2.
 "Logs and timber."—See LIEN, 2.
 "Meubles et effets mobiliers."—See HUSBAND AND WIFE, IV. 2.
 "Next in heirship."—See WILL, II. 7.
 "No order as to costs."—See COSTS, III. 1.
 "Occupant."—See ASSESSMENT AND TAXES, V. 2.
 "Offer."—See COMPANY, IV. 8.
 "Owner."—See ASSESSMENT AND TAXES, I. 1, 2—MECHANICS' LIENS, I. 2.
 "Place of dramatic entertainment."—See COPYRIGHT, 1.
 "Plant and appliances."—See ASSESSMENT AND TAXES, III. 3.
 "Provided."—See MUNICIPAL CORPORATIONS, X. 3.
 "Superstructure."—See ASSESSMENT AND TAXES, III. 1.
 "Under promise of marriage."—See CRIMINAL LAW, III. 18.
 "Unlawfully did steal."—See CRIMINAL LAW, II. 2.
 "Valuable security."—See CRIMINAL LAW, III. 2.

"Workshops now existing."—See RAILWAY, X. 3.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT, II. 2, 16.

WRIT OF CA. SA.

See ARREST, III.

WRIT OF REVENDIGATION.

Irregularities — Affidavit—Service.]
—The omission to describe the person making the affidavit for a fiat for a writ of revendication, and the failure to serve a copy of the affidavit on the defendant, or leave it for him at the office of the Court, within three days, do not constitute fatal irregularities in the procedure. *Haddad v. Marcotte*, 4 Q. P. R. 313.

See EXECUTION, II. 5—PLEADING, III. 4—PLEDGE, 2.

WRIT OF SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

WRIT OF SUMMONS.

I. AMENDMENT.

II. SERVICE.

III. SPECIAL INDORSEMENT.

See COURTS, IX. 2—PARTIES, IV. 5—PLEADING, X. 2.

I. AMENDMENT.

1. Costs.—In an action between lessor and lessee, the plaintiff will be allowed, upon paying costs of motion, to add the words "summary procedure" to the writ and copy thereof. *Cusson v. Vaillantcourt*, 5 Q. P. R. 88.

2. Description of defendant — Company—Incorporation — Exception to form—Costs.—Where the company defendant is described in the writ of summons as a "*corps politique et incorporé*," when it is not an incorporated body at

all, as it appears from the statute creating it, an exception *à la forme* on this ground will not lie when the company fails to prove that it suffers a prejudice by being so described.—2. A motion to amend the writ by striking out the words objected to, will be granted.—3. No costs will be allowed on either proceeding. *Perrault v. Liverpool and London and Globe Ins. Co.*, 4 Q. P. R. 395.

3. Service.—If the plaintiff obtains leave to have his writ regularly signed by the prothonotary, and such signature is not affixed in open Court, he cannot foreclose the defendant from pleading without having first served such amendment upon him. *Beauchamp v. Gourre*, 4 Q. P. R. 201.

4. Substitution of defendants.—Where the plaintiff has sued the defendants as a corporation, he cannot, after the filing of an exception to the form, move to amend his writ by substituting for his designation of the defendants, the names of the members of the so-called corporation, which is in reality a partnership. *Lambe v. Thompson & S. S. Linc.* 4 Q. P. R. 161.

See II. 1.

II. SERVICE.

1. Bailiff — Wrong district—Amendment.—A writ of summons addressed to the bailiffs of a certain district, and executed by a bailiff of another district, may, even after the lodging of an exception to the form founded upon such irregularity, be amended by addressing it to the bailiffs of the district in which it is desired to serve it. *Houle v. Paquet*, Q. R. 20 S. C. 297, 4 Q. P. R. 329.

2. Foreign insurance company—Agent—Power of attorney—Cause of action.—An English insurance company, who had carried on business in Canada, and whose head office was at Toronto, by two powers of attorney had appointed its general agent at Toronto attorney to receive process under both R. S. O. 1897 c. 203, s. 66, and R. S. C. c. 124, s. 13. transferred its Canadian business to another company, and closed its Canadian offices, but the deposit under the Dominion Act had not been released, and neither of the powers of attorney had been cancelled. On a motion to set aside the service of a writ of summons, which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it, on the ground that the company was not within the jurisdiction.—*Held*, that a writ of summons upon a policy issued in Quebec is

respect of a loss upon property in Quebec was properly served upon the agent named as attorney at Toronto under Rule 159, and that the Court in Ontario, therefore, had jurisdiction to entertain the action. *Semble*, that the power of attorney required to be filed under R. S. C. c. 124, s. 13, is to receive service of process in any suit instituted in any Province of Canada in respect of any liability incurred in such Province, and not in respect of any liability incurred in Canada. *Armstrong v. Lancashire Fire Ins. Co.*, 22 Occ. N. 146, 2 O. L. R. 395.

3. Irregularity — Dismissal of action.—An action will not be dismissed upon exception to the form because the writ, addressed to the bailiffs of the district of Beauharnois, has been served upon the defendant at Montreal by a bailiff of the district of Montreal, no prejudice being alleged or proven. *Bromwell v. O'Farrell*, 5 Q. P. R. 85.

4. Out of jurisdiction—Contract—Money had and received—Place of payment.—The defendants, a foreign company, contracted with the plaintiffs, a Victoria firm, to carry coal from Seattle to Alaska, and were paid the amount of the contract price. When the coal arrived at Dyce, the defendants demanded and collected from the plaintiffs' agent an additional sum for taking the coal in lighters from Skagway to Dyce. The defendants' agent promised to repay this amount in Victoria. —*Held*, setting aside an *ex juris* writ, that the claim for this amount really arose out of the contract, and therefore the Court had no jurisdiction. *Shallcross v. Alaska S. S. Co.*, 8 Brit. Col. L. R. 203.

5. Out of jurisdiction—Contract—Place of performance—Quebec law—Discretion.—An agreement between the plaintiff and defendants provided for the purchase by the defendants, who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff, of certain plant and machinery and stock in trade of a business carried on by him at Montreal. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants, and had notified them of his willingness to do so, whereupon they became liable to pay him the price. —*Held*, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicile of the debtor is the place of payment, and therefore the action was not founded

on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (e). The obligation to pay did not arise directly from provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and, notice of the election was given by letter received by the defendants in Montreal. A proper discretion was exercised in setting aside an order allowing service of the writ out of Ontario. *Comber v. Leyland*, [1898] A. C. 524, referred to. *Phillips v. Malone*, 22 Occ. N. 32, 3 O. L. R. 47.

See the next case.

6. Out of jurisdiction—Contract—Place of performance—Option exercised through post office—Terms—Acceptance—Onus.—An appeal from the decision of MEREDITH, C.J., 22 Occ. N. 32, 3 O. L. R. 47, was dismissed with costs. *Held*, per FALCONBRIDGE, C.J., that if the agreement of the 1st May, 1899, was complete, the contract was made in Quebec; but, if it was to be completed by the subsequent acts of the parties, there was no authority to the plaintiff to use the post office as a means of communication. *Per STREET, J.*—The plaintiff might have notified the defendants that he desired them to become the purchasers of the goods, but he had no right to prescribe the dates at which the defendants should pay for them. Their letter was only a proposal to take the goods upon the terms proposed therein, requiring an acceptance by the defendants to make it a complete contract, the onus of shewing which was on the plaintiffs, and was not satisfied. *Phillips v. Malone*, 22 Occ. N. 159, 3 O. L. R. 492.

7. Out of jurisdiction—Contract of hiring—Breaches within and without Ontario.—The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed-on remuneration, in selling and taking orders for their goods over a prescribed route to British Columbia and return, his duties on such return requiring him to call at a number of places in Ontario, to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position. The plaintiffs refused to accept his resignation, and, after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for breach thereof. —*Held*, by the Master in Chambers, dismissing an application to set aside an order for service of the writ of summons out of Ontario, that there was a breach of the contract within

Ontario for which the plaintiffs were entitled to sue. On appeal to a Judge in Chambers, this order was varied by limiting the action to breaches in Ontario; but reserving to the plaintiffs the right to bring actions for breaches which occurred out of Ontario. *R. J. Lovell Co. v. Coles*, 22 Occ. N. 165, 3 O. L. R. 291.

8. Out of jurisdiction — Foreign company—Transfer of assets in Ontario to Ontario company—Defence.] — On a motion to set aside a writ of summons, the order permitting service out of the jurisdiction, and the service thereunder, in an action brought in the Province of Ontario, by shareholders resident in the Province of Nova Scotia of a loan company incorporated in and with its head office and assets (real estate mortgages), except \$1,200 in mortgages on land in Ontario, in the Province of Quebec, against the loan company and its liquidators, resident in the Province of Quebec, and a loan company incorporated in and with its head office in the Province of Ontario, to set aside an agreement transferring the assets of the Quebec company to the Ontario company, and making the shareholders of the Quebec company shareholders in the Ontario Company, and for distribution of the proceeds of the assets, &c., on the ground that the Courts in Ontario had no jurisdiction and that the case did not fall within any of the clauses of Rule 162:—*Held*, that the action was not brought with reference to real estate in the same sense as *Henderson v. Bank of Hamilton*, 23 S. C. R. 716, and similar cases were; and that the case fell within Con. Rule 162, clauses (g) and (h). Motion dismissed without prejudice to defendants setting up want of jurisdiction as a defence. *Mackay v. Colonial Investment and Loan Co.*, 22 Occ. N. 389, 4 O. L. R. 571.

9. Out of jurisdiction — Foreigner — Notice.]—The question in what circumstances and to what extent provisions in the Rules under the English Judicature Act are to be held incorporated with the Judicature Ordinance discussed. English Order XI. (Marginal Rules 64-70) is not in force in the Territories. The Judicature Ordinance, 1893, s. 32, authorizes an order for the service of a writ of summons *ex juris*, though the party to be served is not a British subject, and the other should provide for service of the writ of summons, not of a notice thereof. Judgment of SCOTT, J., 4 Terr. L. R. 322, 20 Occ. N. 108, on this and other points, affirmed. *Conrad v. Alberta Mining Co.*, 21 Occ. N. 102, 4 Terr. L. R. 412.

10. Out of jurisdiction—Order before action—Parties—Causes of action—Joinder.]—The proper practice under the

Rules as they stand (Rules of 1897 Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction. Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec, and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant and taken to Quebec and prosecuted there upon a criminal charge, of which he was acquitted, and that against the fourth defendant, the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario:—*Held*, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to do with each other. *Held*, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (g), and an order should be made for the issue and service of the writ upon the other two in Quebec. *Croft v. King*, [1893] 1 Q. B. 419, followed. But the order should contain a clause providing that in case the action should be dismissed as against the defendant in Ontario, the plaintiff should consent to its dismissal as against the other defendants as well. *In re Jones v. Bu-sonnnette*, 22 Occ. N. 53, 2 O. L. R. 54.

11. Place of—Office of firm—Prejudice—Costs.]—The office of a commercial firm in which the defendant is a partner, is not that of the defendant, within the meaning of Art. 128, C. P. Nevertheless, the service in this case not having caused prejudice, an exception to the form was dismissed with costs. *Patterson v. Levy*, 4 Q. P. R. 196.

12. Place of business — Domicil—Judge's order.]—It is only in default of a regular domicil or of an ordinary residence, that a defendant may be served with process at his place of business.—2. In spite of an order of a Judge permitting service at the place of business, upon a report of a bailiff to the effect that the domicil of the defendant is closed and unoccupied, an action in which process had been served in accordance with such order will be dismissed upon exception to the form. *Soucy v. Electric Printing Co.*, 5 Q. P. R. 107.

13. Proof of—Oath—Person administering—Default judgment.] — A judgment cannot be obtained by default against a defendant served in another

Province, if the oath of the person who has signed the report of service has been taken before a notary, instead of before one of the persons designated by Art. 137, C. P. *Lydon v. Moore*, 4 Q. P. R. 169.

14. Time — Dismissal of action.]—Service of a writ effected more than six months after issue, the writ not having been renewed, is void, and the action will be dismissed upon exception to the form. *Langevin v. Grand Trunk R. W. Co.*, 4 Q. P. R. 162.

See I. 3, III. 3.

III. SPECIAL INDORSEMENT.

1. Foreign judgment—Interest till judgment—Liquidated demand.]—A claim for interest "until payment or judgment" is not a claim for a liquidated demand within the meaning of Order II., r. 6, except where the cause of action is in respect to negotiable instruments, in which case the interest is, by s. 57 of the Bills of Exchange Act, deemed to be liquidated damages. Interest claimed under a statute cannot be the subject of special indorsement, unless it is stated in the indorsement under what Act the interest is claimed. A specially indorsed writ should state specifically the amount due, and when a claim is made for the taxed costs of a foreign judgment, the date of the taxation should be stated. Decision in 9 Brit. Col. L. R. 27, 22 Occ. N. 154, reversed: *MARTIN, J.*, dissenting. *Macaulay v. Victoria Yukon Trading Co.*, 22 Occ. N. 377, 9 Brit. Col. L. R. 136.

2. Foreign judgment — Summary judgment.]—In an action on a foreign judgment the statement of claim indorsed on the writ did not allege specifically against whom the judgment was recovered:—*Held*, that the writ was not specially indorsed; and a motion for summary judgment was refused. *Boyle v. Victoria Yukon Trading Co.*, 8 Brit. Col. L. R. 352.

3. Interest — Summary judgment—Amendment of indorsement—Re-service.]—Summons for judgment under Order XIV., in an action for principal and interest due under a covenant in a mortgage. The statement of claim indorsed on the writ, in addition to the claim for principal and interest computed to a certain date previous to issue of writ, contained a claim for interest on the principal until payment or judgment:—*Held*, such claim for interest was not a subject of special indorsement under Order III., r. 6. *Held*, also, that where, on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement, it is not open to the plaintiff to obtain an amendment and proceed, but a new summons must be taken out. Where the indorsement of a writ has been amended, re-delivery but not re-service is necessary. *Pike v. Copley*, 22 Occ. N. 218, 9 Brit. Col. L. R. 52.

4. Omission of formal words—Motion for summary judgment.]—A motion for summary judgment under Order XIV. was refused on the ground that the writ of summons was not specially indorsed, the indorsement not being headed with the words "statement of claim." *Vancouver Agency v. Quigley*, 8 Brit. Col. L. R. 142.

5. Promissory note — "Duly presented"—Summary judgment.]—Appeal from an order giving the plaintiffs leave to sign final judgment under Order XIV. The statement of claim indorsed on the writ stated plaintiffs' claim as being on a note dated . . . payable four months after its date to the order of M. L. Wurzburg & Company, at their office, Halifax. N. S., indorsed . . . and which said note was duly presented for payment and was dishonoured:—*Held*, a good special indorsement. *Cunard v. Symon-Kaye Syndicate*, 27 N. S. Reps. 340, distinguished. *Union Bank of Halifax v. Wurzburg & Co., Ltd.*, 22 Occ. N. 402, 9 Brit. Col. L. R. 160.

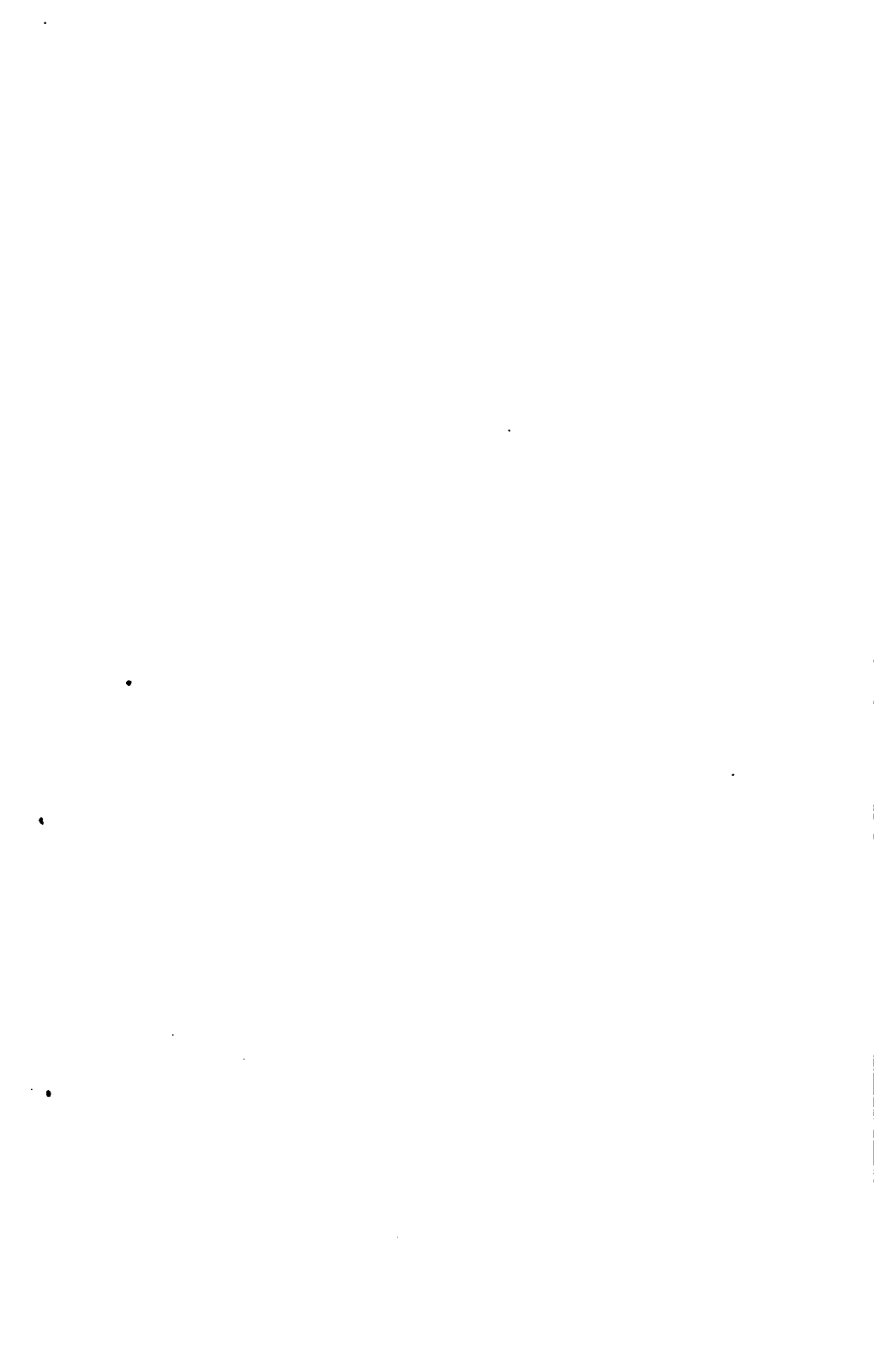


TABLE OF THE NAMES OF CASES

REPORTED IN

VOLUME I. OF THE ONTARIO WEEKLY REPORTER.

The figures indicate the pages of The Ontario Weekly Reporter on which the cases will be found.

A few cases published in the Ontario Law Reports during the year 1902, and not in The Ontario Weekly Reporter, are included in the table and in the accompanying digest.

A.

Abbott v. Atlantic Refining Co., 701.
Abbott v. Gustin, 482.
Adams v. Culligan, 38.
Aillo v. Fauquier, 833.
Aitcheson v. McKelvey, 51, 355.
Allan v. Rever, 459.
Allen v. City of Toronto, 518.
Allen and Town of Napanee, *Re*, 634.
Anderson, *Re*, 217.
Anderson v. Chandler, 417.
Anderson v. Elgie, 550, 638.
Anderson v. Mikado Gold Mining Co., 276.
Anderson Produce Co. v. Nesbitt, 818.
Anthony v. Blain, 841.
Armstrong v. Canada Atlantic R. W. Co., 612.
Armstrong v. Lancashire Fire Ins. Co., 3 O. L. R. 395.
Armstrong v. Michigan Central R. W. Co., 714.
Armstrong v. Toronto Police Benefit Fund, 829.
Asselstine, *Re*, 178.
Attorney-General v. Toronto General Trusts Corporation, 807.

B.

Bailey v. Gillies, 325.
Bain v. Copp, 706, 784, 804.
Baker v. Royal Insurance Co., 294.
Ball v. Farmers' Central Mutual Fire Ins. Co., 168.
Banfield v. Hamilton Brass Co., 293.
Bank of Hamilton v. Hurd, 456.
Bank of Ottawa v. Lewis, 71.
Bank of Ottawa v. McLeod, 565.
Barr v. Bird, 30.
Bartlett v. Canadian Bank of Commerce, 68, 162.
Baston v. Toronto Fruit Vinegar Co., 301.
Batzold v. Upper, 381.
Baxter v. Jones, 554.
Beam v. Beatty, 54, 616.
Beaudry v. Gallien, 793.
Belling v. City of Hamilton, 124.
Bentley v. Murphy, 273, 726, 845.
Bergman v. Armstrong, *Re*, 792.
Berry v. Days, 809.

Bertudato v. Fauquier, 802.
Bibby v. Davis, 189.
Birkbeck Loan Co. v. Johnston, 163.
Birkett v. Brewder, 62.
Birney v. Toronto Milk Co., 736.
Black v. Imperial Book Co., 743.
Blanquist v. Hogan, 15.
Back v. Township of Wilmot, 415.
Bodwell v. McNiven, 841.
Bonnville v. Grand Trunk R. W. Co., 304.
Booth v. Booth, 49.
Bowerman v. Town of Amherstburg, 16.
Bowman v. Imperial Cotton Co., 450.
Boyd v. McKay, 474.
Bradburn and Turner, *Re*, 152.
Brampton Gas Co., *Re*, 543.
Brandon v. Galloway, *Re*, 677.
Breakenridge v. Mason, 529.
Breese v. Clark, 825.
Brothers v. Alford, 31.
Brotherson v. Corry, 34.
Brown v. City of Hamilton, 271.
Brown v. McGregor, 398.
Bryce v. Township of Brooke, 274, 324, 835.
Bunting v. Beatty, 54, 616.
Burch, *Re*, 436.
Burke v. Burke, 127, 419.
Burrell v. Lott, 181.
Burton v. Playfair, 599.
Butler, *Re*, 826.

C.

Caldwell v. Buchanan, 682.
Campbell and Horwood, *Re*, 139, 396.
Canada Atlantic R. W. Co. v. City of Ottawa, 377.
Canadian Bank of Commerce v. Rolston, 351.
Canadian Bank of Commerce v. Town of Toronto Junction, 74.
Canadian Mining, etc., Co. v. Wheeler, 103.
Canadian Pacific R. W. Co. and City of Toronto, *Re*, 385.
Canadian Pacific R. W. Co. v. City of Toronto, 255.
Carleton Place Methodist Church, Trustees of, v. Keyes, 10.
Carleton Place Voters' Lists, *Re*, 105.
Carr v. O'Rourke, 331.

Carscallen v. Madole, 472.
 Carswell v. Langley, 107.
 Cartwright School Trustees and Town-
 ship of Cartwright, *Re* 387, 477.
 Centaur Cycle Co. v. Hill, 229, 377, 401,
 639.
 Central Canada Loan and Savings Co.
 v. Porter, 482.
 Centre Bruce Provincial Election, *Re*,
 503.
 Chambers v. McCombs, 689.
 Chapman, *Re*, 434.
 Chevalier v. Ross, 12, 115.
 Chevalier v. Trepannier, 847.
 Christian v. Poulin, 275.
 Citizens' Telephone & Electric Light Co.
 v. Town of Rat Portage, 42.
 Clark v. Gray, 370.
 Clark and Kellett, *Re*, 577.
 Clark v. Walsh, 228.
 Clarry v. Brodie, 387.
 Clemens v. Bartlett, 342.
 Clergue v. McKay, 178, 241.
 Clunis v. Sloan, 27.
 Coburn v. Hardwick, 733.
 Conley v. Ashley, 704.
 Cooke v. Wilson, 3 O. L. R. 299.
 Co-operative Cycle and Motor Co., *Re*,
 778.
 Corbett and Hartin, *Re*, 744.
 Cornell, *Re*, 56.
 Coté v. Meloche, 802.
 Counsell v. Livingston, 444.
 Covenant Mutual Life Association of
 Illinois, *Re*, 392.
 Crawford, *Re*, 470.
 Crompton and Knowles Loom Works v.
 Hoffman, 717.
 Crosby v. Ball, 545.
 Crown Corundum and Mica Co. v. Lo-
 gan, 107, 174.
 Crow's Nest Pass Coal Co. v. Bell, 679.
 Cummings v. Ryan, 149.
 Currie, *Re*, 9.
 Cushen v. City of Hamilton, 441.

D.

Daubeny, *Re*, 733.
 Davis v. Hord, 418, 471.
 Davis v. Rideau Lake Navigation Co.,
 229.
 Davis v. Walker, 1, 745.
 Dawdy v. Hamilton, Grimsby, and
 Beamsville Electric R. W. Co., 364,
 781.
 Decker v. Cliff, 354, 419.
 Deering v. Beatty, 363.
 Delahay v. Reid, 522.
 Dodge v. Smith, 46, 803.
 Doherty v. Millers and Manufacturers
 Ins. Co., 457.
 Doidge v. Dominion Council of the Royal
 Templars of Temperance, 485.
 Dominion Bank v. Ewing, 654.
 Dominion Pavine and Contracting Co. v.
 Magann, 226.
 Dominion Radiator Co. v. Bull, 672.

Doolittle v. Electrical Maintenance and
 Construction Co., *Re*, 202.
 Dover v. Denne, 297.
 Drope, *Re*, 817.
 Dulmage v. White, 4 O. L. R. 121.
 Duncombe, *Re*, 153.
 Dunlop Pneumatic Tire Co. v. Ryck-
 man, 699, 820.
 Dunn v. Prescott Elevator Co., 75, 404.
 Duprat v. Daniel, 561.
 Duthie v. McDermott, 776.

E.

Earle v. Burland, 527.
 Elliott v. Hamilton, 705.
 Employers' Liability Assurance Corpora-
 tion and Excelsior Life Insurance
 Co., *Re*, 87, 192.
 Ennis v. Reade, 652.
 Equitable Savings, Loan, and Building
 Association, *Re*, 571.
 Evans, Margaret, *Re*, 92.
 Evans v. Evans, 69, 223.
 Evans v. Jaffray, 29, 158.
 Excelsior Life Insurance Co. and De
 Geer, *Re*, 702, 771.

F.

Fairfield v. Ross, 631.
 Fallis v. Gartschore-Thompson Pipe
 Foundry Co., 348.
 Falls v. Bank of Montreal, 538.
 Farley v. Sanson, 738.
 Farmers Loan and Savings Co. v.
 Hickey, 695.
 Ferguson v. Arkell, 190.
 Findlay v. Ottawa Furnace and
 Foundry Co., 323.
 Fisher v. Bradshaw, 282.
 Fisher v. Fisher, 442.
 Fitzgerald v. Fitzgerald, 17.
 Fitzsimmons, *Re*, 220.
 Flett v. Coulter, 775.
 Foley v. Trusts and Guarantee Co., 526.
 Ford v. Hodgson, 121.
 Ford v. Metropolitan R. W. Co., 318.
 Fowlie v. Ocean Accident and Guarantee
 Co., 252.
 Fox v. Klein, 172.
 Frankel v. Grand Trunk R. W. Co., 254,
 339, 396.
 Fraser v. Griffiths, 141.
 Fuller v. Grant, 452.

G.

Gaby v. City of Toronto, 440, 606, 635,
 711.
 Gallio v. Fauquier, 833.
 Gardner, *Re*, 157.
 Gaul v. Township of Ellice, 119.
 Gault v. Carpenter, *Re*, 404.
 Gearing v. McGee, 213.
 Geddes and Cochrane, *Re*, 15.
 Gegg v. Bassett, 3 O. L. R. 263.
 Gibson, *Re*, 58.
 Gildner v. Busse, 167.
 Gillem, *Re*, 37.

Gillett v. Lumsden, 488.
 Girardot v. Curry, 21.
 Glenn, *Re*—Rex v. Meehan, 136.
 Glenn v. Rudd, 116.
 Globe Printing Co. v. Sutherland, 589.
 Gloucester, Township of, v. Canada
 Atlantic R. W. Co., 18, 485.
 Godbold v. Godbold, 233, 357.
 Goodyear v. Goodyear, 405.
 Goulet v. Greening, 550.
 Graham v. Bourque, 138, 358.
 Grainger v. Hamilton, 819.
 Grand Hotel Co. of Caledonia Springs
 v. Wilson, 785.
 Grand Hotel Co. of Caledonia Springs
 v. Tune, 785.
 Grand Trunk R. W. Co. v. Valliear, 695.
 Grant v. McPherson, 240.
 Gray v. McMath, 445.
 Grear v. Mayhew, 529.
 Greisman v. Fine, 479.
 Greenwood v. Buster, *Re*, 226.
 Grimshaw and Grimshaw, *Re*, 744.
 Grossman v. Canada Cycle Co., 846.
 Guenot v. Girardot, 638.
 Gunn v. Harper, 366.
 Gurney v. Tilden, 207.

H.

Hager v. Hagar, 78.
 Haight v. Dangerfield, 551.
 Hall v. Alexander, 204.
 Halliday v. Rutherford, 816.
 Halton Provincial Election, *Re*, 501.
 Ham v. Pillar, 259.
 Hamilton, City of, v. Kramer-Irwin
 Rock Asphalt, etc., Co., 111.
 Hamilton and City of Toronto, *Re*, 234.
 Harris v. Bank of British North
 America, 76, 285.
 Harris v. Harris, 684, 734.
 Harris v. Stevens, 109.
 Hay v. Bingham, 822.
 Haynes v. Edmonds, 340.
 Heal v. Spramotor Co., 175, 466.
 Heffernan v. McNab, 165.
 Henning v. Maclean, 657.
 Henry v. Ward, 222, 652.
 Hepburn v. Vanhorne, 506.
 Hime v. Town of Toronto Junction, 740.
 Hinds v. Town of Barrie, 775.
 Hislop v. Joss, 9.
 Hogg v. Township of Brooke, 568.
 Holden v. Township of Yarmouth, 557.
 Holland, *Re*, 73.
 Holman v. Times Printing Co., 7, 338,
 756.
 Holmes v. Town of Goderich, 367, 814.
 Holness v. Russell, 655, 774.
 Holtby v. French, 821.
 Hopkin v. Hamilton Electric Light and
 Cataract Power Co., 486.
 Hospital for Sick Children v. Chute, 321.
 Howard v. Quigley, 96.
 Howe v. Culligan, 38.
 Howland v. Patterson, 653.
 Huffman v. Hull, 242.
 Hull v. Allen, 151, 782.

Hume v. Hume, 156, 187.
 Humphries v. Aggett, 33.
 Hunt v. Robins, 80.
 Hunt v. Town of Palmerston, 791.
 Hunter v. Boyd, 79.
 Hutton v. Justin, 64.

I.

Iroquois Electric Light Co. v. Village of
 Iroquois, 306.
 Ivey v. Moffat, 519.

J.

Jamieson v. Mackenzie, Mann, & Co.,
 555.
 Johnston v. Macfarlane, 287.
 Johnston v. Ryckman, 720.
 Johnston, *Re*, Chambers v. Johnston,
 806.
 Jones v. Bissonette, 13.
 Joyce v. Joyce, 479.

K.

Keenan v. Richardson, 333.
 Keeso v. Thompson, 176.
 Keith v. Ottawa and New York R. W.
 Co., 104, 749.
 Kelly v. Pollock, 735.
 Kelly v. Smith, 732.
 Kidd v. Harris, 141.
 King v. City of Toronto, 843.
 Kingston, City of, and Kingston Light,
 Heat, and Power Co., *Re*, 194.
 Knickerbocker Trust Co. of New York
 v. Brockville, Westport, and Sault
 Ste. Marie R. W. Co., 311.

L.

Lachance v. Lachance, 518, 778.
 Laishley v. Gould, 566.
 Lamphier v. Stafford, 329.
 Langley v. Law Society of Upper Can-
 ada, 143, 718.
 Lanz v. McAllister, 455.
 Larose v. Ottawa Trust and Deposit
 Co., 210, 309.
 Lasjinski v. Campbell, 114.
 Law Society of Upper Canada v. Hutch-
 ison, 558.
 Lawrence v. Town of Owen Sound, 559.
 Leach and City of Toronto, *Re*, 661.
 Leader v. Siddall, 337.
 Leadley and City of Toronto, *Re*, 239.
 Leduc v. Booth, 800.
 Leeder v. Toronto Biscuit Co., 687.
 Leishman v. Garland, 22.
 Lewis v. Grand Trunk R. W. Co., 771.
 Lennox Provincial Election, *Re*, 472,
 730, 810.
 Lethbridge, *Re*, 553.
 Lewis v. Dempster, 602.
 Lewis v. Ellis, 356.
 Lincoln Provincial Election, *Re*, 564.
 Lindsay v. Strathroy Petroleum Co.,
 355.
 Lloyd v. Walker, 383.

- Lochiel, Township of, v. Township of East Hawkesbury, 661.
 Lockhart v. Lockhart, 819.
 London Life Insurance Co. v. Molsons Bank, 457.
 Long v. Eby, 420.
 Lord's Day Act of Ontario, *Re*, 312.
 Lossing v. Wrigglesworth, 460.
 Lovell v. Coles, 3 O. L. R. 291.
 Luton v. Township of Yarmouth, 40.
- M.**
- Macdonell v. City of Toronto, 433.
 Mackay v. Colonial Investment and Loan Co., 569, 592, 646.
 MacLaughlin v. Lake Erie and Detroit River R. W. Co., 266, 428.
 Maclean v. Wood, 703.
 Macnee v. Rose, 173.
 Macpherson and City of Toronto, *Re*, 234.
 McAllister, *Re*, 230.
 McAlpine and Lake Erie and Detroit River R. W. Co., *Re*, 100, 484.
 McAvity v. Morrison, 552, 632.
 McCallam v. Sun Savings and Loan Co., 226.
 McCann v. Slater, 131.
 McCauley v. Butler, 72, 343.
 McClenaghan v. Perkins, 191, 752.
 McClure v. Township of Brooke, 274, 324, 835.
 McCowan v. Armstrong, 28.
 McCready v. Gananoque Water Power Co., 438.
 McCullough v. Hull, 451.
 McDermott v. Hickling, 19, 768.
 McDonald v. Hennessy, 559.
 McDonald v. Sullivan, 721, 723, 784, 849.
 McDonell v. City of Toronto, 494.
 McGarr v. Town of Prescott, 53, 439.
 McGarrigle v. Simpson, 685.
 McGibbon v. Charlton, 828.
 McGillivray v. Williams, 510.
 McGuinness v. McGuinness, 23.
 McIntyre, *Re*—McIntyre v. London and Western Trusts Co., 56.
 McIntyre v. Town of Lindsay, 492.
 McKay v. Boyd, 483.
 McKenzie, *Re*, 739.
 McKenzie v. McLaughlin, 58, 80.
 McKinnon v. Jessop, 564.
 McLaughlin v. McCart, 504.
 McLaughlin v. McLaughlin, 378, 424.
 McLaughlin v. Mayhew, 308.
 McLean v. Robertson, 578.
 McLellan v. Hooey, 215, 707.
 McMaster Estate, *Re*, 98.
 McMillan, *Re*, 471.
 McNeil v. Dawson, 24.
 McRae v. S. J. Wilson Co., 380.
 Madill v. Township of Caledon, 290.
 Mahaffy v. Bridgland, 487.
 Major v. McGregor, 839.
 Mann v. City of St. Thomas, 480.
 Mann v. Grand Trunk R. W. Co., 230.
 Markham, Village of, and Town of Aurora, *Re*, 289.
- Marks v. Waterous Engine Works Co., 148.
 Mason v. Lindsay, 561, 583.
 Massey-Harris Co. v. Elliott, 65.
 Mathews v. Mathews, 844.
 Matthews v. Moody, 47.
 Medler and City of Toronto, *Re*, 545.
 Merchants Bank of Canada v. Sussex, 572, 584.
 Merritt v. Nissen, 456.
 Metallic Roofing Co. v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, 573, 644.
 Middleton v. Scott, 536, 632.
 Midland Navigation Co. v. Dominion Elevator Co., 593.
 Milligan v. Jamieson, 4 O. L. R. 650.
 Milner v. Kay, 200.
 Minerva Manufacturing Co. v. Roche, 530, 722.
 Minns v. Village of Omemee, 90, 362.
 Monro v. Toronto R. W. Co., 25, 316, 813.
 Montreal and Ottawa R. W. Co. v. City of Ottawa, 349.
 Moore v. Balch, 824.
 Moore, *Re*, 50.
 Moore v. J. D. Moore Co., 290.
 Morang v. Rose, 3 O. L. R. 354.
 Murphy v. Colwell, 146.
 Morrison v. Grand Trunk R. W. Co., 180, 263, 329, 758.
 Morrison v. Mitchell, 709, 838.
 Morrow v. Peterborough Water Co., 512.
 Morse v. Morse, 500.
 Munro v. Toronto Railway Co., 25, 316, 813.
 Murphy v. Brodie, 429, 681.
 Murphy v. Lake Erie and Detroit River R. W. Co., 827.
 Murray, *Re*, 576.
 Murray v. Empire Loan and Savings Co., 310.
 Murray v. Wurtele, 298, 353.
 Muskoka Provincial Election, *Re*, 487.
 Mutchmor v. Waterloo Mutual Fire Insurance Co., 667.
 Myers v. Sault Ste. Marie Pulp and Paper Co., 280.
- N.**
- Nasmith and City of Toronto, *Re*, 238.
 Naylor, *Re*, 809.
 Neely v. Peter, 499.
 Nelson Coke and Gas Co. v. Pellatt, 595.
 Nesbit v. Galna, 218.
 Newborn, *Re*, Toronto General Trusts Corporation v. Newborn, 122.
 Nixon v. Barber, 501.
 Nolan v. Ocean Accident and Guarantee Corporation, 777.
 Norris, *Re*, 817.
 North Grey Provincial Election, *Re*, 474, 483.
 North Waterloo Election, *Re*, 86.
 Northmore v. Abbott, 231.

Nottawasaga, Township of, and County of Simcoe, *Re*, 278.

O.

O'Hearn v. Town of Port Arthur, 373.
Oman v. Copp-Clark Co., 542.
Ontario Bank v. Poole, 20, 832.
Ottawa, City of, v. Ottawa Electric R. W. Co., 830.
Ottawa Electric Co. v. City of Ottawa, 508.
Ottawa Electric Co. v. Consumers Electric Co., 154.
Ottawa Gas Co. v. City of Ottawa, 647, 697.

P.

Padget and Curren, *Re*, 427.
Padget v. Padget, 160.
Page, *Re*, 849.
Parent v. Cook, 3 O. L. R. 350.
Parent v. Cook, 366.
Parks and Lake Erie and Detroit River R. W. Co., *Re*, 484.
Parramore v. Boston Mfg. Co., 643, 716.
Patriarche v. Kammerer, 425.
Patriarche v. Tucker, 629.
Patterson v. Turner, 82.
Pattison v. Township of Wainfleet, 407.
Pearen v. Merchants Bank of Canada 277.
Pegg v. Hamilton, 418, 633.
Pelot and Township of Dover, *Re*, 792.
Pennington v. Honsinger, 270, 507.
Pennington v. Morley, 246.
People's Building and Loan Association v. Stanley, 399, 469, 572, 592.
Perrin, *Re*, 209.
Perry v. Carscallen, 730, 810.
Peters v. Whyte, 26.
Pettit, *Re*, 464.
Phelan, *Re*, 741.
Phelps v. McLachlin, 806.
Phillips v. Hanna, *Re*, 245.
Phillips v. Malone, 200.
Piché v. Montgomery, 325.
Piggott v. Toronto Rubber Shoe Mfg. Co., 541.
Pilgrim v. Cummer, 531.
Pimperton v. McKenzie, 335.
Pink, *Re*, 772.
Pinkney, *Re*, 694, 715.
Platt v. Buck, 4 O. L. R. 421.
Plummer v. Sholdice, 780.
Powell v. Dancyger, *Re*, 63.
Prescott Elevator Co., *Re*, 161.
Prince Edward Provincial Election, *Re*, 468.
Pritchard v. Fick, 815.
Prittle v. Loughton, 185.
Provident Chemical Works v. Canada Chemical Mfg. Co., 618.
Publishers' Syndicate, *Re*, 725.
Publishers' Syndicate, *Re*, Hart's Case, 508.
Publishers' Syndicate, *Re*, Mallory's Case, 142.

Purdy v. Purdy, 449.
Puterbaugh v. Gold Medal Co., 250.
Puterbaugh, v. Gold Medal Mfg. Co., 3 O. L. R. 259.

Q.

Quirk v. Dudley, 637.

R.

Rankin v. Sterling, 243.
Rat Portage Lumber Co. v. Kendall, 197, 528.
Rat Portage, Town of, v. Citizens' Electric Co., 44.
Reilly v. McDonald, 196, 721, 723, 784, 849.
Rennie v. Quebec Bank, 286.
Rex v. Bennett, 360.
Rex v. Cole, 117.
Rex v. Daoust, 344.
Rex v. Godson, 250.
Rex v. Hanrahan, 346.
Rex v. Hayward, 799.
Rex v. James, 520.
Rex v. Kennedy, 31.
Rex v. Martin, 429.
Rex v. McGinnes, 812.
Rex v. McGregor, 358.
Rex v. McKinnon, 199.
Rex v. Meehan, *Re*, 136, 248.
Rex v. Moyer, 780.
Rex v. Rice, 394.
Rex v. St. Pierre, 365.
Rex v. Scully, 452.
Rex v. Trevanne, 587.
Rex *ex rel.* Ivison v. Irwin, 371.
Rex *ex rel.* McFarlane v. Coulter, 636.
Rex *ex rel.* Roberts v. Ponsford, 223, 286, 590, 645.
Rex *ex rel.* Ross v. Taylor, 265, 582.
Rex *ex rel.* Talmie v. Campbell, 268.
Richardson v. West, 670.
Ritchie v. Vermillion Mining Co., 624.
Ritz and Village of New Hamburg, *Re*, 574, 690.
Robinson v. McLeod, 83.
Rochon v. Wellington, *Re*, 805.
Rockett v. Rockett, 309.
Rose v. Croden, 170.
Rothschild v. Silverman, 38.
Ruttan v. Burk, 560.
Ryan v. Catholic Order of Foresters, 547.
Ryan v. Ryan, 824.
Ryerson v. Murdock, 466.

S.

St. Jean v. Danis, 790.
Salter and Township of Beckwith, *Re*, 266.
Saunby v. London Water Comrs., 567.
Sawers v. City of Toronto, 656.
Scadding, *Re*, 467, 683.
Schiedell v. Burrows, 793.
Scott v. Barron, 558.
Shantz v. Tawn of Berlin, 4 O. L. R. 730.

Sharkey v. Williams, 135, 419.
 Sherlock v. Wallace, 54, 393.
 Shore, *Re*, 586.
 Skillings v. Royal Insurance Co., 411.
 Slater Shoe Co. v. Wilkinson, 591.
 Slaven v. Slaven, 410.
 Slinn v. City of Ottawa, 269.
 Smith, *Re*, 55.
 Smith v. Hunt, 598, 798.
 Smith v. Mason, 478.
 Smith v. Wade, 549.
 Snure and Davis, *Re*, 379.
 Snyder, *Re*, 461.
 South Oxford Provincial Election, *Re*, 795.
 Southampton Lumber Co. v. Austin, 548.
 Southwold School Section, *Re*, 32.
 Spooner v. Mutual Reserve Fund Life Association, 566, 583.
 Stack v. T. Eaton Co., 511.
 Standard Trading Co. v. Seybold, 650, 724, 783.
 Stephens v. O'Connor, 241.
 Stevens v. City of Chatham, 199.
 Stevens v. Daly, 621.
 Stewart v. Clark, 503.
 Stewart v. Walker, 489.
 Stokes v. Continental Life Ins. Co., 640.
 Stormont Provincial Election, *Re*, 504.
 Strathroy Petroleum Co. v. Lindsay, 356.
 Styles v. Towers, 523.
 Summers, *Re*, 523.
 Summers v. County of York, 137.
 Sutton v. Village of Port Carling, 67.
 Swayzie v. Township of Montague, 742.

T.

Tawse v. Seguin, 14, 56.
 Taylor v. Delaney, 208, 409.
 Taylor v. Grand Trunk R. W. Co., 447.
 Taylor v. Macfarlane, 283.
 Thomas v. Calder, 26.
 Thompson v. Coulter, 205.
 Thompson v. King, 119.
 Thompson v. Thompson, 431.
 Thompson v. Township of Yarmouth, 556.
 Thomson v. Stone, *Re*, 509.
 Thorndyke v. Thorndyke, 11.
 Thorne v. Parsons, 608.
 Thuresson, *Re*, McKenzie v. Thuresson, 4, 437.
 Toronto, City of, Assessment Appeal, *Re*, 261.
 Toronto, City of, v. Bell Telephone Co. of Canada, 192.
 Toronto General Trusts Corporation v. Central Ontario R. W. Co., 713.
 Toronto General Trusts Corporation v. White, 198, 760.
 Toronto Junction Public School Board v. County of York, 216.
 Toronto Public School Board and City of Toronto, *Re*, 443.

Toronto Railway Co. and City of Toronto, *Re*, 441.
 Town v. Archer, 391.
 Tuckett-Lawry v. Lamoureux, 295.
 Turner, *Re*, Turner v. Turner, 4 O. L. R. 578.
 Turner v. Township of York, 723.

U.

Uda v. Algoma Central R. W. Co., 246.
 Union Bank of Canada v. Cunningham, 432.
 Union Bank of Canada v. Rideau Lumber Co., 764.
 United Gas and Oil Co. of Ontario and Township of Colchester South, *Re*, 642.

V.

Valleau v. Valleau, 65.
 Vandusen v. Young, 55.

W.

Walkerton Binder Twine Co. v. Higgins, 403.
 Walkerville Match Co. v. Scottish Union and National Ins. Co., 647.
 Walton v. Welland Vale Mfg. Co., 839.
 Ward v. Benson, 24.
 Wason v. Douglas, 552.
 Watts, *Re*, 129, 133.
 Watts v. Sale, 681.
 Webb v. Gage, 327.
 Webb v. Ottawa Car Co., 90.
 Webling v. Fick, 203.
 West v. Benjamin, 212.
 West Wellington Provincial Election, *Re*, 629.
 Wheeler v. Town of Cornwall, 4 O. L. R. 120.
 Whelihan v. Hunter, 788.
 Whipple v. Ontario Box Co., 36.
 Whitby, Town of, v. Grand Trunk R. W. Co., 292.
 White v. McLagan, 59.
 White v. Malcolm, 302.
 Whitesell v. Reece, 516.
 Wickett, *Re*, 554.
 Wiedeman v. Guittard, 110.
 Wilder v. Wolf, 481.
 Williams, *Re*, 534.
 Williams v. Cook, 133.
 Williams v. Currie, 468.
 Wilson v. Botsford-Jenks Co., 101.
 Wilson v. Howe, 272.
 Witty v. London Street Railway Co., 288.
 Wolff v. Kehoe, 78.

Y.

Yates, *Re*, 630.
 Yocom, *Re*, Honsinger v. Hopkins, 85.

Ontario Weekly Reporter

INDEX-DIGEST FOR VOL. 1 (1902.)

All the cases reported in Volume I. of The Ontario Weekly Reporter, from the 1st of January to the 31st of December, 1902, are digested.

This digest includes all the cases decided at Osgoode Hall and other cases reported in The Ontario Weekly Reporter.

Where the case digested is reported in the Ontario Law Reports, a reference is added to the volume and page, thus:

Doe v. Roe, 8; 3 O. L. R. 6.

The figure "8" indicates the page of The Ontario Weekly Reporter.

ABANDONMENT.

See Assessment and Taxes, 1—Parliamentary Elections, 6—Trade Mark, 2.

ACCIDENT.

See Contract, 20.

ACCIDENT INSURANCE.

See Insurance, 1.

ACCOUNT.

Items—Chattel Mortgage: Pennington v. Honsinger, 270.

See Interest—Landlord and Tenant, 3—Mortgage, 8—Particulars—Partnership, 4—Pleading, 10—Specific Performance, 5.

ACQUIESCENCE.

See Landlord and Tenant, 5—Partition, 2.

ACQUITTAL.

See Malicious Arrest and Prosecution, 2.

ACTION.

1. Consolidation of Actions — Stay of Proceedings — Parties — Jury Notice: Murphy v. Brodie, 429, 681.
2. Discontinuance — Counterclaim — Cause of Action—Jurisdiction: Dominion Burglary Guarantee Co. v. Wood, 3 O. L. R. 365.
3. Dismissal of — Order—Undertaking—Default: Crown Corundum and Mica Co. v. Logan, 107, 174; 3 O. L. R. 434.

See Discovery—Limitation of Actions—Lis Pendens—Mechanics' Liens, 1—Mortgage, 1-5 — Parties — Res Judicata—Solicitor, 1.

ADEMPTION.

See Will, 37.

ADMINISTRATION.

Claims of Creditors—Promissory Note—Interest—Corroboration — Open Account — Statute of Limitations — Work and Labour — Release of Claim: Halliday v. Rutherford, 816.
See Executors and Administrators, 2.
8.

ADMINISTRATION ORDER.

Summary Application for—Insolvent Estate—Creditors — Conduct of Proceedings—Discretion of Court: Re Yocom, Honsinger v. Hopkins, 85.
See Executors and Administrators, 7.

ADMINISTRATOR.

See Executors and Administrators.

ADMINISTRATOR AD LITEM.

Appointment of—Rules 194, 195, 196: Fairfield v. Ross, 631; 4 O. L. R. 534.
See Judgment, 3.

ADMINISTRATOR PENDENTE LITE.

See Will, 1.

ADMISSIONS.

See Discovery, 2—Executors and Administrators, 9.

ADVERTISEMENT.

See Will, 28.

AFFIDAVITS.

See Discovery—Judgment, 7—Municipal Elections, 1, 6—Parliamentary Elections, 4, 6—Parties, 3.

AGENT.

See Principal and Agent.

AGREEMENT.

See Contract.

ALIMONY.

See Infant, 4.

AMENDMENT.

See Discovery, 6—Infant, 6—Judgment, 1, 3—Municipal Elections, 2—Parliamentary Elections, 1, 15—Pleading, 6, 8, 9, 11—Railways, 10—Specific Performance, 1, 9.

ANIMALS.

See Pledge.

ANNUITY.

See Bankruptcy and Insolvency, 1—Executors and Administrators, 5—Pleading, 1—Will, 10, 20.

APPEAL TO COUNTY COURT JUDGE.

See Assessment and Taxes, 1.

APPEAL TO COURT OF APPEAL.

1. Extension of Time—Laches—Security: Brown v. McGregor, 398.
2. Leave to Adduce Further Evidence: Dodge v. Smith, 803.
3. Leave to Appeal: Rothschild v. Silverman, 38; Hutton v. Justin, 64; Wiedeman v. Guittard, 110; Re Employers' Liability Corporation and Excelsior Life Ins. Co., 192; Evans v. Evans, 233; Larose v. Ottawa Trust and Deposit Co., 309; McClure v. Township of Brooke, Bryce v. Township of Brooke, 324; 4 O. L. R. 102; Morrison v. Grand Trunk R. W. Co., 329; People's Building and Loan Association v. Stanley, 399; 4 O. L. R. 90; Davis v. Hord, 471; Middleton v. Scott, 632; McAvity v. Morrison, 632; Pegg v. Hamilton, 633; Minerva Mfg. Co. v. Roche, 722; Bain v. Copp, 804.

4. Leave to Appeal—Appeal as of Right on One Branch—Amount Involved—Divergence of Judicial Opinion: Bentley v. Murphy, 845.
5. Leave to Appeal—Attachment of Debts—Small Amount Involved: McDonald v. Sullivan, 840.
6. Leave to Appeal—Difficult Construction of Statute—Matter of Public Interest: Re Cartwright School Trustees and Township of Cartwright, 477; 4 O. L. R. 278; Hunter v. Boyd, 79.
7. Leave to Appeal—Important Question of Law—Construction of Statute—Small Amount in Controversy: Mason v. Lindsay, 583.
8. Leave to Appeal—Question of Costs—Conflict of Decisions—Statutes: Ottawa Gas Co. v. City of Ottawa, 697.
9. Leave to Appeal—Question of Substance—Joinder of Plaintiffs and Causes of Action: Hinds v. Town of Barrie, 775.
10. Leave to Appeal—Special Circumstances—Dispensing with Security: Kidd v. Harris, 141; 3 O. L. R. 277.
11. Leave to Appeal—Special Circumstances—Order relating to Discovery: McKenzie v. McLaughlin, 80.
12. Leave to Issue Execution Pending Appeal—Special Circumstances: Centaur Cycle Co. v. Hill, 377, 401; 4 O. L. R. 92.
13. Motion to Quash Appeal of Third Party against Plaintiff—Useless Proceeding: Gaby v. City of Toronto, 635.
14. Reversal of Judgment on Questions of Fact: Lewis v. Dempster, 602.
15. Right of Appeal—Order under Ontario Winding-up Act—Final Order—Settlement of Appeal Case: Re Equitable Savings, Loan, and Building Assn., 571; 4 O. L. R. 479.
16. Right of Appeal—Order of Judge of Appeal—"Court Appealed to or Judge Thereof": Centaur Cycle Co. v. Hill, 401; 4 O. L. R. 92.
17. Right of Appeal—Surrogate Court Case—Divisional Court—Second Appeal: Haynes v. Edmonds, 340.

5 APPEAL TO DIVISIONAL COURT—ARBITRATION AND AWARD. 6

18. Security for Costs—Joint Appeal of Two Parties — Security by One — Payment into Court — Abandonment of Appeal—Motion for Payment out—Costs—Set-off—Increased Security — Limitation of Amount: Centaur Cycle Co. v. Hill, 639; 4 O. L. R. 493.

19. Settling Appeal Case—Evidence on Various Issues — Construction of Contract — Limited Appeal: City of Hamilton v. Kramer-Irwin Rock Asphalt, etc., Co., 111.

20. Stay of Reference pending Appeal from Judgment Directing Reference: Monro v. Toronto R. W. Co., 813.

See Bail—Costs, 2, 17—Execution, 2.

APPEAL TO DIVISIONAL COURT.

1. From County Court — Interlocutory Order — Examination of Judgment Debtor and Transferee: Re Gault v. Carpenter, 404.

2. From County Court—Right of Appeal—New Trial: Leishman v. Garland, 22; 3 O. L. R. 241.

3. From Surrogate Court—Notice of Appeal—Bond — Erroneous Recitals — "Court of Appeal": Taylor v. Delaney, 208; 3 O. L. R. 380.

4. Reversal of Order of Judge on Appeal from Report—Further Appeal: Pennington v. Hosinger, 270.

5. Setting down—Christmas Vacation: Hislop v. Joss, 9.

APPEAL TO HIGH COURT.

From Ruling of Master in Ordinary—Forum—Weekly Court or Divisional Court—Matter of Practice: Monro v. Toronto R. W. Co., 813.

APPEAL TO JUDGE OF COURT OF APPEAL.

See Parliamentary Elections, 14.

APPEAL TO JUDGE OF HIGH COURT.

Right of Appeal—Order of County Court Judge Quashing Quo Warranto Proceedings—Power to make order: Rex ex rel. McFarlane v. Coulter, 636; 4 O. L. R. 520.

APPEAL TO SESSIONS.

See Certiorari.

APPEAL TO SUPREME COURT OF CANADA.

1. Leave to Appeal: McLaughlin v. Lake Erie and Detroit River R. W. Co., 428.

2. Right of Appeal—Amount in Controversy—Leave ex Cautela: Frankel v. Grand Trunk R. W. Co., 339, 396; 3 O. L. R. 703.

3. Time—Extension of—Grounds for Allowing—Negotiations for Settlement—Special Circumstances—Bona Fide Intention to Appeal: Smith v. Hunt, 798.

APPEARANCE.

Limited Appearance — Submission to Judgment — Irregularity — Motion for Judgment: Padget v. Padget, 160.

See Partnership, 5—Writ of Summons, 4.

APPURTENANCES.

See Title to Land, 1.

ARBITRATION ACT.

See Referees.

ARBITRATION AND AWARD.

1. Clerical Error in Award—Reference back — Arbitration Act of Ontario—Railway Act of Canada: Re McAlpine and Lake Erie and Detroit River R. W. Co., 100; 3 O. L. R. 230.

2. Insurance Policy—Submission to Two Arbitrators — Appointment of Sole Arbitrator—Summary Proceeding—Discretion: Re Employers' Liability Assurance Corporation and Excelsior Life Ins. Co., 87; 3 O. L. R. 93.

3. Municipal Corporation—Purchase of Property—Voluntary Submission — Construction of Agreement—"Works and Property"—"Franchises and Goodwill"—Statutes — Ejusdem Generis Rule: Re City of Kingston and Kingston Light, Heat, and Power Co., 194; 3 O. L. R. 637.

4. Municipal Corporations — Railway — Appeal from Award—Costs—Closing of street: Re Medler and City of Toronto, 545.

5. Taking down Evidence — Objection — Findings of Arbitrators—Errors—Setting aside Award—Costs—Uncertainty as to: Re Grimshaw and Grimshaw, 744.

See Contract, 9 — Costs, 4 — Insurance, 13—Landlord and Tenant, 4, 5, 10—Partition, 2—Schools, 3, 4, 5.

ARCHITECT.

See Contract, 7.

ARREST.

1. Intent to Quit Ontario—Intent to Defraud—Foreigner: Henry v. Ward, 222.
2. Motion to Set aside ex Parte Order for Ca. Sa.—Concurrent Writ—Appeal—Discretion — Expiry of Original Writ—Invalid Arrest—Application for New Writ—Concealment of Facts: Merchants Bank of Canada v. Sussex, 572, 584; 4 O. L. R. 524.

ASSESSMENT AND TAXES.

1. Distress—"Owner"—Agreement for Purchase—Part Performance—Local Improvement Rates—Abandonment of Distress: Sawers v. City of Toronto, 656; 4 O. L. R. 624.
2. Equalization of Assessments—Appeal—County Judge—Delivery of Judgment—Time — Statute — Imperative or Directory: Re Township of Nottawasaga and County of Simcoe, 278; 4 O. L. R. 1.
3. Exemptions—Trustees — Income : Re McMaster Estate, 98.
4. Local Improvements—Petition for — Majority of Owners—Value of Real Property — Buildings — Lands — Property of Municipality: Macdonell v. City of Toronto, 433; 4 O. L. R. 315.
5. Local Improvement Rates—Charge on Land—Distress — Invalid By-law—Validating Statute—Frontage Tax—Special Rate: McDonell v. City of Toronto, 494.
6. Local Improvement Rates—Sidewalk—Lessee of Land from Crown—Dedication of Private Way as Public Highway: Re Leach and City of Toronto, 661; 4 O. L. R. 614.

7. "Owner"—Agreement to Purchase—Possession—Lease—Estoppel: Lloyd v. Walker, 383; 4 O. L. R. 112.

8. Personal Property—Choses in Action — Property not Already Assessed—Court of Revision: Re Nasmith and City of Toronto, 238.

9. Personal Property — Exemptions — Trustees — Non-resident Beneficiaries—Income of Trust Estate: Re Macpherson and City of Toronto, Re Hamilton and City of Toronto, 234.

10. Personal Property Owned out of Province — Exemptions — Cash in Banks—Trustees; Re Leadley and City of Toronto, 239.

11. Sale for Taxes—Description of Land — Sufficiency of—Possession—Rights of Entry: McLellan v. Hooey, 215, 707.

12. Street Railway—Trolley Cars—Real Estate: Re Toronto R. W. Co. and City of Toronto, 441.

13. Tax Sale—Action to Set aside—Prior Tax Sale—Purchase by Municipality — Lien — Redemption — Costs — Interest: Hime v. Town of Toronto Junction, 740.

14. Tax Sale—Existence of Arrears—Assessment Act, 1892: Ruttan v. Burk, 560.

15. Tax Sale — Validity — Uncertainty as to Land—Irregularities—Statute Curing — Advertisement: MacLellan v. Hooey, 215, 707.

16. Valuation of Property — Electric Companies—Rails, Poles, Wires—Wards — Franchise — Statutes: Re City of Toronto Assessment Appeal, 261; 3 O. L. R. 620.

17. Valuation of Property—Gas Pipes—Natural Gas Company: Re United Gas and Oil Co. of Ontario and Township of Colchester South, 642.

See Landlord and Tenant, 1—Limitation of Actions—Municipal Corporations, 2, 21—Parties, 10—Survey.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action.

ASSIGNMENTS AND PREFERENCES.

See Bankruptcy and Insolvency.

ATTACHMENT OF DEBTS.

1. Division Court — Cheque — Payment Stopped—Garnishee — Payment into Court: Wilder v. Wolf, 481; 4 O. L. R. 451.

2. Rent—To whom due—Heirs of Deceased Landlord—Executors—Devolution of Estates Act: Reilly v. McDonald, 721, 723; McDonald v. Sullivan, 784, 840.

See Bankruptcy and Insolvency, 5—Division Courts, 8—Pleading, 11.

ATTACHMENT OF GOODS.

Seizure—Interest of Partner in Grain—Possession: Clemens v. Bartlett, 342.

ATTORNEY-GENERAL.

See Malicious Arrest and Prosecution, 2.

AWARD.

See Arbitration and Award.

BAIL.

Powers of Judge of Court of Appeal—Pending Appeal—Extradition: Re Watts, 133; 3 O. L. R. 279.

See Criminal Law, 6.

BAILMENT.

Warehouseman—Negligence—Loss by Heating of Goods Stored—Measure of Damages: Dunn v. Prescott Elevator Co., 75, 404; 4 O. L. R. 103.

See Pledge—Railways, 2.

BALLOTS.

See Municipal Elections, 6—Parliamentary Elections, 9-14.

BANKRUPTCY AND INSOLVENCY.

1. Assignment for Creditors—Right to Rank on Estate—Annuity—Growing Payments—Contingent Debts: Carswell v. Langley, 107; 3 O. L. R. 261.
2. Mortgage by Insolvent Wife to Husband—Preference—Presumption—Rebuttal: McNeil v. Dawson, 24.
3. Preference—Chattel Mortgage—Attack on—Time—Presumption—Satisfaction of Onus—Good Faith—Notice—Knowledge: Keenan v. Richardson, 333.
4. Preference—Transfer by Insolvent Debtor—Attacking—Time—Division Court—Attachment of Debts—Collateral Inquiry—Pressure: Morphy v. Colwell, 146; 3 O. L. R. 314.

5. Preference—Assignee for Creditors—Further Directions: Law Society of Upper Canada v. Hutchison, 558.

6. Preference—Payment in Ordinary Course of Business—Power of Attorney: Goulet v. Greening, 550.

7. Sale of Estate by Assignee for Creditors—Covenant of Purchaser to Pay Creditors—Enforcement—Privity—Trust: Dominion Radiator Co. v. Bull, 672.

See Administration Order—Contract, 19—Division Courts, 6—Execution, 4—Executors and Administrators, 7—Fraudulent Conveyance—Insurance, 11—Landlord and Tenant, 9.

BANKS AND BANKING.

See Bills of Exchange and Promissory Notes, 5—Chose in Action—Discovery, 3—Gift, 1—Lunatic—Malicious Arrest and Prosecution, 3.

BAWDY HOUSE.

See Criminal Law, 7.

BENEFIT SOCIETY.

Pension—Vested Right—Alteration in Rules—Validity of: Armstrong v. Toronto Police Benefit Fund, 829.

See Insurance, 2, 16.

BETTING.

See Criminal Law, 4.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Agreement not to Negotiate—Notice: Murray v. Wurtele, 298.
2. Holder in Due Course—Effect of Indorsement—Evidence: Wiedeman v. Guittard, 110.
3. Notice of Dishonour—Sufficiency of—Husband and Wife—Agency: Counsell v. Livingston, 444; 4 O. L. R. 340.
4. Notice of Dishonour—Presentment—Demand Prior to Action—Power of Attorney: Patriarche v. Krammer, 425.
5. Notice of Specific Purpose—Collateral Security—Bank—Consideration—Holder in Due Course—"Negotiate": Ontario Bank v. Poole, 20, 832.

6. Oral Agreement Contemporaneous with Note—Evidence of—Consideration—Contradictory Written Documents—New Trial—Objection to Evidence not Taken at Trial—Discretion of Court: *Conley v. Ashley*, 704.
 7. Power of Agent for Collection to Compromise—Striking out Claim for Wages: *Guenot v. Girardot*, 638.
 8. Ratification of Forgery—Notice—No Repudiation—*Estoppel*: *Dominion Bank v. Ewing*, 654.
- See Administration—Contract, 3—Division Courts, 1, 5—Evidence, 3—Limitation of Actions, 2—Mortgage, 1—Partnership, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Chattel Mortgage—Prior Agreement for—Fatal Defect in Mortgage: *Fisher v. Bradshaw*, 282; 4 O. L. R. 162.
 2. Chattel Mortgage—Renewal—Change of Possession—Parent and Child—Execution Creditor: *Goodyear v. Goodyear*, 405.
 3. Chattel Mortgage—Seizure under—Breach of Trust—Damages: *Watts v. Sale*, 681.
 4. Chattel Mortgage—Seizure under without Default—Possession of Goods till Default—Absence of Re-demise Clause—Collateral Security—Covenant to keep up Stock—Arrears—Interest—Issue of Writ of Summons—Condition against Selling—Damages: *Stevens v. Daly*, 621.
- See Account—Bankruptcy and Insolvency, 3—County Courts, 2—Pledge.

BOARD OF HEALTH.

See Public Health.

BOND.

See Executors and Administrators, 2—Railways, 1—Street Railways, 5.

BONUS.

See Municipal Corporations, 1.

BOUNDARIES.

See Schools, 3—Trespass, 2—Way, 16.

BRIBERY.

See Parliamentary Elections, 7.

BRIDGE.

See Municipal Corporations, 24—Way, 8, 12.

BROKER.

See Contract, 5.

BUILDING CONTRACT.

See Contract, 6, 7, 8, 9.

BUILDING SOCIETY.

Shares—Advance on—Trust—Notice—Mortgages—Consolidation—Evidence—Examination for Discovery: *Birkbeck Loan Co. v. Johnston*, 163; 3 O. L. R. 497.

BY-LAWS.

See Assessment and Taxes, 5—Company, 2—Municipal Corporations, 1-12, 16, 17, 19—Parties, 7—Survey—Way, 17.

CALLS.

See Company, 7.

CAPIAS.

See Arrest, 2.

CARRIERS.

See Railways.

CAUSE OF ACTION.

See Action, 2—Appeal to Court of Appeal, 9—Municipal Corporations, 18—Parties, 2, 4—Writ of Summons, 4.

CERTIORARI.

Motion for—Previous Appeal to Sessions—Dismissal on Preliminary Objection: *Brothers v. Alford*, 31.

See Landlord and Tenant, 8—Municipal Corporations, 9.

CHARGE ON LAND.

See Will, 40.

CHARTERPARTY.

See Ship, 1.

CHATTEL MORTGAGES.

See Bills of Sale and Chattel Mortgages.

CHEQUE.

See Attachment of Debts.

CHOSE IN ACTION.

Assignment of Notice of — Partnership — Interest of Partner—Sheriff—Execution—Banks: Rennie v. Quebec Bank, 286; 3 O. L. R. 541.

See Assessment and Taxes, 8—Contract, 17—Will, 26.

CHURCH.

Trustees—Allotment of Pews — Rent—Punishment of Persons Disturbing Public Worship: Carleton Place Methodist Church Trustees v. Keyes, 10; 3 O. L. R. 165.

See Will, 21, 33.

CLERK OF THE PEACE.

See Malicious Arrest and Prosecution, 2.

COLLATERAL SECURITIES.

See Bills of Sale and Chattel Mortgages, 4—Deed, 1—Railways, 1.

COMMISSION.

See Master and Servant, 1—Principal and Agent, 1, 4—Solicitor, 3.

COMPANY.

1. Electric Light Company—Nuisance—Vibration — Injunction — Damages: Hopkin v. Hamilton Electric Light and Cataract Power Co., 486; 4 O. L. R. 258.

2. Hiring of Manager—By-law—Contract—Seal—Director as Manager—Shareholders: Birney v. Toronto Milk Co., 736.

3. Mining Company — Directors—Power to Sell Lands—Irregularity—Shareholders—Directors — Qualification—Injunction Restraining Sale: Ritchie v. Vermilion Mining Co., 624; 4 O. L. R. 588.

4. Shares — Lien on — Amount Due to Company: Walkerton Binder Twine Co. v. Higgins, 403.

5. Shares—Subscription — Agreement — Prospectus—Delay in Carrying out Objects of Company—Repudiation—Judgment—Estoppel—Res Judicata: Patterson v. Turner, 82; 3 O. L. R. 373.

6. Shares—Subscription — Misrepresentation—Agent—Settlement of Action—Threats: McCallam v. Sun Savings and Loan Co., 226.

7. Shares — Subscription — Preference Shares—Validity of — Contract by Deed—Issue and Allotment—Necessity for — Calls — Resolutions and Letters—Sufficiency of: Nelson Coke and Gas Co. v. Pellatt, 595; 4 O. L. R. 481.

8. Voluntary Winding-up — Distribution of Surplus Assets — Shareholders—Ordinary and Preferred — Shares—Fully and Partly Paid—By-laws and Resolutions — Profits: Morrow v. Peterborough Water Co., 512; 4 O. L. R. 324.

9. Winding-up—Claim against Assets—Breach of Contract—Damages: Re Publishers' Syndicate, 72a.

10. Winding-up—Contributory — Shares—Allotment: Re Publishers' Syndicate, Hart's Case, 508.

11. Winding-up—Contributory — Shares—Condition—Allotment—Notice: Re Publishers' Syndicate, Mallory's Case, 142; 3 O. L. R. 552.

12. Winding-up — Contributory — Subscription for Shares—Extrinsic Evidence — Placing Shares — Commission—Payment for Shares—Contract—Consideration — Transfer of Assets: Re Co-operative Cycle and Motor Co., 778.

13. Winding-up—Jurisdiction of Master in Ordinary — Valuing Securities—Liquidator: Re Brampton Gas Co., 543; 4 O. L. R. 509.

14. Winding-up—Terms of Order—Execution Creditor—Priorities: Re Prescott Elevator Co., 161.

See Appeal to Court of Appeal, 15—Arbitration and Award, 3—Assessment and Taxes, 12, 16, 17—Building Society—Constitutional Law, 1 — Conversion, 1 — Estoppel, 3 — Fraud and Misrepresentation, 2, 3 — Municipal Corporations, 14 — Particulars, 3—Parties, 11—Partnership, 5—Principal and Agent, 2 — Specific Performance, 9.

CONDITIONAL SALE.

See Sale of Goods, 2, 3.

CONSOLIDATION OF ACTIONS.

See Action, 1—Solicitor, 4.

CONSPIRACY.

See Criminal Law, 8—Pleading, 10.

CONSTABLE.

See Costs, 13—Malicious Arrest and Prosecution, 1.

CONSTITUTIONAL LAW.

1. Incorporation of Companies—Dominion Objects—Interference with Property and Civil Rights in Province—Telephone—Poles and Wires—Streets—Municipal Corporations—Consent—Statutes: City of Toronto v. Bell Telephone Co. of Canada, 192; 3 O. L. R. 465.

2. Powers of Provincial Legislature—Act to Prevent Profanation of Lord's Day—Work—Necessity—Conveying Travellers: Re Lord's Day Act of Ontario, 312.

See Municipal Corporations, 8.

CONTEMPT OF COURT.

See Criminal Law, 3.

CONTRACT.

1. Board and Lodging—Bequest in Lieu of Payment—Lapse: Larose v. Ottawa Trust and Deposit Co., 210, 309.

2. Breach—Damages—Time—Essence of—Waiver: McRae v. S. J. Wilson Co., 380.

3. Breach—Non-payment of Note—Refusal to Perform—Rescission: Graham v. Bourque, 138, 358.

4. Breach—Subsequent Letter—Satisfaction—Waiver—Evidence: Heal v. Sramotor Co., 175, 466.

5. Broker—Profits on Stock Transactions—Evidence of Agreement—Security—Redemption: Sherlock v. Wallace, 54.

6. Building Contract—Balance—Counterclaim—Evidence: Breakenridge v. Mason, 529.

7. Building Contract—Breach—Dismissal of Contractor—Architect's Notice of—Time—Sunday: Anderson v. Chandler, 417.

8. Building Contract—Breach—Negligent Work—Responsibility: Hagar v. Hagar, 78.

9. Building Contract—Material Supplied not Covered by Contract—Damages—Arbitrator—Bias—Lien: Piggott v. Toronto Rubber Shoe Mfg. Co., 541.

10. Condition—Non-performance—Delivery of Deed in Escrow—Option—Trust: Harris v. Bank of British North America, 76, 285.

11. Construction—Evidence to Aid—Reformation after Breach: Pritchard v. Fick, 815.

12. Construction—Removal of Timber—Injunction—Refusal—Appeal—Merits—Affirmance: Murphy v. Lake Erie and Detroit River R. W. Co., 827.

13. Correspondence—Proposal—Acceptance—"Final Arrangements": Baston v. Toronto Fruit Vinegar Co., 301; 4 O. L. R. 20.

14. Delivery of Timber—Correspondence—Evidence—Non-completion of Contract: McGibbon v. Charlton, 828.

15. Division of Profits—Partnership—Question of Fact—Onus—Appeal: Rat Portage Lumber Co. v. Kendall, 528.

16. Fraud in Reducing to Writing—Foreigner—Void Agreement—Sale of Standing Timber—Interest in Land—Execution by Wife—Construction of Contract: Lasjinski v. Campbell, 114.

17. Furnishing and Erecting Monument—Dispute as to Design—Performance of Work—Assignment of Contract—Action by Assignees—Appeal—Reversal of Judgment on Questions of Fact: Lewis v. Dempster, 602.

18. Novation—Consideration—Collateral Promise—Oral Evidence to Alter Writing—Costs: Webb v. Ottawa Car Co., 90.

19. Printing of Reports—Assignment by Printers of Claim for Payment—Subsequent Assignment for Creditors—Sale of Claim by Assignee—Rights of Vendee—Judgment—Set-off: Langley v. Law Society of Upper Canada, 718.

20. Unforeseen Accident—Breach—Damages—Electric Lighting: Ottawa Electric Co. v. City of Ottawa, 508.

See Appeal to Court of Appeal, 19—Arbitration and Award, 2, 3—Bills of Exchange and Promissory Notes—Bills of Sale and Chattel Mortgages—Company—Deed, 7—Division Courts, 5—Guaranty—Indemnity—Infant, 2—Insurance—Landlord and Tenant—Master and Servant—Mechanics' Liens—Municipal Corporations, 2, 13, 14, 24—Partnership—Patent for Invention, 1—Pleading, 4—Principal and Agent—Railways—Sale of Goods—Ship—Specific Performance—Writ of Summons, 2, 3.

CONTRACT OF HIRING.

See Master and Servant, 1-4.

CONTRIBUTION.

See Sale of Goods, 7.

CONVERSION.

1. President of Company—Detention of Books—Terms of Giving up: Strathroy Petroleum Co. v. Lindsay, 356.
2. Trespass—Trees—Damages: Parent v. Cook, 366.

See Pleading, 7.

CONVICTION.

See Costs, 6—Criminal Law—Fraud and Misrepresentation, 1—Municipal Corporations, 5, 9.

COPYRIGHT.

1. Book—Infringement—5 & 6 Vict. ch. 45 (Imp.)—Injunction—Damages: Oman v. Copp-Clark Co., 542.
2. Book—Infringement—Importation of Foreign Reprints—Title—License—Customs—Notice: Black v. Imperial Book Co., 743.
3. Newspaper Printed in United States—Copyright in England—Application of Imperial Statutes—"First Publication:" Grossman v. Canada Cycle Co., 846.
4. Works of Fine Art—Imperial Acts—Colonies: Graves v. Gorrie, 259; 3 O. L. R. 697.

CORRUPT PRACTICES.

See Parliamentary Elections, 7, 8.

COSTS.

1. Added Defendants—Unnecessary Parties: Gurney v. Tilden, 207.

2. Appeal on Merits where only Costs Involved: Holmes v. Town of God-erich, 814.
3. Appeal to Court of Appeal—Parties—Added Plaintiff: Murray v. Wurtele, 353.
4. Arbitration under Railway Act—Taxation by Judge: Re Parks and Lake Erie and Detroit River R. W. Co., Re McAlpine and Lake Erie and Detroit River R. W. Co., 484.
5. Partition Proceedings—Taxed Costs—Special Circumstances: McLaughlin v. McLaughlin, 378, 424.
6. Quashing Conviction—Criminal Matter—Jurisdiction: Rex v. Bennett, 360; 4 O. L. R. 205.
7. Receiver—Partnership—Advance by Partner—Priority: Merritt v. Nissen, 456.
8. Right of Party to Costs against Opposite Party—No Liability to Solicitor—Corporation Solicitor Paid by Salary—Change in By-law of Corporation: Ottawa Gas Co. v. City of Ottawa, 647, 697; 4 O. L. R. 656.
9. Scale of—Jurisdiction of County Court—Ascertainment of Amount Claimed: Minerva Mfg. Co. v. Roche, 530, 722.
10. Security for—Petition by Parents for Custody of Infant—Petitioners out of Jurisdiction—Respondents Admitting Rights of Petitioners: Re Pinkney, 694, 715.
11. Security for—Plaintiff out of Jurisdiction—Property within Jurisdiction—Shares in Mining Company—Evidence of Value: Howland v. Patterson, 653.
12. Security for—Praecipe Order—Application for Increased Amount—Election—Costs: Standard Trading Co. v. Seybold, 724, 753.
13. Security for—Public Officer—Police Constable: Lewis v. Dalby, 3 O. L. R. 301.
14. Security for—Residence of Plaintiff out of Ontario—Ordinary Residence: Nesbit v. Galna, 218; 3 O. L. R. 429.
15. Taxation—Apportionment—Issues in Slander Action—Set-off: Davis v. Hord, 418, 471; 4 O. L. R. 466.

16. Taxation—Evidence—Brief of, Used by Opposite Counsel: Pennington v. Honsinger, 507.
17. Third Party—Indemnity—Extent of Liability — Court of Appeal — Time for Disposing of Costs—Several Appeals: Gaby v. City of Toronto, 711.
18. Trial — Motion for Judgment: Lachance v. Lachance, 518.

See Appeal to Court of Appeal, 18—Arbitration and Award, 4, 5—Assessment and Taxes, 13—Contract, 18—Creditors' Relief Act—Deed, 9—Discovery, 1—District Courts—Division Courts, 7—Dower, 5—Evidence, 1—Execution, 2, 3, 4—Executors and Administrators, 3, 7—Gift, 2—Interest—Judgment, 1—Lunatic—Mistake — Mortgage, 4—Parties, 11—Partnership, 3—Pleading, 6—Principal and Agent, 2—Public Health—Sale of Goods, 1—Solicitor—Specific Performance, 2, 5—Trusts and Trustees, 3—Water and Watercourses, 4—Will, 3, 26, 42, 43—Work and Labour.

COUNTERCLAIM.

See Action, 2—Contract, 6 — District Courts — Pleading, 2-4 — Sale of Goods, 1, 5, 7—Work and Labour.

COUNTY COURT JUDGE.

See Assessment and Taxes, 2.

COUNTY COURTS.

1. Jurisdiction—Consent — Prohibition: Re Greenwood v. Buster, 225.
2. Jurisdiction — Subject-matter—Setting aside Chattel Mortgage—Claim of Judgment Creditor: Re Thomson v. Stone, 509; 4 O. L. R. 333, 585.

See Appeal to Divisional Court, 1, 2—Costs, 9.

COURT OF APPEAL.

See Appeal to Court of Appeal—Appeal to Divisional Court, 3—Bail—Execution, 2—Judgment, 1, 3.

COURT OF REVISION.

See Assessment and Taxes, 6.

COURTS.

See Appeal to Court of Appeal—Appeal to Divisional Court—Appeal to Supreme Court of Canada—County Courts—District Courts — Division Courts—High Court of Justice.

COVENANT.

1. Restraint of Trade—Breach—Waiver — Injunction — Damages — Reference: Berry v. Days, 809.
2. Restraint of Trade—Carrying on Business—Advertising — Breach: Johnston v. Macfarlane, 287.

See Bankruptcy and Insolvency, 7—Bills of Sale and Chattel Mortgages, 4—Division Courts, 2—Easement, 1—Landlord and Tenant—Mechanics' Liens, 2—Mortgage, 1, 2, 5—Sale of Goods, 7—Vendor and Purchaser, 3—Will, 24.

CREDITORS.

See Bankruptcy and Insolvency — Insurance, 9—Partition, 3.

CREDITORS' RELIEF ACT.

Several Executions—Sale under Second Execution—Costs — Advertisement: McGuinness v. McGuinness, 23; 3 O. L. R. 78.

CRIMINAL LAW.

1. Evidence—Deposition Taken at Preliminary Inquiry — Admissibility at Trial — Incomplete Cross-examination — Waiver: Rex v. Trevanne, 587; 4 O. L. R. 475.
2. Evidence — Prisoner's testimony — Cross-examination—Contradiction — Previous Conviction: Rex v. Daoust, 344; 3 O. L. R. 653.
3. Extradition — Parent Stealing His Child—Foreign Law—Divorce—Collusion — Contempt of Court: Re Watts, 129, 133; 3 O. L. R. 279, 368.
4. Gaming—Common Betting House—Incorporated Association—Race Track: Rex v. Hanrahan, 346; 3 O. L. R. 659.
5. Incest—Evidence — Destroyed Letters — Inferences—Misdirection — Substantial Miscarriage — New Trial —: Rex v. Godson, 250.
6. Incitement to Give False Evidence—Misdemeanour—Single Justice of the Peace—Jurisdiction—Grand Jury — Variance—Bail—Recognition—Estreat: Rex v. Cole, 117; 3 O. L. R. 389.
7. Keeping House of Ill-fame—Conviction—Evidence: Rex v. Martin, 429.

8. Murder—Constructive Offence — Conspiracy—Charge to Jury—Verdict—Mistrial: *Rex v. Rice*, 394; 4 O. L. R. 223.
9. Obstruction of Highway—Conviction for — Weight of Evidence — New Trial—Direction to Jury—Proof of Original Survey — Onus: *Rex v. Moyer*, 780.
10. Summary Conviction — Motion for Rule Nisi to Quash—Untenable Grounds — Like Motions in Other Cases — Rule Granted on Terms: *Rex v. McGinnes*, 812.
11. Summary Conviction—Ontario Act—Criminal Code—Information—Time for Laying: *Rex v. McKinnon*, 199; 3 O. L. R. 508.
12. Summary Trial without Consent of Prisoner — Conviction — Discharge from Gaol—Second Prosecution: *Rex v. Kennedy*, 31.
13. Theft—Juvenile Offender — Magistrate's Conviction — Place of Imprisonment—Duration of Sentence—Discharge—Order for Further Detention: *Rex v. Hayward*, 799.

See Bail—Costs, 6—Fraud and Misrepresentation, 1—High Court of Justice, 1—Mandamus.

CROWN.

See Assessment and Taxes, 6—Way, 16.

CUSTOMS DUTIES.

See Copyright.

DAM.

See Water and Watercourses, 2, 4.

DAMAGES.

See Bailment—Bills of Sale and Chattel Mortgages, 3, 4—Company, 1, 9—Contract, 2, 9, 20—Conversion, 2—Copyright—Covenant, 1—Defamation, 3—Discovery, 9—District Courts—Division Courts, 2, 3—Infant, 2, 6—Master and Servant, 3, 7, 19—Municipal Corporations, 17—Principal and Agent, 3, 4, 5—Railways, 2, 8, 10—Sale of Goods, 1, 6, 7, 9—Ship—Specific Performance, 2, 11—Street Railways, 2, 4, 5—Trade Mark, 4—Trespass, 1—Waste—Water and Watercourses, 4, 5—Way, 3, 4—Work and Labour.

DEATH.

See Judgment, 3—Master and Servant, 5, 6, 14.

DECEIT.

See Fraud and Misrepresentation, 2.

DECLARATORY JUDGMENT.

See Division Courts, 6—Pleading, 5—Title to Land, 3.

DEDICATION.

See Mortgage, 6.

DEED.

1. Absolute Conveyance of land—Collateral Security—Redemption—Waiver—Counsel—Mistake at Trial: *Sherlock v. Wallace*, 393.
 2. Conveyance of Land — Setting aside—Undue Influence — Parent and Child—Fraud—Consideration: *Vandusen v. Young*, 55.
 3. Conveyance of Land—Undue Influence—Full Disclosure: *Christian v. Poulin*, 275.
 4. Construction — Gravel — Subsequent Deposit: *Mann v. Grand Trunk R. W. Co.*, 230.
 5. Delivery — Retention by Grantor—Possession by Grantee—Evidence—Improvements—Executor and Trustee—Breach of Trust: *Humphries v. Aggett*, 33.
 6. Reformation—Mistake: *Girardot v. Curry*, 21.
 7. Reformation — Mortgage — Non-conformity with Contract for—Mistake: *Richardson v. West*, 670.
 8. Security—Conveyance of Lands—Cutting down to Mortgage — Improvidence — Fraud: *Holness v. Russell*, 655.
 9. Setting aside—Improvidence—Family Settlement — Costs: *Lockhart v. Lockhart*, 819.
- See Company, 7—Contract, 10 — Estoppel, 1—Fraudulent Conveyance—Specific Performance, 8—Vendor and Purchaser, 3, 5.

DEFAMATION.

1. Dictated Letter—Proof of Publication—Privilege: *Peterbaugh v. Gold Medal Co.*, 250.
2. Occasion Privileged—Master and Servant: *Gildner v. Busse*, 167; 3 O. L. R. 561.

3. Occasion Privileged—Proof of Malice—Social or Moral Duty—Functions of Judge and Jury—Excessive Damages: *Clunis v. Sloan*, 27.
 4. Onus—Words not Defamatory per se—Innuendo: *Lossing v. Wrigglesworth*, 460.
 5. Pleading—Defence—Fair Comment—Embarrassing Pleading—Particulars: *Crow's Nest Pass Co. v. Bell*, 679; 4 O. L. R. 660.
 6. Pleading—Defence—Stating Facts and Circumstances without Justifying—Embarrassment: *Caldwell v. Buchanan*, 682.
 7. Pleading—Statement of Claim—Setting out Whole Newspaper Article—Parts not Referring to Plaintiff—Innuendo: *Hay v. Bingham*, 822.
 8. Post-card—Words of Doubtful Signification—Innuendo—Sense in which Words Understood: *Major v. McGregor*, 839.
 9. Verdict for Defendant notwithstanding Proof of Defamatory Words—New Trial—Aggravation of Damages—Evidence—Pleading: *Milligan v. Jamieson*, 4 O. L. R. 650.
- See Costs, 15—Discovery, 9—Injunction, 2—Jury Notice, 1.

DEPOSIT.

See Parliamentary Elections, 2.

DETINUE.

See Conversion.

DEVOLUTION OF ESTATES ACT.

See Attachment of Debts, 2—Dower, 1—Title to Land, 3.

DIRECTORS.

See Company.

DISABILITY INSURANCE.

See Insurance, 2.

DISCONTINUANCE.

See Action, 2.

DISCOVERY.

1. Affidavit of documents—Materiality of Documents—Examination of Parties—Scope of—Consequential Discovery—Discretion—Contents of Documents—Recollection—Costs of Lengthy Examination: *Evans v. Jaffray*, 29, 158; 3 O. L. R. 327.

2. Affidavit of Documents—Possession—Admissions on Examination for Discovery—Re-examination after Examination Closed: *Standard Trading Co. v. Seybold*, 650.
3. Examination of Officer of Corporation—Railway—Engine-driver: *Morrison v. Grand Trunk R. W. Co.*, 180, 263, 329, 758; 4 O. L. R. 43.
4. Examination of Officers of Bank—Local manager—Teller: *Bartlett v. Canadian Bank of Commerce*, 68, 162.
5. Examination of Parties—Attendance—Refusal to answer questions—Subpoena: *Cooke v. Wilson*, 3 O. L. R. 299.
6. Examination of Parties—Amendment: *McKenzie v. McLaughlin*, 80.
7. Examination of Parties—Default of Attendance—Motion to Dismiss Action—Proof of Default—Affidavit of Solicitor—Cross-examination—Ex Parte Certificate of Examiner: *Johnston v. Ryckman*, 720.
8. Examination of Parties—Production of Documents—Patent Action—Forfeiture—Non-performance of Condition on which Patent Granted—Affidavit: *Parramore v. Boston Mfg. Co.*, 716; 4 O. L. R. 627.
9. Examination of Parties—Relevancy of Questions—Defamation—Privilege—Mitigation of Damages: *McKenzie v. McLaughlin*, 58.
10. Production—Correspondence after Action Begun—Information for Defence—Privilege—Examination for Discovery—Undertaking to Produce: *Shoe Co. v. Wilkinson*, 591.
11. Production—Privilege—Information and Documents Obtained before Action: *London Life Ins. Co. v. Molsons Bank*, 457.
12. Production—Privilege—Letters—Solicitor and Client—Affidavit—Requirements of: *Clergue v. McKay*, 178, 241; 3 O. L. R. 478; *Platt v. Buck*, 4 O. L. R. 421.

See Appeal to Court of Appeal, 11—Building Society—Infant, 8—Particulars—Pleading, 9.

DISMISSAL OF ACTION.

See Action, 3.

DISTRESS.

See Assessment and Taxes, 5 — Landlord and Tenant, 3.

DISTRIBUTION OF ESTATES.

See Executors and Administrators, 5—Insurance, 15—Will, 9, 14, 16, 23, 28.

DISTRICT COURTS.

Jurisdiction—Counterclaim — Work and Labour—Amount — Deterioration — Damages—Set-off—Costs: Breese v. Clark, 825.

DITCHES.

See Municipal Corporations, 17.

DITCHES AND WATERCOURSES ACT.

See Water and Watercourses, 3.

DIVISION COURTS.

1. Jurisdiction — Ascertainment of amount—Promissory notes—Breach of undertaking: McCormick Harvesting Machine Co. v. Warnica, 3 O. L. R. 427.
2. Jurisdiction — Lease — Covenant to leave in repair—Breach—Damages—Prohibition — Transfer to High Court: Re Powell v. Dancyger, 63.
3. Jurisdiction—Splitting Cause of Action — Mortgage — Interest post Diem—Damages Re Phillips v. Hanna, 245; 3 O. L. R. 558.
4. Jurisdiction—Whole cause of action—Prohibition: Re Doolittle v. Electrical Maintenance and Construction Co., 202; 3 O. L. R. 460.
5. Jurisdiction — Territory — Action on two promissory notes—"Contract" —Prohibition — Omission to record evidence: Union Bank of Canada v. Cunningham, 432.
6. Jurisdiction—Action for Declaration of Right to Rank on Insolvent Estate — Prohibition: Re Bergman v. Armstrong, 199; 4 O. L. R. 717.
7. Jurisdiction—Amount Involved — Action for Tort—Prohibition—Costs of Motion for: Re Brandon v. Galoway, 677.
8. Jurisdiction—Attachment of Debts — Wages of Debtor — Married Man — Proof of Being—Error in Ruling as to Evidence—Prohibition: Re Rochon v. Wellington, 805.

See Attachment of Debts—Bankruptcy and Insolvency, 4 — Parent and Child—Res Judicata—Specific Performance, 2.

DIVISIONAL COURTS.

See Appeal to Court of Appeal, 17—Appeal to Divisional Court—Appeal to High Court—High Court of Justice—Will, 32.

DIVORCE.

See Criminal Law, 3.

DOCUMENTS.

See Discovery.

DOMICIL.

See Lunatic.

DONATIO MORTIS CAUSA.

See Gift, 1, 2.

DOWER.

1. Assignment by Infant Devisee—Executor—Devolution of Estates Act—Lease by Husband: Allan v. Rever, 459; 4 O. L. R. 309.
 2. Election—Distributive Share of Estate: Re Pettit, 464; 4 O. L. R. 506.
 3. Equity of Redemption—Conveyance by Husband to Defeat: Fitzgerald v. Fitzgerald, 17.
 4. Fraud of Mortgagor—Assignment — Mistake — Subrogation — Merger: Anderson v. Elgie, 550, 638.
 5. Reference — Report — Judgment — Costs—Sale of Land: Lachance v. Lachance, 778.
- See Execution, 1 — Vendor and Purchaser, 5—Will, 10.

DRAINAGE.

See Municipal Corporations, 17, 18.

DRAINAGE REFEREE.

See Referees.

DRAINS.

See Water and Watercourses.

DURESS.

See Company, 6.

EASEMENT.

1. Dominant and Servient Tenements — Covenant by Original Grantor—Discharge of Snow and Water: Hall v. Alexander, 204; 3 O. L. R. 482.
2. Right of Way—Repairs—Dominant and Servient Tenements—Water — Right to Flow of—Injunction: Burrell v. Lott, 181.

See Water and Watercourses, 1—Way, 14, 15.

ELECTION.

See Costs, 12—Dower, 2—Execution, 1 —Parties, 4—Pleading, 9 — Vendor and Purchaser, 5—Will, 10.

ELECTIONS.

See Municipal Elections — Parliamentary Elections.

ELECTRIC COMPANIES.

See Assessment and Taxes—Company—Municipal Corporations, 12, 15 — Street Railways.

EQUITY OF REDEMPTION.

See Dower, 3—Execution, 1.

ESTATE.

See Insurance, 12—Will, 11, 17, 18.

ESTOPPEL.

1. By Deed—Mines and Minerals—Reservation in Deed: Dodge v. Smith, 46; 3 O. L. R. 305.
2. Fraud — Patent for Mining Land — Registration — Mortgage — Notice: Barr v. Bird, 30.
3. Rent—Claim for, by President of Company — Annual Statement: Lindsay v. Strathroy Petroleum Co., 355.

See Assessment and Taxes, 7—Bills of Exchange and Promissory Notes, 8 — Company, 5 — Insurance, 5, 7 — Mechanics' Liens, 6—Res Judicata — Schools, 5.

ESTREAT.

See Criminal Law, 6.

EVIDENCE.

1. Admissibility—Production of Book — Refusal of Trial Judge to Allow—Substantial Wrong — New Trial — Costs: Matthews v. Moody, 47.

2. Corroboration—Action against Administrator — Interest — Cestui que Trust: Batzold v. Upper, 381; 4 O. L. R. 116.

3. Corroboration — Action against Executors—Promissory Note — Comparison of Signature: Thompson v. Thompson, 431; 4 O. L. R. 442.

4. Corroboration — Claim against Estate of Deceased Person—Statute of Limitations: Wilson v. Howe, 272.

5. Corroboration — Partition of Land — Proof of Identity: Fuller v. Grant, 452.

6. Parol Evidence to Establish Trust—Admission of: Hull v. Allen, 151, 782.

See Appeal to Court of Appeal, 2—Arbitration and Award, 5—Bills of Exchange and Promissory Notes, 6 —Building Society—Company, 12—Contract, 11, 14, 18—Criminal Law, 1, 2, 5, 6, 7, 9—Deed, 5—Defamation, 1, 3, 4—Discovery—Division Courts, 5—Executors and Administrators, 1, 9—Gift, 1, 2, 3, 4—Insurance, 1, 2—Malicious Arrest and Prosecution, 2—Master and Servant, 14, 16—Medical Practitioner—Mortgage, 5 — Municipal Elections, 1, 6, 7—Parliamentary Elections, 11—Particulars—Patent for Invention, 2, 3—Seduction—Specific Performance, 2—Street Railways, 2—Vendor and Purchaser, 1, 2—Will, 1, 2, 37, 41.

EXAMINATION OF PARTIES.

See Discovery—Judgment Debtor.

EXCHEQUER COURT.

See Industrial Design—Patent for Invention, 4.

EXECUTION.

1. Equity of Redemption—Dower—Election — Right to Estate in Land — Assign — Tenant in Common: Canadian Bank of Commerce v. Rolston, 351; 4 O. L. R. 106.

2. For Costs of Application for Leave to Appeal — Court of Appeal — Power over Costs—High Court — Issue of Execution out of: People's Building and Loan Assn. v. Stanley, 469, 572; 4 O. L. R. 247, 377.

3. Judge's Order for Costs — Direction for Set-off — Service of Allocatur— Issue of Execution — Production of Original Order or Office Copy: People's Building and Loan Assn. v. Stanley, 692; 4 O. L. R. 644.

4. Sale of Land under—Assignment for Benefit of Creditors — Priorities — Costs: Elliott v. Hamilton, 705; 4 O. L. R. 535.

See Appeal to Court of Appeal, 12— Attachment of Goods—Bills of Sale and Chattel Mortgages, 2—Chose in Action—Company, 14—Creditors' Relief Act—Judgment Debtor, 4—Landlord and Tenant, 11—Liquor License Act, 1—Trade Mark, 3.

EXECUTORS AND ADMINISTRATORS.

1. Action by Executors for Debt Due to Testator — Onus — Corroboration: Thompson v. Coulter, 205.
2. Administration of Estate—Payment of Voluntary Debts — Bond—Consideration—Assignment of Securities — Value: Re Summers, 523.
3. Bill of Costs — Service to Testator— Proceeding for Taxation — Application by Residuary Legatee—Assets— Indemnity: Foley v. Trusts and Guarantee Co., 526.
4. Compensation of Executor—Negligence — Breaches of Trust: McClenaghan v. Perkins, 191, 752.
5. Distribution of Estate — Will—Annuities — Setting apart Securities — Redemption of Annuity—Consent—Rule 93S — Jurisdiction under — Trusts: Re McIntyre, McIntyre v. London and Western Trusts Co., 56; 3 O. L. R. 212.
6. Maintenance—Infant—Custody — Advice: Re Cornell, 56.
7. Removal of Executor — Insolvency — Misconduct—Administration Order— Undertaking — Costs: Godbold v. Godbold, 233, 357.
8. Surrogate Courts—Grant of Administration — Nominee of Next of Kin — Revocation: Carr v. O'Rourke, 331; 3 O. L. R. 632.
9. Trust—Breaches of — Negligence — Claim by Executor against Estate— Corroboration — Payment in Lifetime of Testator—Admission—Compensation—Devise in Lieu of—Construction of Will: McClenaghan v. Perkins, 191, 752.

See Administration Order—Administrator ad Litem — Attachment of Debts, 2—Deed, 5 — Dower, 1— Evidence, 2, 3, 4—Gift, 2—Infant, 1—Insurance, 18 — Mistake—Mortgage, 2, 3—Partition, 1—Pleading, 1—Trusts and Trustees — Vendor and Purchaser, 5—Will, 8, 12, 16, 17, 24, 28, 30, 35, 36, 40.

EXEMPTIONS.

See Assessment and Taxes, 3, 9, 10— Landlord and Tenant, 1.

EXPERTS.

See Judgment, 5.

EXPROPRIATION.

See Municipal Corporations, 22.

EXTRADITION.

See Bail—Criminal Law, 3.

FACTORIES ACT.

See Master and Servant.

FACTORY.

See Fixtures—Master and Servant, 15, 16—Municipal Corporations, 1.

FAIR COMMENT.

See Defamation, 5.

FALSE EVIDENCE.

See Criminal Law, 6.

FAMILY ARRANGEMENTS.

See Deed, 9.

FATAL ACCIDENTS ACT.

See Master and Servant.

FENCES.

See Way, 17.

FIRE INSURANCE.

See Insurance, 2-8.

FIXTURES.

1. Shop Fittings—Gas Fittings—Vendor and Purchaser: Stack v. T. Eaton Co., 511; 4 O. L. R. 385.
2. Machinery in Factory — Rights of Mortgagee—Intention: Schiedell v. Burrows, 793.

FORECLOSURE.

See Trusts and Trustees, 2.

FOREIGN COMMITTEE.

See Lunatic.

FOREIGN COMPANY.

See Insurance, 11, 19—Partnership, 5—Specific Performance, 9—Writ of Summons, 5.

FOREIGN JUDGMENT.

See Judgment, 4.

FOREIGN LAW.

See Criminal Law, 3.

FOREIGN PATENT.

See Patent for Invention, 2.

FOREIGNER.

See Arrest—Contract, 16.

FORFEITURE.

See Discovery, 8—Landlord and Tenant, 9—Mechanics' Liens, 3.

FORGERY.

See Bills of Exchange and Promissory Notes, 8.

FRAUD AND MISREPRESENTATION.

1. Conviction for—Fruit Marks Act—Possession of Fruit for Sale—Packages—"Faced or Shewn Surface:" Rex v. James, 520; 4 O. L. R. 537.

2. Sale of Shares—Action for Deceit—Cause of Purchase: Clark v. Gray, 370.

3. Sale of Shares—Fraud of Agent—Notice to Company—Right to Recover Money Paid: Stokes v. Continental Life Ins. Co., 640.

See Arrest—Company, 6—Contract, 16—Deed, 2, 8—Dower, 4—Estoppel, 2—Landlord and Tenant, 11—Mortgage, 9—Specific Performance, 1—Trade Mark, 4—Will, 42.

FRAUDULENT CONVEYANCE.

1. Creditor—Right of, to Attack—Mortgage—Simple Contract Creditor: Thomas v. Calder, 26.

2. Husband and Wife—Intent—Consideration: McDonald v. Hennessy, 559.

3. Injunction—Receiver—Money in Custodia Legis: Bank of Ottawa v. McLeod, 565.

FREE LIBRARY.

See Municipal Corporations, 11.

FRIENDLY SOCIETY.

See Insurance, 14.

FRUIT MARKS ACT.

See Fraud and Misrepresentation, 1.

FURTHER DIRECTIONS.

See Bankruptcy and Insolvency, 5.

GAMING.

See Criminal Law, 4.

GARNISHEE.

See Attachment of Debts.

GAS COMPANY.

See Assessment and Taxes, 17—Way, 7.

GIFT.

1. Donatio Mortis Causa—Bank Deposit in Names of Donor and Donee—Survivorship—Evidence: St. Jean v. Danis, 790.

2. Donatio Mortis Causa—Solicitor—Lack of Independent Advice—Action against Administrator—Want of Corroboration—Burden of Proof—Costs: Davis v. Walker, 3, 745.

3. Parent and Child—Bounty or Bargain—Undue influence—Mental competence: Thorndyke v. Thorndyke, 11.

4. Parent and Child—Business Relationship—Undue Influence—Onus: Fisher v. Fisher, 442.

See Will.

GOODWILL.

See Liquor License Act, 1.

GRAND JURY.

See Criminal Law, 6.

GUARANTY.

1. Consideration—Novation—Statute of Frauds: *Bailey v. Gillies*, 325; 4 O. L. R. 182.
2. Written Statement — Mercantile Agency — Creditor not Privy to—Statute of Frauds—Sale of Goods: *Harris v. Stevens*, 109.

See Principal and Agent, 5—Solicitor, 2—Work and Labour.

HIGH COURT OF JUSTICE.

1. Application for Mandamus to Justice of the Peace—Forum—Civil Proceeding—Single Judge—Divisional Court: *Re Glenn, Rex v. Meehan*, 136; 3 O. L. R. 361.
2. Divisional Court — Composition of—Two or three Judges: *Minns v. Village of Omemee*, 90.

See Appeal to High Court—Appeal to Judge of High Court—Division Courts, 2—Execution, 2—Mechanics' Liens, 1.

HIRE RECEIPT.

See Sale of Goods, 2.

HUSBAND AND WIFE.

See Bills of Exchange and Promissory Notes, 3—Bankruptcy and Insolvency, 2—Dower—Fraudulent Conveyance, 2—Infant, 4—Insurance, 14—Pleading, 3.

IMPRISONMENT.

See Judgment Debtor.

IMPROVEMENTS.

See Deed, 5—Specific Performance, 5—Title to Land, 3.

INCEST.

See Criminal Law, 5.

INDEMNITY.

Contract—Construction of Works for Municipal Corporation—Liability for Injuries to Persons—Provisions of Contract—Agreement with Another Contractor — Want of Privity — Costs of Defending Action—Third Party: *Gaby v. City of Toronto*, 606.

See Costs, 17—Executors and Administrators, 3—Infant, 2, 7.

INDUSTRIAL DESIGN.

Infringement — Imitation — Injunction —Jurisdiction of Exchequer Court: *Findlay v. Ottawa Furnace and Foundry Co.*, 323; 7 Ex. C. R. 340.

INFANT.

1. Advancement on Account of Legacy—Executor: *Re Currie*, 9.
 2. Contract — Indemnity — Voidable or void—Ratification — Damages — Interest: *Beam v. Beatty, Bunting v. Beatty*, 54, 616; 3 O. L. R. 345, 4 O. L. R. 554.
 3. Custody of—Father or Mother: *Re Smith*, 55.
 4. Custody of—Father or Mother — Action for Alimony—Access by Father: *Re Gibson*, 58.
 5. Custody of—Parent—Other Relatives —Evidence: *Re Gillem*, 37.
 6. Lease by—Repudiation — Partition —Amendment—Parties — Damages: *Munro v. Toronto R. W. Co.*, 25, 316; 4 O. L. R. 36.
 7. Liability to Indemnity—Next Friend—Improvident Litigation — Ratification: *Macnee v. Rose*, 173.
 8. Party to Action—Right of Opposite Party to Examine for Discovery—Discretion of Examiner: *Flett v. Coulter*, 775; 4 O. L. R. 714.
- See Costs, 10—Dower, 1—Executors and Administrators, 6—Insurance, 10, 15—Master and Servant, 8, 9—Negligence, 1, 4—Parent and Child —Will, 38.

INFORMATION.

See Criminal Law, 8—Mandamus.

INJUNCTION.

1. Interim Injunction—Completion of Elevator—Delivery of Possession — Rights of Parties: *Jamieson v. MacKenzie, Mann, & Co.*, 555.
2. Repetition of, Slander—Public Entertainement — Pretended Supernatural Revelations—Imputation of Murder —Pending Inquest: *Quirk v. Dudley*, 637; 4 O. L. R. 532.
3. Undertaking to speed Trial—Breach of: *Clarry v. Brodie*, 387.

See Company, 1, 3—Contract, 12—Copyright—Covenant, 1—Easement, 2—Fraudulent Conveyance, 3—Industrial Design—Liquor License Act, 2—Municipal Corporations, 10, 13, 14, 15—Parties, 11—Pleading, 4—Schools, 5—Street Railways, 5—Tenant for Life—Timber and Trees, 2—Trade Mark, 2, 3, 4—Waste—Water and Watercourses, 5—Way, 13, 17.

INQUEST.

See Injunction, 2.

INSOLVENCY.

See Bankruptcy and Insolvency—Executors and Administrators, 7.

INSPECTOR OF PRISONS AND PUBLIC CHARITIES.

See Lunatic, 3.

INSURANCE.

1. Accident—"Accidental" death—Onus—Finding of jury—Notice and particulars of death—Waiver: *Fowle v. Ocean Accident and Guarantee Co.*, 252; 4 O. L. R. 146.
2. Disability—Benevolent Society—Certificate—Proof of Age—Waiver—Surrender—Domestic forum—By-laws: *Doidge v. Dominion Council of Royal Templars of Temperance*, 485; 4 O. L. R. 423.
3. Fire—Application—Diagram of Buildings—Omission from—Agent: *Ball v. Farmers' Central Mutual Fire Ins. Co.*, 168.
4. Fire—Notice to Company Terminating Contract—Registered Letter—Wrong Address: *Skillings v. Royal Ins. Co.*, 411; 4 O. L. R. 123.
5. Fire—Proofs of Loss—Delay—Conditions of Policy—Estoppel—Ownership of Property: *Baker v. Royal Ins. Co.*, 294.
6. Fire—Renewal Premiums—Non-payment—Non-existence of Contract—Delivery of Receipt—Meaning of: *Doherty v. Millers' and Manufacturers' Ins. Co.*, 457; 4 O. L. R. 303.
7. Fire—Conditions—Prior Insurance—Subsequent Insurance—Substituted Insurance—Assent—Estoppel—Findings of Jury: *Mutchmor v. Waterloo Mutual Fire Ins. Co.*, 667; 4 O. L. R. 606.

8. Fire—Contract—Authority of Agent: *Walkerville Match Co. v. Scottish Union and National Ins. Co.*, 647.
9. Life—Assignment of Policy—Insurable Interest—Creditor: *Decker v. Cliff*, 354, 419.
10. Life—Certificate—Change of Beneficiary—Will—Infant Children of Deceased: *Re Snyder*, 461; 4 O. L. R. 320.
11. Life—Insolvent Foreign Company—Deposit—Surplus—Interest: *Re Covenant Mutual Life Assn. of Illinois*, 392.
12. Life—Preferred Beneficiary—Will—Trust—Estate: *Re Duncombe*, 153; 3 O. L. R. 510.
13. Life—Action on Policy—Condition as to Arbitration—Public Policy—Application to Stay Proceedings: *Nolan v. Ocean Accident and Guarantee Corporation*, 777.
14. Life—Disposition of Proceeds of Policy—Friendly Society—Claimants—Two Wives both Living—"Dependent"—Judgment *ex Æquo et Bono*: *Crosby v. Ball*, 545; 4 O. L. R. 496.
15. Life—Infant en Ventre Sa Mère—Period of Distribution—Trustee Relief Act: *Re Lethbridge*, 553.
16. Life—Mutual Benefit Society—Contract *Uberrimæ Fidei*—Untrue Representations in Application—Agency: *Ryan v. Catholic Order of Foresters*, 547.
17. Life—Policy in Favour of Mother—Advance by Mother on Faith of—Subsequent Marriage of Insured—Apportionment in Favour of Wife—Claim by Mother as Beneficiary for Value: *Re Excelsior Life Ins. Co. and De Geer*, 702, 771.
18. Life—Policy on Life of one Person for Benefit of Another—Assignment—Death of Assured—Claim by Administrator: *Bain v. Copp*, 706, 784, 804.
19. Life—Validity of Policy—Lien against Transferred Policy—Acceptance of Premium—Evidence of Contract—Foreign Companies—Licenses to do Business in Canada: *Spooner v. Mutual Reserve Fund Life Association*, 560, 583.

See Arbitration and Award, 2—Benefit Society—Principal and Agent, 3—Writ of Summons, 1.

INTEREST.

1. Charging Accounting Party with—Further Directions—Costs: Earle v. Burland, 527.

2. Claim for Price of Goods Sold—Interest not claimed in Writ of Summons — Report — Appeal—Items—Costs: Kelly v. Smith, 732.

See Assessment and Taxes, 13—Bills of Sale and Chattel Mortgages, 4—Division Courts, 3—Evidence, 2—Infant, 2—Insurance, 11—Landlord and Tenant, 1, 4—Mortgage, 2, 7—Partnership, 2—Will, 40.

INTERPLEADER.

See Particulars.

INTOXICATING LIQUORS.

See Liquor License Act—Municipal Corporations, 6.

INVENTION.

See Patent for Invention.

INVESTMENT.

See Solicitor, 2.

JUDGMENT.

1. Certificate of — Court of Appeal — Power to Amend after Issue—Mistake — Costs: Whipple v. Ontario Box Co., 36.

2. Consent—Sale of Railway—Petition to Open up—Conflicting Claims to Represent Railway Company—Issue Directed: Toronto General Trusts Corporation v. Central Ontario R. W. Co., 713.

3. Death of Plaintiff after Hearing — Court of Appeal—Certificate—Date — Amendment — Administrator ad litem: Gunn v. Harper, 366; 3 O. L. R. 693.

4. Foreign Judgment—Action on—Pleading—Defence on Merits: Anderson Produce Co. v. Nesbitt, 818.

5. Reference by Consent to Experts—Misunderstanding of Counsel as to Purpose of Reference—Opening up Judgment: Beaudry v. Gallien, 793.

6. Summary Judgment — Payment into Court—Payment out without Prejudice: Dominion Paving and Contracting Co. v. Magann, 226.

7. Summary Judgment—Rule 603—Liability of Defendants—Finding of Fact on Correspondence, Affidavits, and Depositions: Globe Printing Co. v. Sutherland, 589.

See Appearance—Assessment and Taxes, 2—Company, 5—Contract, 19—Costs, 18—Dower, 5—Lunatic, 3—Railways, 1—Specific Performance, 13.

JUDGMENT DEBTOR.

1. Examination—Insufficient Answers — Further Examination: Ivey v. Moffat, 519.

2. Examination — Making away with Property—Committal: Hunt v. Robins, 80.

3. Examination of — Unsatisfactory Answers — Preference — Committal: Hepburn v. Vanhorne, 506.

4. Transferee of — Examination — Third Mortgagee—"Exigible under Execution"—Receiver: Canadian Mining etc., Co. v. Wheeler, 103; 3 O. L. R. 210.

See Appeal to Divisional Court, 1.

JURY.

Special Jury—Notice of Striking—Time—Holiday: Holman v. Times Printing Co., 7.

See Criminal Law, 7, 9—Defamation, 3—Insurance, 1, 7—Malicious Arrest and Prosecution, 4—Master and Servant, 7, 9, 10, 13, 18—Negligence, 2—Street Railways, 4, 7.

JURY NOTICE.

1. Necessity for—Action for Libel: Puterbaugh v. Gold Medal Mfg. Co., 3 O. L. R. 259.

2 Striking out—Jurisdiction of Judge in Chambers: People's Building and Loan Assn. v. Stanley, 399; 4 O. L. R. 90; Shantz v. Town of Berlin, 4 O. L. R. 730.

See Action, 1.

JUSTICE OF THE PEACE.

See Criminal Law, 5—High Court of Justice, 1—Malicious Arrest and Prosecution, 1.

LACHES.

See Appeal to Court of Appeal, 1—Insurance, 5—Specific Performance, 1, 6, 7—Trade Mark, 4.

LANDLORD AND TENANT.

1. Agreement for Lease — Covenants — Taxes — Local Improvement Rates — Re-entry — Repair — Interest — Exemptions: Re Canadian Pacific R. W. Co. and City of Toronto, 385; 4 O. L. R. 134.

2. Agreement for Lease — Incomplete Contract—Nature of Tenancy—Possession: Grant v. McPherson, 240.

3. Excessive Distress — Irregularities—Waiver — Sale for Full Value—Account of Proceeds: Piché v. Montgomery, 325.

4. Lease—Purchase of Buildings by Lessor at End of Term — Arbitration—Valuation — Interest — Possession: Toronto General Trusts Corporation v. White, 198, 760; 3 O. L. R. 519.

5. Lease—Renewal—Arbitration or Valuation—Irregularities—Acquiescence—Waiver: Gray v. McMath, 445.

6. Lease — Renewal — Covenant—Construction of — Increased Rent — Average for Renewal Term: Re Geddes and Cochrane, 15; 3 O. L. R. 75.

7. Overholding Tenants Act — Order for possession — Review — Evidence — Breach of Covenant in Lease—Notice Specifying: Re Snure and Davis, 379; 4 O. L. R. 82.

8. Overholding Tenants Act—Right to Terminate Lease—Notice to Quit—Difficult Questions of Law—Refusal of Certiorari: Re Clark and Kellett, 577.

9. Relief against Forfeiture of Lease—Insolvency—Mistake in Telegram: Smith v. Wade, 549.

10. Renewal of Lease — Arbitration—Lessee—Naming Arbitrator under Protest—Sole Arbitrator: Farley v. Sanson, 738.

11. Rescission of Lease—Action for—Fraud — Improvidence — Execution—Sunday: Duprat v. Daniel, 561.

See Assessment and Taxes, 7—Attachment of Debts, 2—Division Courts, 2—Infant, 6—Limitation of Actions —Mechanics' Liens, 2 — Specific Performance, 10.

LEASE.

See Assessment and Taxes, 7—Division Courts, 2—Infant, 6—Landlord and Tenant — Mechanics' Liens, 2 — Specific Performance, 10, 11.

LEAVE TO APPEAL.

See Appeal to Court of Appeal, 3-11—Appeal to Supreme Court of Canada, 1—Execution, 2.

LEGACY.

See Infant, 1—Will.

LEGISLATURE.

See Constitutional Law.

LIBEL.

See Defamation.

LICENSE.

See Copyright—Insurance, 19—Liquor License Act—Partnership, 5—Patent for Invention, 1.

LIEN.

See Assessment and Taxes, 13—Company, 4—Contract, 9—Insurance, 19 —Mechanics' Liens—Solicitor, 1 — Timber and Trees, 2—Trusts and Trustees, 2.

LIFE INSURANCE.

See Insurance, 9-19.

LIMITATION OF ACTIONS.

1. Land—Real Property Limitation Act—Son in Possession of Father's Land — Assessment as Tenant — Tenancy at Will—Settlement in Ignorance of Rights: McCowan v. Armstrong, 28; 3 O. L. R. 100.

2. Promissory Notes—Commencement of Statute—Absence of Defendant from Province—Return: Moore v. Balch, 824.

See Evidence, 4—Medical Practitioner—Mortgage, 8—Specific Performance, 5—Title to Land, 2, 3—Way, 5, 14 —Will, 40.

LIQUOR LICENSE ACT.

1. License and Goodwill—Will—Devise—Renewal of License—Interest of Devisee—Execution against: Taylor v. Macfarlane, 283; 4 O. L. R. 239.

2. Transfer of License to new Premises — Notice—Report of Inspector—Injunction: Stephens v. O'Connor, 241.

LIS PENDENS.

Vacating—Application of Plaintiff: McGillivray v. Williams, 510; 4 O. L. R. 454.

LIVERY STABLE KEEPER.

See Municipal Corporations, 5.

LOCAL IMPROVEMENTS.

See Assessment and Taxes, 1, 4, 5, 6—Landlord and Tenant, 1.

LOCAL OPTION.

See Municipal Corporations, 6.

LORD'S DAY ACT.

See Constitutional Law, 2.

LUNATIC.

1. Domicil — Residence Abroad—Money in Bank in Ontario—Right of Foreign Committee to — Change of Domicil—Private International Law — Costs: Falls v. Bank of Montreal. 538.
2. Funds in Hands of Committee—Payment into Court—Reference—Report of Master—Revision of Costs: Re Norris, Re Drope, 817.
3. Plaintiff Becoming Insane after Judgment—Proposed Appeal—Appointment of Next Friend—Inspector of Prisons and Public Charities: Holness v. Russell, 774.

MAINTENANCE.

See Executors and Administrators, 6—Will, 29.

MALICIOUS ARREST AND PROSECUTION.

1. Constable—Good Faith — Warrant—Notice of Action — Fine—Municipal Corporation — Resolution — Ultra Vires—Members of Council—Justice of the Peace: Gaul v. Township of Ellice, 119; 3 O. L. R. 438.
2. Evidence—Record of Acquittal—Fiat of Attorney-General—Mandamus — Clerk of the Peace: Rex v. Scully 452; 4 O. L. R. 394.

3. Reasonable and Probable Cause — Bank—Customer — Warehouse Receipts — Nonsuit: Pearen v. Merchants Bank of Canada, 277.

4. Reasonable and Probable Cause — Functions of Judge and Jury—Trial: Peters v. Whyte, 26.

MALPRACTICE.

See Medical Practitioner.

MANDAMUS.

Police Magistrate — Jurisdiction—Information—Criminal Offence — Municipal Election—Offence at: Re Rex v. Mehan, 248; 3 O. L. R. 567.

See High Court of Justice, 1—Malicious Arrest and Prosecution, 2 — Public Health—Schools, 4.

MASTER AND SERVANT.

1. Contract of Hiring—Rescission—Continuance in Employment—Abandonment—Part Payment of Commission: Banfield v. Hamilton Brass Co., 293.
2. Contract of Servant not to Engage in Particular Business—Wrongful Dismissal of Servant—Subsequent Engaging in same Business: Ryerson v. Murdock, 466.
3. Dismissal of Servant — Subsequent Employment—Damages: Laishley v. Gould Bicycle Co., 566; 4 O. L. R. 350.
4. Dismissal of Servant—Wrongful Dismissal—Contract of Hiring — Construction—Statute of Frauds: Glenn v. Rudd, 116; 3 O. L. R. 422.
5. Injury to Servant Causing Death—Negligence of Master—Mine—Defective Machinery—Contributory Negligence—Fatal Accidents Act—Death of Widow of Servant after Action: Adams v. Culligan, Howe v. Culligan, 38.
6. Injury to Servant — Death — Mine — Negligence—Onus — Waiver — Disobedience of Servant: Anderson v. Mikado Gold Mining Co., 276; 3 O. L. R. 581.
7. Injury to servant—Dangerous Machinery — Precautions — Negligence of Fellow Workmen—Jury—Damages: Myers v. Sault Ste. Marie Pulp and Paper Co., 280; 3 O. L. R. 600.

8. Injury to Servant—Infant—Machinery—Negligence of Foreman: Holman v. Times Printing Co., 338, 756.

9. Injury to Servant—Moving Machinery—Guard—Factories Act—Negligence—Infant—Jury: Moore v. J. D. Moore Co., 290; 4 O. L. R. 167.

10. Injury to Servant—Negligence of Foreman—Jury: Bowman v. Imperial Cotton Co., 450.

11. Injury to Servant—Negligence of Master—Dangerous Employment—Volunteer: Blanquist v. Hogan, 15.

12. Injury to Servant—Negligence of Master—Foreman—Secretary of Company—Knowledge—Evidence: Wilson v. Botsford-Jenks Co., 101.

13. Injury to Servant—Negligence of Master—Question for Jury—Res Ipsa Loquitur: Brotherson v. Corry, 34.

14. Injury to Servant—Death—Workmen's Compensation Act—Notice of Injury—Excuse for Want of—Evidence—Statement of Deceased—Negligence—Cause of Injury—Jury: Armstrong v. Canada Atlantic R. W. Co., 612; 4 O. L. R. 560.

15. Injury to Servant—Factory—Elevator—Defects—Safeguards—Signals—Negligence—Findings of Jury: Leeder v. Toronto Biscuit Co., 687.

16. Injury to Servant—Factory—Negligence—Findings of Jury—Finding of Judge—Consent—Notes of Evidence: Walton v. Welland Vale Mfg. Co., 839.

17. Injury to Servant—Workmen's Compensation Act—Negligence of Foreman of Works—Questions for Jury—New Trial—Small Verdict: Aillo v. Fauquier, Gallio v. Fauquier, 833.

18. Injury to Servant—Workmen's Compensation Act—Railway Contractors—Sub-contractors—Question of Liability—Ruling of Trial Judge—Questions for Jury—New Trial: Bertudato v. Fauquier, 802.

19. Liability of Master for Act of Servant—Trespass to Person—Owner of House—Unnecessary Force—Solicitor—Damages: Burke v. Burke, 127, 419.

See Defamation, 2—Negligence, 1.

MASTER IN ORDINARY.

See Appeal to High Court—Company, 13.

MECHANICS' LIENS.

1. Action Begun by Statement of Claim—Service of, out of Ontario—Statutes and Rules—Powers of High Court: Pennington v. Morley, 246; 3 O. L. R. 514.

2. "Owner"—Lease—Covenant by Lessee to Erect Buildings: Webb v. Gage, 327.

3. Plant Supplied by Contractor—Forfeiture to Owner—Lien not Attaching: Birkett v. Brewder, 62.

4. Registered Owner—Contract with—Transfer of Property after Registration of Lien—Previous Agreement—Notice—Parties: Fraser v. Griffiths, 141.

5. Work Done upon Houses of Several Owners—Interest of Each—Proportionate Amount—Appeal from Judgment of Master: Booth v. Booth, 49; 3 O. L. R. 294.

6. Work and Labour—Defect in Building—Assent—Estoppel: Holtby v. French, 821.

MEDICAL HEALTH OFFICER.

See Public Health.

MEDICAL PRACTITIONER.

Malpractice—Limitation of Actions—Want of Care—Onus: Town v. Archer, 391; 4 O. L. R. 383.

MERCANTILE AGENCY.

See Guaranty, 2.

MERGER.

See Dower, 4.

MINES AND MINERALS.

See Company, 3—Estoppel 1, 2—Master and Servant, 5, 6—Specific Performance, 9.

MISREPRESENTATIONS.

See Fraud and Misrepresentation.

MISTAKE.

Money overpaid on Mortgage—Ignorance of Facts—Executor—Costs: McDermott v. Hickling, 19, 768.

See Deed, 1, 6, 7—Dower, 4—Judgment, 1—Landlord and Tenant, 9—Municipal Elections, 2—Pleading, 8.

MONEY.

See Fraudulent Conveyance, 3.

MONEY IN COURT.

See Lunatic, 2 — Parliamentary Elections, 6.

MORTGAGE.

1. Action on Covenant—Defence of Payment — Promissory Notes: *Pegg v. Hamilton*, 418, 633.
 2. Action on Covenant—Interest—Board in Lieu of—Settlement—Administrator: *Rockett v. Rockett*, 309.
 3. Action to Enforce by Sale—Parties—Mortgagees — Separate Advances — Mortgagor—Administrator: *Fox v. Klein*, 172.
 4. Costs of Mortgagee — Unnecessary Proceedings—Tender—Waiver: *Middleton v. Scott*, 536, 632; 4 O. L. R. 450.
 5. Covenant—Release—Right of Way—Action on by Mortgagee after Release—Further Evidence: *Re Thuresson, McKenzie v. Thuresson*, 4; 3 O. L. R. 271.
 6. Covenant—Release of Part of Land —Right of Way—Dedication — Adjoining Owners: *Re Thuresson, McKenzie v. Thuresson*, 437.
 7. Default of Payment of Interest—Possession: *Coté v. Meloche*, 802.
 8. Mortgagee in Possession—Statute of Limitations—Payment by Rents and Profits—Account—Reference: *Chambers v. McCombs*, 689.
 9. Pretended Sale under Power—Fraud — Purchasers for Value without Notice—Knowledge of Agent—Interest to Conceal — Redemption—Compensation: *Smith v. Hunt*, 598, 798; 4 O. L. R. 653.
- See Bankruptcy and Insolvency, 2 — Building Society—Deed, 7, 8—Division Courts, 3—Dower, 4—Estoppel, 2—Fixtures—Fraudulent Conveyance — Judgment Debtor, 4—Mistake — Partition, 3 — Pleading, 10—Tenant for Life—Will, 5, 8, 24, 35, 36.

MUNICIPAL CORPORATIONS.

2. By-law—Contract for Lighting — Reduction of Price—Execution of Contract — Part Performance—Tax By-law: *Citizens Telephone and Electric Light Co. v. Town of Rat Portage*, 42; *Town of Rat Portage v. Citizens Electric Co. of Rat Portage*, 44.
3. By-law—Fireworks—Discretion as to Enforcement—Injury to Person — Nontfeasance: *Brown v. City of Hamilton*, 271; 4 O. L. R. 249.
4. By-law — Invalidity of — Payment of Money under — Recovery from Corporation: *Cushen v. City of Hamilton*, 441; 4 O. L. R. 265.
5. By-law—Livery stable keeper—Damage to Vehicle—Refusal of Hirer to pay for—Conviction—Fine: *Brothers v. Alford*, 31.
6. By-law—Intoxicating Liquors—Local Option—Posting in Public Places—Directions to Voters — Omissions — Curative Clause of Statute—Motion to Quash—Status of Elector to Oppose: *Re Salter and Township of Beckwith*, 266; 4 O. L. R. 51.
7. By-law—Ordinary Current Expenditure—Borrowing Money to Use as Security for Appeal in Previous Action—Appeal for Costs—Status of Plaintiff: *Holmes v. Town of Goderich*, 367, 814.
8. By-law—Prevention of Fires—Storing Combustible Material — Statutes — Construction—Ejusdem Generis Rule — Constitutional Law — Provincial Legislation—Dominion Legislation—Petroleum Inspection Act: *Rex v. McGregor*, 358; 4 O. L. R. 198.
9. By-law—Transient traders—Conviction—Certiorari—Right taken away by Statute: *Rex v. St. Pierre*, 365; 4 O. L. R. 76.
10. By-law—Vehicles standing on Highway — Agreement with Railway Companies—Injunction — Quashing By-law—Public Interest: *Canadian Pacific R. W. Co. v. City of Toronto*, 255.
11. By-law—Aid to Free Library—Necessity for Submission to Popular Vote — Special Rate — Construction of Statute: *Hunt v. Town of Palmerston*, 791.
12. By-law—Diversion of Road—Interest of Individuals—Contrary to Public Interest: *Re Pelot and Township of Dover*, 792.

1. Bonus — Factory — Removal of — By-law—Intention to Remove: *Re Village of Markham and Town of Aurora*, 289; 3 O. L. R. 609.

13. Contract — Specifications — Injunction: *Allen v. City of Toronto*, 518.
 14. Contracts with Electric Light Companies—Use of Streets—Poles and Wires—Proximity—Rival Companies—Injunction: *Ottawa Electric Co. v. Consumers' Electric Co.*, 154.
 15. Council—Power to Submit Questions to Electors—Proposed Expenditure for Sanitarium—Injunction: *King v. City of Toronto*, 843.
 16. Council—Resolution of—Trimming of Trees in Streets—Towns and Villages—Powers of Council—Necessity for By-law: *Re Allen and Town of Napance*, 634; 4 O. L. R. 582.
 17. Ditch—Construction of—Absence of By-law—Flooding Lands—Liability for Damages: *Lawrence v. Town of Owen Sound*, 559.
 18. Drainage—Flooding Private Lands—Culvert—Increase in Rapidity of Flow of Water—Cause of Action: *Swayzie v. Township of Montague*, 742.
 19. Highway—Laying Gas Pipes under—Permission of Council—Resolution—By-law: *Bowerman v. Town of Amherstburg*, 16.
 20. Highway—Raising Level of—Injury to Adjoining Land—Backing Water on—Culvert—Inappreciable Injury: *Turner v. Township of York*, 723.
 21. Liability for Acts of Treasurer—Power to Pledge Credit—Advertising Tax Sale: *Canadian Bank of Commerce v. Town of Toronto Junction*, 74; 3 O. L. R. 309.
 22. Purchase of Electric Light Plant—Compulsory Expropriation: *Iroquois Electric Light Co. v. Village of Iroquois*, 306.
 23. Railway Embankment—Damages to adjacent Property—Water—Liability of Corporation: *Slinn v. City of Ottawa*, 269.
 24. Undertaking to Repair and Maintain Bridge—Contract with Ratepayers—Enforcement—Remedy by Indictment: *Thompson v. Township of Yarmouth*, 556.
- See Arbitration and Award, 4—Assessment and Taxes—Constitutional Law, 1—Costs, 8—Indemnity—Malicious Arrest and Prosecution, 1—

Negligence, 1—Parties, 7, 10—Railways, 4, 8—Schools, 1, 2—Street Railways, 5—Survey—Timber and Trees, 1—Way, 1-12, 16, 17.

MUNICIPAL ELECTIONS.

1. Contested Election — Cross-examination on Affidavits—Discretion: *Rex ex rel. Ross v. Taylor*, 265.
2. Contested Election—Notice of Motion—Mistake in Return Day—Amendment: *Rex ex rel. Roberts v. Ponsford*, 223, 286; 3 O. L. R. 410.
3. Contested Election — Irregularities — Saving Clause: *Rex ex rel. Ross v. Taylor*, 582.
4. Contested Election — Irregularities at Polls — Aldermen of City — Election by General Vote — Voters Voting more than Once—Affecting Result: *Rex ex rel. Roberts v. Ponsford*, 590, 645.
5. Contested Election — Order Quashing Quo Warranto Proceedings—Right of Appeal—Power to Make Order: *Rex ex rel. McFarlane v. Coulter*, 636; 4 O. L. R. 520.
6. Tampering with Ballots—Evidence of Voters as to Voting—Affidavits — Supplementary Oral Testimony — Cross-examination — Discretion—Irregularities: *Rex ex rel. Iverson v. Irwin*, 371; 4 O. L. R. 192.
7. Voter Voting more than Once—Majority—Presumption — Proof: *Rex ex rel. Tolmie v. Campbell*, 268; 4 O. L. R. 25.

See Mandamus.

MURDER.

See Criminal Law, 8—Injunction, 2.

NEGLIGENCE.

1. Injury to Person—Municipal Corporation—Work on Roads—Pathmaster—Relationship of Master and Servant—Infant: *Bock v. Township of Wilmot*, 415.
2. Injury to Person—Unsafe Premises—Unheard of Nature of Accident—Findings of Jury: *Fallis v. Gartsch-Thompson Pipe Foundry Co.*, 348; 4 O. L. R. 178.
3. Injury to Volunteer—Machinery—Defects—Duty—Delegation: *Pimperton v. McKenzie*, 335.

4. Playing Dangerous Game on Highway—Infant—Contributory Negligence: *Coburn v. Hardwick*, 733.

See Bailment—Contract, 8—Executors and Administrators, 4, 9—Master and Servant, 5-18—Principal and Agent, 3—Railways, 3, 5-9—Street Railways—Way, 1-12.

NEW TRIAL.

Absence of Material Witness—Taking Chances at Trial: *Maclellan v. Hovey*, 707.

See Appeal to Divisional Court, 2—Bills of Exchange and Promissory Notes, 6—Criminal Law, 5, 9—Evidence, 1—Master and Servant, 17, 18—Street Railways, 2.

NEXT FRIEND.

See Infant, 7—Lunatic, 3.

NEWSPAPER.

See Copyright—Defamation, 7.

NONSUIT.

See Malicious Arrest and Prosecution, 3.

NOTICE.

See Bills of Exchange and Promissory Notes, 8—Company, 11—Fraud and Misrepresentation, 3—Mortgage, 9.

NOTICE OF ACTION.

See Malicious Arrest and Prosecution, 1.

NOTICE OF INJURY.

See Master and Servant, 14.

NOTICE OF MOTION.

See Municipal Elections, 2.

NOTICE TO QUIT.

See Landlord and Tenant, 8.

NOVATION.

See Contract, 18—Guaranty, 1.

NUISANCE.

See Company, 1.

OBSTRUCTION OF HIGHWAY.

See Criminal Law, 9.

OFFICIAL REFEREE.

See Referees.

ORDER IN COUNCIL.

See Survey.

OVERHOLDING TENANTS ACT.

See Landlord and Tenant, 7, 8.

OWNER.

See Mechanics' Liens.

PARENT AND CHILD.

Liability of Parent for Child's Tort—Infant—Knowledge—Division Courts Act: *McCann v. Slater*, 132.

See Bills of Sale and Chattel Mortgages, 2—Costs, 10—Criminal Law, 3—Deed, 2—Gift, 3, 4—Infant, 3-5.

PARLIAMENTARY ELECTIONS.

1. Controverted Election Petition—Clerical Error—Service—Formal Objection—Amendment: *Re Centre Bruce Provincial Election*, *Stewart v. Clark*, 503; 4 O. L. R. 263.
2. Controverted Election Petition—Deposit—Rival Claimants—Issue: *Re North Waterloo Election*, 86.
3. Controverted Election Petition—Status of Petitioner—Statement—Sufficiency—Defeated Candidate: *Re Stormont Provincial Election*, *McLaughlin v. McCart*, 504.
4. Controverted Election Petition—Affidavit of Bona Fides—Commissioner—Agent for Solicitor: *Re Lennox Provincial Election*, *Perry v. Carscallen*, 730; 4 O. L. R. 647.
5. Controverted Election Petition—Misdescription of Electoral District: *Re Lincoln Provincial Election*, *McKinnon v. Jessop*, 504; 4 O. L. R. 456.
6. Controverted Election Petition—Deposit—Payment Out—Petition Abandoned before Service—Grounds of Abandonment—Affidavits Denying Collusion: *Re West Wellington Provincial Election*, *Patterson v. Tucker*, 629.
7. Corrupt Practices—Bribery by Respondent—Bribery by Agents—Evidence—Hiring Vehicles—Payment for Vehicles on Polling Day: *Re Lennox Provincial Election*, *Perry v. Carscallen*, 810.

8. Corrupt Practices—Hiring Vehicles—Statutory Declarations of Proposed Witnesses—Saving Clause—"Trifling Extent"—Personal Charges against Respondent—Disagreement of Judges: *Re South Oxford Provincial Election*, 795.
9. Recount of Votes—Ballots—Crosses—Name of Candidate—Words—Intention: *Re North Grey Provincial Election*, *Boyd v. McKay*, 474; 4 O. L. R. 286.
10. Recount of Votes—Ballots—Irregular Marking—Initials of D. R. O.: *Re Muskoka Provincial Election*, *Mahaffy v. Bridgland*, 487; 4 O. L. R. 253.
11. Recount of Votes—Ballots—Marks—Crosses—Writing—Evidence: *Re Halton Provincial Election*, *Nixon v. Barber*, 501; 4 O. L. R. 345.
12. Recount of Votes—Ballots not Objected to before D. R. O.—Form of Ballots—Crosses—Circular Marks—Words—Initials—Indefinite Marks: *Re Lennox Provincial Election*, *Carscallen v. Madole*, 472; 4 O. L. R. 378.
13. Recount of Votes—Ballots—Numbers of Candidates torn off: *Re Prince Edward Provincial Election*, *Williams v. Currie*, 468; 4 O. L. R. 255.
14. Recount of Votes—Notice of Appeal—Solicitor—Cross-appeal—Result of—Re-opening Original Appeal: *Re North Grey Provincial Election*, *McKay v. Boyd*, 483; 4 O. L. R. 286.
15. Voters' Lists—Notice of Complaint—Statement of Grounds—Signing by Complainant—Amendment: *Re Carleton Place Voters' Lists*, 105; 3 O. L. R. 223.
- See Pleading, 9.
4. Statement of Claim—Trade Mark—Infringement: *Morrison v. Mitchell*, 709.
- See Defamation, 5—Discovery, 10—Pleading, 10.

PARTIES.

1. Action Brought in Name of "C. & Co."—Sole Plaintiff—Rules of Court: *Cummings v. Ryan*, 149.
2. Adding Parties—Joinder of Causes of Action—Relief over—Third Party: *Langley v. Law Society of Upper Canada*, 143; 3 O. L. R. 245.
3. Adding Plaintiffs—Consent—Verification by Affidavit—Identity of Names: *Webbing v. Fick*, 203.
4. Adding Plaintiffs—Distinct Causes of Action—Election to Proceed with One: *Plummer v. Sholdice*, 789.
5. Representation of Classes—Appointment of Solicitor—Rule 200: *Ward v. Benson*, 24; 3 O. L. R. 199.
6. Striking out—Improper Joinder—Matter of Substance: *Morang v. Ross*, 3 O. L. R. 354.
7. Summary Application to Quash Municipal By-law—Countermand—Motion to Add or Substitute New Applicant: *Re Ritz and Village of New Hamburg*, 574, 690; 4 O. L. R. 639.
8. Third Party—Notice—Time—Enlarging: *Parent v. Cook*, 3 O. L. R. 330.
9. Third Party—Settlement of Action: *Wheeler v. Town of Cornwall*, 4 O. L. R. 120.
10. Third Party—Action to Set aside Tax Sale—Claim by Purchaser to Relief over against Municipality: *Farmers' Loan and Savings Co. v. Hickey*, 695.
11. Unincorporated Voluntary Association—Motion to Strike Out Name—Injunction—Trial—Pleading—Costs: *Metallic Roofing Co. v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn.*, 573, 644.
- See Action, 1—Appeal to Court of Appeal, 9, 13—Costs, 1, 3, 17—Discovery—Indemnity—Infant, 6, 8—Mechanics' Liens, 4—Mortgage, 3—Parliamentary Elections, 3—Pleading, 3—Will, 1—Writ of Summons, 4.

PARTICULARS.

1. Further Particulars—Interpleader Issue—Credits—Settled Account: *Tawse v. Seguin*, 14, 56.
2. Statement of Defence—Material on Application for—Issue Joined: *Uda v. Algoma Central R. W. Co.*, 246;
3. Statement of Claim—Action to Set aside Resolution of Shareholders of Company—Allegation of Non-compliance with Companies Acts—Submission to Court: *Maclean v. Wood*, 703.

PARTITION.

1. Right to—Executor—Devisees: *Re Assestine*, 178.
2. Sale—Oral Agreement—Statute of Frauds—Part Performance—Acquiescence—Arbitration or Valuation—Notice: *Joyce v. Joyce*, 479.
3. Tenant by the Curtesy—Mortgagees—Judgment Creditor of Owner of Interest: *Bank of Hamilton v. Hurd*, 456.
4. Tenants in Common—Expensive Proceedings—Leave to Proceed with Former Action—Terms: *Mathews v. Mathews*, 844.

See Costs, 5—Evidence, 5—Infant, 6.

PARTNERSHIP.

1. Authority of Partner—Bill of Exchange—Notice: *Bank of Ottawa v. Lewis*, 71.
2. Contract—Interest—Liability of Partner—Holding out: *Deering v. Beatty*, 363.
3. Co-partner—Offer to Sell Share to—Acceptance—Specific Performance—Improvvidence—Security—Costs: *Pilgrim v. Cummer*, 531.
4. Judgment—Settlement—Accounting: *West v. Benjamin*, 212.
5. Practice—Appearance as for—Foreign Corporation Carrying on Business without License: *Duthrie v. McDearmott*, 776.

See Attachment of Goods—Chose in Action—Contract, 15—Costs, 7—Ship, 2.

PATENT FOR INVENTION.

1. Contract—License—Alteration in Article—Consideration: *MacLaughlin v. Lake Erie and Detroit River R. W. Co.*, 266, 428; 3 O. L. R. 706.
2. Infringement—Foreign patent—Application for Canadian Patent—Time—Evidence: *Milner v. Kay*, 200.
3. Infringement—Novelty—Onus: *Lang v. McAllister*, 455.
4. Infringement—Action for—Motion to Stay—Proposal to Proceed in Exchequer Court to Avoid Patent: *Parramore v. Boston Mfg. Co.*, 643, 4 O. L. R. 627.

See Discovery, 8—Pleading, 4.

PATHMASTER.

See Negligence, 1.

PAYMENT.

See Bankruptcy and Insolvency, 6—Company, 12—Mortgage, 1, 18—Municipal Corporations, 4—Sale of Goods, 7, 10.

PAYMENT INTO COURT.

See Attachment of Debts—Judgment, 3—Lunatic, 2—Pleading, 8.

PAYMENT OUT OF COURT.

See Parliamentary Elections, 6.

PENALTY.

See Pleading, 9.

PENSION.

See Benefit Society.

PERPETUITY.

See Will, 21.

PLEADING.

1. Counterclaim by Executor for Estate—Claim to Arrears of Annuity—Release—Striking out Counterclaim: *Hume v. Hume*, 156, 187.
2. Counterclaim—Striking out—Defendants to Counterclaim out of Jurisdiction—Foreign Trade Mark, Subject of Counterclaim—Hardship—Injustice: *Dunlop Pneumatic Tire Co v. Ryckman*, 699, 820.
3. Counterclaim—Striking out—Parties—Action by Execution Creditor of Husband to Declare Wife Trustee for Husband—Counterclaim by Husband for Debt Assigned to him: *Ennis v. Reade*, 652.
4. Counterclaim—Striking out—Patent for Invention—Trade Mark—Contract for Right to—Breach of—Injunction: *McAvity v. Morrison*, 552, 632.
5. Statement of Claim—Declaratory Judgment—Statements of Reasons for Seeking Relief—Embarrassment—Pleading to Claim—Waiver: *Harris v. Harris*, 684, 734.
6. Statement of Claim—Delivery of Amended Pleading—Time—Leave—Consent—Order Validating—Terms—Stay of Proceedings—Payment of Costs: *Anthony v. Blain*, 841.

7. Statement of Claim — Alternative Claim—Sale or Conversion — Doubtful Facts: *Leader v. Siddall*, 337.
 8. Statement of Claim — Amendment — Diligence in Moving — Mistake — Money paid into Court: *Chevalier v. Ross*, 12, 115; 3 O. L. R. 219.
 9. Statement of Claim — Amendment — Election—Penalty — Writ of Summons—Discovery — Dominion Elections Act: *Rose v. Croden*, 170; 3 O. L. R. 383.
 10. Statement of Claim — Particulars—Mortgage—Sale under Power—Conspiracy—Account: *Huffman v. Hull*, 242.
 11. Statement of Defence — Leave to Amend—Adding Defence—Attaching Order: *Gearing v. McGee*, 213.
- See Defamation, 5, 6, 7—Judgment, 4—Particulars—Railways, 10—Sale of Goods, 1, 5, 7, 8—Specific Performance, 2, 9—Title to Land, 3—Trade Mark, 5.

PLEDGE.

Bailment of Animal—Pasturage—Subsequent Advances — Distinction between Pledge and Chattel Mortgage: *Kelly v. Pollock*, 735.

POLICE MAGISTRATE.

See Mandamus.

POWER OF ATTORNEY.

See Bankruptcy and Insolvency, 6.

PRACTICE.

See Action — Administration Order — Administrator ad Litem—Appeal to Court of Appeal — Appeal to Divisional Court — Appeal to High Court — Appeal to Supreme Court of Canada — Appearance—Arbitration and Award, 1 — Arrest — Bail — Building Society — Certiorari — Company, 14 — Costs — County Courts—Courts—Creditors' Relief Act — Discovery — Division Courts—Evidence—Execution, 2 — Executors and Administrators, 7 — Infant—Injunction — Judgment — Judgment Debtor—Jury—Jury Notice—Lis Pendens—Lunatic — Mechanics' Liens, 1 — Mortgage, 4 — Municipal Elections, 1, 2, 5, 6 — Parliamentary Elections, 1-6, 14 — Particulars — Parties—Pleading — Referees — Settled Estates Act — Solicitor, 1—Venue—Writ of Summons.

PREFERENCE.

See Bankruptcy and Insolvency.

PRESCRIPTION.

See Limitation of Actions—Water and Watercourses, 5—Way, 14.

PRESSURE.

See Bankruptcy and Insolvency.

PRESUMPTION.

See Bankruptcy and Insolvency—Municipal Elections, 7.

PRINCIPAL AND AGENT.

1. Commission on Sale of Land—Re-opening Negotiations — Agent's Advertising Expenses: *Thompson v. King*, 119.
2. Company—Liability of—Holding out of Person as General Manager—Costs: *Davis v. Rideau Lake Navigation Co.*, 229.
3. Contract of Agent—Negligent Performance — Fire Insurance — Damages: *Baxter v. Jones*, 554; 4 O. L. R. 541.
4. Purchase of Goods by Agent—Commission—Damages: *Henry v. Ward*, 652.
5. Undisclosed Principal — Action by Agent—Breach of Contract—Construction of Roof—Guarantee—Representation as to Ownership—Addition of Principal as Party—Recovery—Damages: *Abbott v. Atlantic Refining Co.*, 701; 4 O. L. R. 701.

See Bills of Exchange and Promissory Notes, 3, 4 — Company, 6—Insurance, 3, 16—Master and Servant, 1 — Solicitor, 3 — Specific Performance, 1, 3—Writ of Summons, 1.

PRINCIPAL AND SURETY.

See Guaranty.

PRIVATE INTERNATIONAL LAW.

See Lunatic.

PRIVILEGE.

See Defamation, 1, 2, 3—Discovery.

PRODUCTION OF DOCUMENTS.

See Discovery.

PROHIBITION.

See County Courts, 1—Division Courts.

PROMISSORY NOTES.

See Bills of Exchange and Promissory Notes—Contract, 3.

PROVINCIAL LEGISLATURES.

See Constitutional Law.

PUBLIC HEALTH.

Contagious Disease—Services of Physician—Remuneration—Action to Recover—Board of Health—Medical Health Officer—Liability—Mandamus—Costs: *Bibby v. Davis*, 189.

PUBLIC SCHOOLS.

See Schools.

PUBLICATION.

See Defamation, 1.

RAILWAYS.

1. Bonds—Collateral Security—Injury—Judgment—Reference: *Knickerbocker Trust Co. of New York v. Brockville, Westport, and Sault Ste. Marie R. W. Co.*, 311.
2. Carriage of Goods—Non-delivery—Place—Refusal to Accept—End of Transitus—Bailees—Damages: *Frankel v. Grand Trunk R. W. Co.*, 254, 339, 396.
3. Carriage of Goods—Misdelivery—New Contract—Breach—Negligence: *Armstrong v. Michigan Central R. W. Co.*, 714.
4. Highway Crossing—Compensation to Municipality—Private Ownership—Construction—"At or near" City—Power to take through County: *Montreal and Ottawa R. W. Co. v. City of Ottawa*, 349; 4 O. L. R. 56; *Canada Atlantic R. W. Co. v. City of Ottawa*, 377; 4 O. L. R. 75.
5. Injury to Passenger—Alighting from Moving Car—Contributory Negligence: *Keith v. Ottawa and New York R. W. Co.*, 104, 749; 3 O. L. R. 265.
6. Injury to Person Crossing Tracks—Negligence—Proximate Cause—Right to Lay Tracks: *Bonville v. Grand Trunk R. W. Co.*, 304.

7. Injury to Person Crossing Tracks—Negligence—Contributory Negligence—Findings of Jury: *Lennox v. Grand Trunk R. W. Co.*, 771.

8. Injury to Person—Negligence of Servants—Crossing—Non-repair of Highway—Municipal Corporation—Damages—Loss of Consortium: *Holden v. Township of Yarmouth*, 557.

9. Passenger—Special Contract—Conditions—Failure to Perform—Ejection from Train: *Taylor v. Grand Trunk R. W. Co.*, 447; 4 O. L. R. 357.

10. Pleading—Amendment—Damages—Removal of Workshops—Statutes—Town of *Whitby v. Grand Trunk R. W. Co.*, 292; 3 O. L. R. 536.

See Arbitration and Award, 1, 4—Costs, 4—Discovery, 3—Judgment, 2—Municipal Corporations, 10, 16—Street Railways—Way, 14, 17.

RATES.

See Assessment and Taxes.

RATIFICATION.

See Bills of Exchange and Promissory Notes, 8—Infant, 2, 7—Ship, 2.

REAL PROPERTY LIMITATION ACT.

See Limitation of Actions.

RECEIPT.

See Insurance, 6.

RECEIVER.

See Costs, 7—Fraudulent Conveyance, 3—Judgment Debtor, 4.

RECORD OF ACQUITTAL.

See Malicious Arrest and Prosecution, 2.

RECOUNT.

See Parliamentary Elections, 9-14.

REDEMPTION.

See Assessment and Taxes, 13—Deed, 1,—Mortgage, 9.

REFEREES.

Drainage Referee—Official Referee—Arbitration Act: *McClure v. Township of Brooke*, *Bryce v. Township of Brooke*, 274, 324, 835; 4 O. L. R. 97.

See Sale of Goods, 1.

REFERENCE.

Stay of, pending Appeal from Judgment Directing Reference: *Monro v. Toronto R. W. Co.*, 813.

See Covenant, 1—Dower, 5—Judgment, 5—Lunatic, 2—Mortgage, 8—Railways, 1—Specific Performance, 13—Street Railways, 5—Will, 26.

REFORMATION.

See Contract, 11—Deed, 6, 7.

REGISTRY LAWS.

See Estoppel, 2.

RELEASE.

See Mortgage, 5, 6—Pleading, 1.

RELIEF OVER.

See Parties, 10—Way, 7.

REPORT.

See Appeal to Divisional Court, 4—Dower, 5—Interest, 2—Lunatic, 2—Will, 26.

RES JUDICATA.

Division Court Action—Settlement before Trial—No Bar to Subsequent Action: *Williams v. Cook*, 133.

See Company, 5—Schools, 5—Will, 32—Writ of Summons, 5.

RESCISSION OF LEASE.

See Landlord and Tenant, 11.

RESIDENCE.

See Lunatic.

RESTRAINT OF TRADE.

See Covenant.

RESTRAINT ON ALIENATION.

See Will, 31, 32.

REVENUE.

Succession Duty — Provisions of Will — Future Estates—Future Enjoyment — Duty not Presently Payable: *Attorney-General v. Toronto General Trusts Corporation*, 807.

See Copyright—Will, 35.

REVERSION.

See Waste.

REVOCATION.

See Executors and Administrators, 8—Will, 1.

RIGHT OF WAY.

See Easement, 2—Mortgage, 5, 6.

RIVERS AND STREAMS.

See Water and Watercourses.

RULE NISI.

See Criminal Law, 10.

RULES OF COURT.

See Mechanics' Liens, 1—Parties, 1

SALE OF GOODS.

1. Action for Price — Counterclaim for Damages—Report of Referee—Varying on Appeal—Further Directions—Costs: *Centaur Cycle Co. v. Hill*, 229.
2. Conditional Sale—Hire Receipt—Removal of Goods: *Sharkey v. Williams*, 135, 419.
3. Conditional Sale—Name of Vendor—Option to Purchase: *Mason v. Lindsay*, 561, 583; 4 O. L. R. 365.
4. Contract—Breach — Warranty — Defect: *Williams v. Cook*, 133.
5. Counterclaim — Onus: *Rat Portage Lumber Co. v. Kendall*, 197.
6. Entire Contract—Property not Passing—Action for Price — Deduction for Defects — Damages: *Crompton and Knowles Loom Works v. Hoffman*, 717.
7. Payment for — Covenant—Action on — Counterclaim for Non-delivery of Part—Nominal Damages: *Delaney v. Reid*, 522.
8. Property not Passing—Breach of Warranty — Counterclaim — Pleading: *Marks v. Waterous Engine Works Co.*, 148.
9. Refusal of Vendor to Deliver until Payment — Breach of Contract — Damages — Reference: *Phelps v. McLachlin*, 806.
10. Unascertained Goods — Contract — Appropriation—Passing of Property — Acceptance and Part Payment: *Southampton Lumber Co. v. Austin*, 548.

11. Warranty—Breach — Remedy—Contribution: *Ferguson v. Arkell*, 190.

See Guaranty, 2—Interest, 2—Pleading, 7.

SALE OF LAND.

See Company, 3—Dower, 5—Execution, 4—Partition, 2 — Principal and Agent, 1—Specific Performance—Timber and Trees, 2—Vendor and Purchaser.

SCALE OF COSTS.

See Costs, 7.

SCHOOLS.

1. Public Schools — Expenditure — Annual Estimates—Powers and Duties of Municipal Council and School Board: *Re Toronto Public School Board and City of Toronto*, 443; 4 O. L. R. 468.
2. Public Schools—Model School—Town Separate from County—Liability of County: *Toronto Junction Public School Board v. County of York*, 216; 3 O. L. R. 416.
3. Public School Sections—Alteration of Boundaries—Reference — Award—Union instead of Alteration: *Re Southwold School Sections*, 32; 3 O. L. R. 81.
4. Public School Site—Change of—Meeting of Ratepayers—Arbitration—Invalid Award—Mandamus: *Re Cartwright School Trustees and Township of Cartwright*, 387, 477; 4 O. L. R. 272, 278.
5. Public School Site—Change of—Trustees — Adoption by Ratepayers' Meeting — Resolution — Minutes — Evidence dehors — Inspector—Arbitration—Award — Injunction — Estoppel—*Res Judicata*—Reverting to Former Site after Change—Resolution of Ratepayers — Poll—Qualification of Voters — Scrutiny: *McLean v. Robertson*, 578.

SEAL.

See Company, 2.

SECURITY FOR COSTS.

See Appeal to Court of Appeal, 1, 10, 18—Costs, 10-14.

SEDUCTION.

Evidence—Action Brought for Daughter's Benefit—Judge's Charge—Credibility of Witnesses—Rejection of Evidence—Miscarriage: *Grainger v. Hamilton*, 819.

SERVICE OF PAPERS.

See Execution, 3—Mechanics' Liens, 1 — Parliamentary Elections, 1—Writ of Summons.

SERVITUDE.

See Easement.

SESSIONS.

See Certiorari.

SET-OFF.

See Appeal to Court of Appeal, 18—Contract, 19—Costs, 15 — District Courts—Execution, 3 — Work and Labour.

SETTLED ESTATES ACT.

Leave to Petition under—Status of Applicants: *Re Asselstine*, 178.

SETTLEMENT OF ACTION.

See Parties, 9—*Res Judicata* — Solicitor, 1.

SHARES.

See Building Society — Company, 4-8, 10-12—Contract, 5 — Fraud and Misrepresentation, 2, 3 — Particulars, 3.

SHERIFF.

See Chose in Action—Trade Mark, 3.

SHIP.

1. Charterparty — Breach — Time — "Load," Meaning of—Measure of Damages: *Midland Navigation Co. v. Dominion Elevator Co.*, 593.
2. Contract to Sell—Co-owners—Partnership—Authority of One Co-owner to Bind the Other — Ratification—Specific Performance — Damages: *Bentley v. Murphy*, 273, 726, 845.

SLANDER.

See Defamation—Injunction, 2.

SOLICITOR.

1. Costs—Collusive Settlement of Action—Notice of Lien: *McCauley v. Butler*, 72, 343.
2. Investment of Money—Liability to Client—Guaranty: *Lewis v. Ellis*, 356.
3. Right to Commission on Sale—Disclosure of Agency: *McCullough v. Hull*, 451.
4. Solicitor's Costs—Consolidation of Actions: *Re Wickett*, 554.

See Costs, 8—Discovery, 7, 12—Gift, 1, 2—Master and Servant, 19—Parliamentary Elections, 4, 14—Parties, 5—Specific Performance, 2—Trusts and Trustees, 1, 3.

SPECIFIC PERFORMANCE.

1. Agent—Fraud—Amendment—Delay: *Aitcheson v. McKelvey*, 51, 355.
2. Contract for Sale of Land—Alteration of Written Offer—Onus—Damages—Pleading—Division Court—Claim within Jurisdiction of—Costs—Solicitor: *Prittie v. Laughton*, 185.
3. Contract for Sale of Land—Correspondence—Statute of Frauds—Agent: *White v. Malcolm*, 302.
4. Contract for Sale of Land—Possession: *Abbatt v. Gustin*, 482.
5. Contract for Sale of Land—Possession—Waiver—Improvements—Account—Title by Possession—Costs: *Rankin v. Sterling*, 243; 3 O. L. R. 646.
6. Contract for Sale of Land—Shortage—Statement of Vendor—Laches: *Reilly v. McDonald*, 196.
7. Contract for Sale of Land—Time—Essence of—Delay—Waiver: *Long v. Eby*, 420.
8. Contract for Sale of Land—Verbal Contract—Possession—Part Payment—Conveyance: *McLaughlin v. Mayhew*, 308.
9. Contract to Incorporate Company—Sale of Mining Land—Foreign Incorporation—Pleading—Amendment: *Clark v. Walsh*, 228.
10. Lease—Possession—Verbal Agreement for Purchase—Acts Referable to Agreement: *Haward v. Quigley*, 96.

11. Lease—Undertaking to Build—Non-performance in Lifetime of Lessor—Devise to Lessee—Damages: *Re Murray*, 576; 4 O. L. R. 418.
12. Part Performance of Contract for Sale of Land—Evidence of Acts Constituting: *Bodwell v. McNiven*, 841.
13. Timber Limits—Contract for Sale of—Correspondence—Completed Contract—Statute of Frauds—Misunderstanding—Title—Judgment—Reference: *Benton v. Playfair*, 599.

See Partnership, 3—Ship—Street Railways, 5.

STATEMENT OF CLAIM.

See Mechanics' Liens, 1—Pleading, 5-10—Trade Mark, 5.

STATEMENT OF DEFENCE.

See Pleading, 11.

STATUTE OF FRAUDS.

See Guaranty, 1, 2—Master and Servant, 4—Partition, 2—Specific Performance, 3, 13—Will, 31.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

See Appeal to Court of Appeal, 6, 7, 8—Arbitration and Award, 3—Assessment and Taxes, 2, 5, 16—Constitutional Law—Copyright—Mechanics' Liens, 1—Municipal Corporations, 8, 9, 11—Railways, 10—Street Railways, 5—Timber and Trees, 1—Trusts and Trustees, 1—Will, 33.

STAY OF PROCEEDINGS.

See Action, 1—Appeal to Court of Appeal, 20—Insurance, 13—Patent for Invention, 4—Pleading, 6.

STREAMS.

See Water and Watercourses.

STREET RAILWAYS.

1. Injury to Passenger—Scope of Conductor's Authority: *Dawdy v. Hamilton, Grimsby, and Beamsville Electric R. W. Co.*, 364, 781.

2. Injury to Person—Negligence—Accident — Evidence — Misdirection — Damages—New trial: *Witty v. London Street R. W. Co.*, 288.

3. Injury to Person — Negligence—Collision — Contributory Negligence — Proximate Cause: *O'Hearn v. Town of Port Arthur*, 373; 4 O. L. R. 209.

4. Injury to Person — Negligence—Duty — Jury—Damages — Reduction of: *Ford v. Metropolitan R. W. Co.*, 318; 4 O. L. R. 29.

5. Municipality—Agreement with — Specific Performance — Bond—Injunction—Reference as to Damages—Transportation of Freight—Resolution of Council—Statutes: *City of Ottawa v. Ottawa Electric R. W. Co.*, 830.

See assessment and Taxes, 12, 16—Way, 12.

SUBPENA.

See Discovery, 5.

SUBROGATION.

See Dower, 4—Tenant for Life.

SUCCESSION DUTY.

See Revenue.

SUMMARY CONVICTION.

See Criminal Law.

SUMMARY JUDGMENT.

See Judgment, 6, 7.

SUMMARY TRIAL.

See Criminal Law.

SUNDAY.

See Constitutional Law, 2—Contract, 7—Landlord and Tenant, 11.

SUPREME COURT OF CANADA.

See Appeal to Supreme Court of Canada.

SURGEON.

See Medical Practitioner.

SURROGATE COURTS.

See Appeal to Court of Appeal, 17—Appeal to Divisional Court, 3—Executors and Administrators, 8.

SURVEY.

Village Lots — Authorization—Statutory Requirements — Order in Council — Resolutions of Municipal Council—By-law — Cost of Survey — Assessment for: *Sutton v. Village of Port Carling*, 67; 3 O. L. R. 445.

See Criminal Law, 9—Way, 16.

SURVIVORSHIP.

See Gift, 1.

TAX SALE.

See Assessment and Taxes, 11, 13, 14, 15—Municipal Corporations, 21.

TAXATION OF COSTS.

See Costs, 15, 16—Executors and Administrators, 3.

TAX SALE.

See Assessment and Taxes, 13, 14, 15—Parties, 10.

TAXES.

See Assessment and Taxes.

TELEPHONE.

See Constitutional Law, 1.

TENANT BY THE CURTESY.

See Partition, 3—Title to Land, 3.

TENANT FOR LIFE.

Waste — Cutting Timber — Remainderman—Injunction — Mortgage—Subrogation: *Whitesell v. Reece*, 516.

TENANTS IN COMMON.

See Execution, 1—Partition, 4.

TENDER.

See Mortgage, 4.

THEFT.

See Criminal Law, 13.

THIRD PARTIES.

See Indemnity—Parties, 2, 8, 9, 10.

TIMBER AND TREES.

1. Growing Trees — Highway — "Left Standing"—Municipal Corporation—Statutes: *Wolff v. Kehoe*, 78.

2. Sale of Standing Timber—Interest in Land—Vendor's Lien — Injunction: *Ford v. Hodgson*, 121; 3 O. L. R. 526.

See Contract, 12, 14, 16—Conversion, 2 — Municipal Corporations, 16 — Specific Performance, 13—Tenant for Life—Trespass, 1—Waste.

TIME.

See Appeal to Court of Appeal, 1—Appeal to Supreme Court of Canada, 3 — Assessment and Taxes, 1 — Bankruptcy and Insolvency, 3, 4—Contract, 2, 7—Costs, 17—Criminal Law, 11—Jury — Malicious Arrest and Prosecution, 1 — Parties, 8—Patent for Invention, 2—Pleading, 6 — Ship, 1—Specific Performance, 7.

TITLE TO LAND.

1. Registered Title — Appurtenances: *Greisman v. Fine*, 479.
2. Registered Title—Real Property Limitation Act: *Central Canada L. & S. Co. v. Porter*, 482.
3. Statute of Limitations—Declaration—Pleading—Possession — Tenancy by the Curtesy—Devolution of Estates Act — Improvements: *Chevalier v. Trepannier*, 847.

See Vendor and Purchaser, 4.

TOLLS.

See Water and Watercourses, 4.

TORT.

See Division Courts, 7.

TRADE MARK.

1. Infringement—Trade Union—User by Non-members: *Robinson v. McLeod*, 83.
2. Proper Subject of—Words of Description—Right by User—Injunction — Abandonment: *Gillett v. Lumsden*, 488; 4 O. L. R. 300.
3. Purchaser from Sheriff under Execution — Right to Restrain Infringement: *Gegg v. Bassett*, 3 O. L. R. 263.
4. Registration — Descriptive Letters — Secondary Meaning—Proof of Acquisition of — Fraud—Deception—Infringement — Delay and Acquiescence—Injunction—Damages — Inquiry: *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 618; 4 O. L. R. 545.

5. Statement of Claim — Particulars—Infringement: *Morrison v. Mitchell*, 838.

See Industrial Design—Particulars, 4—Pleading, 2, 4.

TRADE NAME.

Infringement — "Caledonia Water" — Geographical Designation: *Grand Hotel Co. of Caledonia Springs v. Wilson*, *Grand Hotel Co. of Caledonia Springs v. Tune*, 785.

TRADE UNION.

See Trade Mark, 1.

TRANSIENT TRADERS.

See Municipal Corporations, 9.

TREES.

See Timber and Trees.

TRESPASS.

1. Entry on Land — Cutting Timber—Measure of Damages — Distinction between Trespass and Trover: *Union Bank of Canada v. Rideau Lumber Co.*, 764; 4 O. L. R. 721.
2. To Land — Boundaries — Middle of Stream: *Wason v. Douglas*, 552.

See Conversion, 2—Master and Servant, 13—Vendor and Purchaser, 1.

TRIAL.

See Costs, 18—Criminal Law—Deed, 1 — Evidence, 1—Injunction, 3—Jury — Jury Notice—Malicious Arrest and Prosecution, 24—New Trial—Parties, 11—Street Railways, 2, 4 — Venue.

TROVER.

See Conversion—Trespass, 1.

TRUSTEE RELIEF ACT.

See Insurance, 15.

TRUSTS AND TRUSTEES.

1. Liability for Default of Co-trustee—Active Trustee—Request of Testator — Solicitor—Technical Breach—Excuse—Statute: *Dover v. Denne*, 297; 3 O. L. R. 664.
2. Lien — Abortive Sale — Foreclosure—Purchase by Trustee: *Hutton v. Justin*, 64.

3. Remuneration of Trustee—Quantum of Allowance — Capital—Income — Solicitor-trustee — Profit Costs: *Re Williams*, 534; 4 O. L. R. 501.

4. Right of Beneficiary to Enforce Trust: *Morse v. Morse*, 500.

See Assessment and Taxes, 3, 9, 10—Bankruptcy and Insolvency, 7—Bills of Sale and Chattel Mortgages, 3—Building Society—Church—Contract, 10—Deed, 5—Evidence, 2, 6—Executors and Administrators—Insurance, 12—Pleading, 3—Schools, 5—Will, 12, 14, 21, 44.

UNDERTAKING.

See Action, 3—Division Courts, 1—Executors and Administrators, 7—Injunction, 3 — Municipal Corporations, 24 — Specific Performance, 11.

UNDUE INFLUENCE.

See Deed, 2, 3—Gift, 3, 4—Will, 2, 41.

VACATION.

See Appeal to Divisional Court, 5.

VALUATION.

See Landlord and Tenant, 4, 5—Partition, 2.

VEHICLES.

See Municipal Corporations, 5, 10.

VENDOR AND PURCHASER.

1. Action for Purchase Money—Evidence—Trespass to Goods: *Grear v. Mayhew*, 529.

2. Action for Purchase Money—Evidence—Weight of — Corroboration: *Murray v. Empire L. & S. Co.*, 310.

3. Delivery of Conveyance—Covenant for Possession—Enforcement: *Ham v. Pillar*, 259.

4. Doubtful Title—Forcing on Purchaser: *Re Campbell and Horwood*, 139.

5. Sale of Land Devised by Will—Charge of Debts—Powers of Executors—Devises—Widow—Dower—Parties to Conveyance — Election: *Re Bradburn and Turner*, 152; 3 O. L. R. 351.

See Fixtures — Specific Performance — Timber and Trees, 2.

VENUE.

1. Agreement as to before Action: *Dulmage v. White*, 4 O. L. R. 121.

2. Change of—Speedy Trial — Postponement of Sittings—Second Application by Plaintiffs for Change: *Whelihan v. Hunter*, 788.

VOTERS' LISTS.

See Parliamentary Elections, 10.

WAGES.

See Division Courts, 2.

WAIVER.

See Contract, 2, 4—Covenant, 1—Criminal Law, 1—Deed, 1—Insurance, 1, 2—Landlord and Tenant, 3, 5—Master and Servant, 6—Mortgage, 4—Pleading, 5—Specific Performance, 5, 7.

WAREHOUSEMAN.

See Bailment.

WAREHOUSE RECEIPTS.

See Malicious Arrest and Prosecution, 3.

WARRANTY.

See Principal and Agent, 5—Sale of Goods, 4, 8, 11.

WASTE.

Cutting Timber—Injury to Reversion — Injunction — Damages: *Ryan v. Ryan*, 824.

See Tenant for Life.

WATER AND WATERCOURSES.

1. Change in Course of Stream — Accretion—Reliction—Easement — Possessory Title: *Massey-Harris Co. v. Elliott*, 65.

2. Dam—Diversion of Waters—Riparian Proprietor—Order of Judge—Notice: *McCready v. Gananoque Water Power Co.*, 438.

3. Ditches and Watercourses Act—Construction of Ditch — Deepening—Jurisdiction of Engineer: *Lamphier v. Stafford*, 329.

4. Injury to Land by Flooding—Damages—Summary Procedure—Costs—Dam—Owners—Tolls—Users: Neely v. Peter, 499; 4 O. L. R. 293.
5. Obstruction of Stream—Prescription—Mandatory Injunction—Damages: Saunby v. London Water Commissioners, 567.

See Easement, 2—Municipal Corporations, 23—Trespass, 2.

WAY.

1. Non-repair—Injury to Person—Death Caused by—Municipal Corporation—Negligence—Proximate Cause—Contributory Negligence: Gabv v. City of Toronto, 440.
2. Non-repair—Injury to Person—Ice and Snow—Municipal Corporation—Gross Negligence: Mann v. City of St. Thomas, 480.
3. Non-repair—Injury to Person—Knowledge of Municipal Corporation—Causa Causans—Findings of Trial Judge—Appeal—Excessive Damages: Luton v. Township of Yarmouth, 40.
4. Non-repair—Injury to Person—Knowledge of Municipal Corporation—Negligence—Damages: McGarr v. Town of Prescott, 53, 439; 4 O. L. R. 280.
5. Non-repair—Injury to Person—Liability of Municipal Corporation—Nonfeasance—Limitation of Actions: Minns v. Village of Omemee, 362.
6. Non-repair—Injury to Person—Municipal Corporation—Carriageway—Footway—Finding of Fact—Interference on Appeal: Belling v. City of Hamilton, 124; 3 O. L. R. 318.
7. Non-repair—Injury to Person—Municipal Corporation—Gas Company—Relief Over: McIntyre v. Town of Lindsay, 492; 4 O. L. R. 448.
8. Non-repair—Injury to Person—Municipal Corporation—Negligence—Bridge—Traction Engine: Pattison v. Township of Wainfleet, 407.
9. Non-repair—Injury to Person—Sidewalk—Liability of Municipal Corporation: Madill v. Township of Caledon, 299; 3 O. L. R. 555.
10. Non-repair—Injury to Person—Sidewalk—Snow and Ice—Municipal Corporation—Gross Negligence: Stevens v. City of Chatham, 199.
11. Non-repair—Injury to Person—Accumulation of Snow—Liability of Township Corporation: Hogg v. Township of Brooke, 568.
12. Non-repair—Injury to Property—Guard at Approach to Bridge—Negligence—Municipal Corporation—Street Railway: Summers v. County of York, 137.
13. Private Way—Building—Mandatory Injunction: Scott v. Barron, 558.
14. Private Way—Easement—Prescription—Railway Lands—User not Incompatible with Requirements of Railway: Grand Trunk R. W. Co. v. Valliear, 695.
15. Private Way—Easement—Implied Grant—Intention: Styles v. Towers, 533.
16. Public Highway between Townships—Existence and Location of—Boundary Line—Records of Crown Lands Department—Surveys—Field Notes: Township of Lochiel v. Township of East Hawkesbury, 664.
17. Road Allowance—Obstruction—Railway—Fences—Municipal Corporation—By-law—Injunction—Jurisdiction: Township of Gloucester v. Canada Atlantic R. W. Co., 63, 485; 3 O. L. R. 85, 4 O. L. R. 262.

See Arbitration and Award, 4—Assessment and Taxes, 6—Constitutional Law, 1—Criminal Law, 9—Easement, 2—Mortgage, 5, 6—Municipal Corporations, 10, 12, 14, 19, 20—Negligence, 4—Railways—Timber and Trees, 1.

WILL.

1. Action to Establish—Loss of Original—Proof of Copy—Evidence of Revocation—Parties—Administrator pendente Lite: Stewart v. Walker, 489.
2. Action to Set aside—Application for Probate—Withdrawal of Caveat—Burden of Proof—Testamentary Capacity—Undue Influence: Northmore v. Abbott, 231.
3. Action to Set aside—Costs—Separate Defence: Slaven v. Slaven, 410.

4. Construction—Absolute Interest—Gift—Intestacy: *Re Chapman*, 434; 4 O. L. R. 130.
5. Construction—Bequest — “Chattels” —Mortgage: *Re McMillan*, 471; 4 O. L. R. 415.
6. Construction — Bequest for Life to Widow—Use in Specie of Furniture —Income: *Valleau v. Valleau*, 65.
7. Construction—Bequest of Interest on Payments by Devises—Sale in Lifetime of Testator of Land Devised—Failure of Bequest: *Heffernan v. McNab*, 165.
8. Construction—Conversion — Mortgage — Intestacy — Residuary Legatee — Executors: *Re Moore*, 50.
9. Construction — Distribution of Estate “Heirs” — “Next in Heirship” — Period of Ascertainment: *Re Gardner*, 157; 3 O. L. R. 343.
10. Construction — Election — Dower — Annuitant — Lapse — Intestacy — “Balance:” *Re Newborn*, *Toronto General Trusts Corporation v. Newborn*, 122.
11. Construction—Estate Tail: *Re McAllister*, 230.
12. Construction — Executors—Power to Sell—Real Estate Undisposed of—Intestacy—Trust: *Re Campbell and Horwood*, 139, 396.
13. Construction — Executory Devise — Period of Vesting—Majority—Death of Life Tenant—Double Event: *Evans v. Evans*, 69, 233.
14. Construction — Legacies — Period of Vesting — Distribution — Realty and Personality — Sale — Direction to Trustees: *Smith v. Mason*, 478.
15. Construction — Legacy — Interest — Accumulation — Limitation — Condition — “Against:” *White v. McLagan*, 59.
16. Construction — Legacy — Period of Vesting — Direction to Distribute Estate—Discretion of Executors: *Re Burch*, 436.
17. Construction—Legacy—Support and Maintenance — Absolute Gift—Life Interest — Discretion of Executors: *Re Evans*, 92; 3 O. L. R. 401.
18. Construction—Life Estate: *Re Padgett and Curren*, 427.
19. Construction — Alternative Disposition—Death of Testator and Wife “at the Same Time” — Lapse of Sixteen Days between Deaths—Intestacy: *Henning v. Maclean*, 657; 4 O. L. R. 666.
20. Construction — Annuities — Setting apart Fund for—Deficiency of Income — Encroaching on Principal — Rights of Residuary Legatees: *Re McKenzie*, 739; 4 O. L. R. 707.
21. Construction—Bequest for Use of Church—Trust — Mixed Fund—Perpetuity: *Re Johnston*, *Chambers v. Johnston*, 806.
22. Construction — Conflicting Bequests of Personality — Reconciling — Ejusdem Generis Rule—Residuary Bequest: *Re Pink*, 772; 4 O. L. R. 718.
23. Construction—Distribution of Estate —Income—Corpus: *Re Butler*, 826.
24. Construction — Executors — Mortgage—Covenant for Payment—Possession: *Haight v. Dangerfield*, 551.
25. Construction—Fund for Payment of Debts, etc.—Specific Legacies: *Re Page*, 849.
26. Construction—Gift—Intention to Include Choses in Action—Reference —Appeal from Report — Looking at Original Will—Costs: *Thorne v. Parsons*, 608; 4 O. L. R. 682.
27. Construction—Legacies — Conditions — Defeasance — Payment before Period Mentioned in Will: *Re Shore*, 586.
28. Construction—“Personal Representatives” —Executors or Next of Kin —Part Intestacy—Rights of Widow —Advertisement for Creditors: *Re Daubeny*, 773.
29. Construction—Provision for Maintenance of Person—Alternative Provision: *Leduc v. Booth*, 800.
- 29 (a). Construction — Devise to Wife Subject to Condition of Making a Will in Favour of Children: *In re Turner*, 4 O. L. R. 578.
30. Death without Issue—Executory Devise—Power of Sale—Executors — Representatives of: *Re Fitzsimmons*, 220.

31. Devise—Description of Land—Statute of Frauds—Identifying Land—Restraint on Alienation—Invalidity—Repugnancy: *Re Corbett and Hartin*, 744.
32. Devise—Restraint on Alienation—Validity—Case Stated—Reference to Divisional Court—*Res Judicata*: *Re Phelan*, 741.
33. Devise in Trust for Church after Expiry of Life Estates—Time of Making Will—Statutes: *Re Naylor*, 809.
34. Direction to Pay Debts out of Estate—Specific Devise of Personality—Residuary Devise of Money and Securities: *Re Anderson*, 217.
35. Executors—Legacy Duty—Discretion—Residue—Crediting Legacy on Mortgage—Predecease of Legatee—Lapse: *Re Holland*, 73; 3 O. L. R. 406.
36. Executors—Power to Mortgage or Sell Land—Directions of Will: *Re Crawford*, 470; 4 O. L. R. 313.
37. Legacy—Ademption—Evidence: *Tuckett-Lawry v. Lamoureux*, 295; 3 O. L. R. 577.
38. Legacy—Infant—Payment at Majority—Interest: *Re Perrin*, 209.
39. Legacy—Mixed Fund—Interest—Majority: *Re Scadding*, 467, 683; 4 O. L. R. 632.
40. Legacy—Charge on Land—Interest—Legatee also Administrator with Will Annexed—Statute of Limitations: *Re Yates*, 630; 4 O. L. R. 580.
41. Testamentary Capacity—Undue Influence—Onus: *Purdy v. Purdy*, 449.
42. Testamentary Capacity—Unsustained Charges of Fraud—Costs: *Taylor v. Delaney*, 409.
43. Testamentary Capacity—Senile Dementia—Insane Delusions—Comprehension of Terms of Will—Attack on Will by Person Accepting Benefit—Costs: *McGarrigle v. Simpson*, 685.
44. Trustees—Advances—Division of Estate—Discretion: *Hospital for Sick Children v. Chute*, 321; 3 O. L. R. 590.

See Contract, 1—Dower, 1, 2—Executors and Administrators—Infant, 1—Insurance, 10, 12—Liquor License Act, 1—Partition, 1—Revenue—Vendor and Purchaser, 5.

WINDING-UP.

See Company, 8-14.

WITNESSES.

See New Trial—Seduction.

WORK AND LABOUR.

Agent—Joint Liability—Guaranty—Damages for Unskilful Work—Set-off or Counterclaim—Costs: *Kelso v. Thompson*, 176.

See Contract, 17—District Courts—Mechanics' Liens.

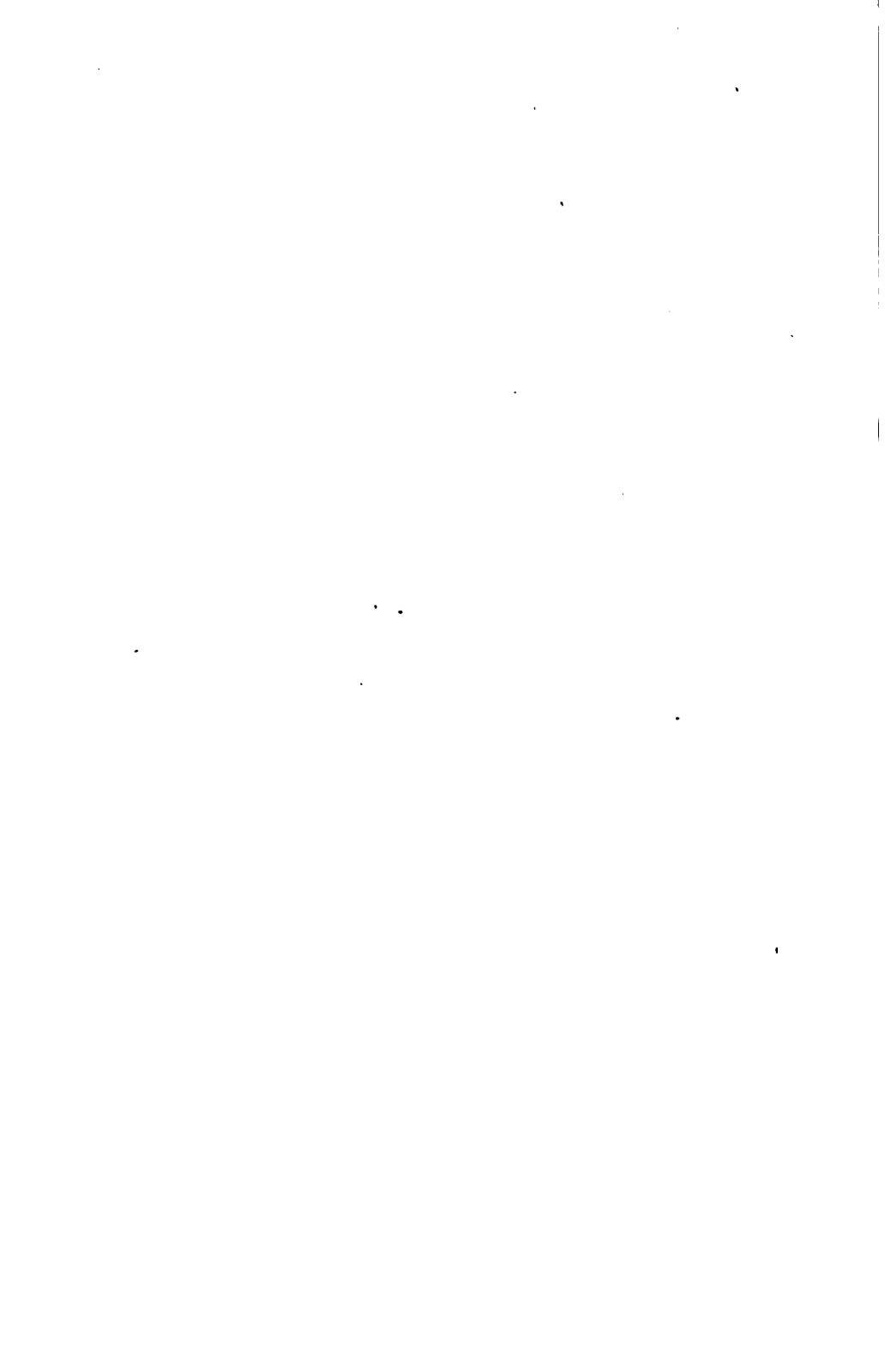
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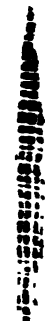
See Master and Servant.

WRIT OF SUMMONS.

1. Service on Insurance Company—Power of Attorney—Removal of Office from Province: *Armstrong v. Lancashire Fire Ins. Co.*, 3 O. L. R. 395.
2. Service out of Jurisdiction—Contract—Breach within Ontario—Traveller: *Lovell v. Coles*, 3 O. L. R. 291.
3. Service out of Jurisdiction—Contract—Place of Performance—Quebec Law—Discretion: *Phillips v. Malone*, 200; 3 O. L. R. 492.
4. Service out of Jurisdiction—Order for Leave to Issue Writ—Fixing Time for Appearance—Parties—Separate Causes of Action—Joinder of: *Jones v. Bissonette*, 13; 3 O. L. R. 54.
5. Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside—Conditional Appearance—*Res Judicata*: *Mackay v. Colonial Investment and Loan Co.*, 569, 592, 646; 4 O. L. R. 571.

See Bills of Sale and Chattel Mortgages, 4—Interest, 2—Pleading, 9.





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